

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application
of Consumers Energy Company for
approval of refunds to retail
electric customers, and for
related relief.

Case No. U-16861

Volume No. 2

CROSS-EXAMINATION

Proceedings held in the above-entitled matter
before Sharon L. Feldman, Administrative Law
Judge with MAHS, at the Michigan Public Service
Commission, 525 West Allegan, Nisbet Room, Lansing,
Michigan, on Tuesday, April 10, 2012, at 9:00 a.m.

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24 REPORTED BY: Marie T. Schroeder, CSR-2183
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1 JUDGE FELDMAN: All right. Before we
2 take up witnesses and pending motions, does anybody have
3 any preliminary matters they wish to raise? All right.

4 Mr. Keskey, it's my understanding that
5 you and Mr. Robinson have agreed to take up Consumers
6 Energy's motion to strike the testimony of Mr. Callen
7 before we proceed with the Company's case?

8 MR. KESKEY: Yes, your Honor.

9 JUDGE FELDMAN: All right. Mr. Robinson,
10 it's your motion. I have read it. Is there anything
11 that you wanted to add?

12 MR. ROBINSON: Just a couple things, your
13 Honor. We think for the reasons stated in our motion
14 that all of Mr. Callen's testimony should be stricken.
15 I'm not going to repeat the motion. But since the time
16 we filed the motion, a proposal for decision was issued
17 in Consumers electric rate case, U-16794. In fact, your
18 Honor was the presiding ALJ in that case and issued the
19 PFD. So because you addressed some of these issues in
20 that case, it seems to me it's appropriate to maybe make
21 a few distinctions here.

22 The thrust of the recommendation you made
23 in the PFD was that, well, let's just not deal with these
24 issues in the electric rate case, let's deal with them
25 over here in the U-16861 case. And I've got just really

1 a couple points to make in response to that.

2 One is, I don't think that really
3 eliminates the basis for the motion. The fact is that
4 the testimony of MCAAA and Mr. Callen was received in
5 that other case, 16794, and frankly at this point it's
6 just a waste of time to go through it and do it again.
7 Notwithstanding the recommendation you make in the PFD,
8 the fact is the evidence is in the record. My belief is
9 Mr. Keskey and MCAAA will be taking exceptions to your
10 ruling and so this is all going to be argued in the
11 context of that case. And it's duplicative and just a
12 waste of time and resources to go through it all over
13 again here in this case.

14 Now having said that, there are a couple
15 distinctions that are probably worth making, and they
16 relate to the difference between the one time fee, the
17 163 million that we spent a lot of time talking about in
18 the past few electric rate cases, and the on-going fee.
19 Those were the fees that were paid by the Company from
20 basically April of 1983 through April of 2007, when the
21 Palisades plant was sold to Entergy. Those on-going fees
22 were all the subject of PSCR cases over that whole period
23 of time. Mr. Keskey and Mr. Callen were representing
24 various clients in those cases at that time, making
25 largely the same arguments that they have made or are

1 offering to make in this case. The Commission
2 consistently rejected them. Various appeals were taken.
3 Court of Appeals consistently rejected them. So it's --
4 even if you believe that it's appropriate to consider
5 issues regarding this one time fee and whether it was
6 reasonable to pay it in the context of the settlement of
7 DOE litigation, that's not going to salvage or make
8 somehow more appropriate the re-litigation of any issues
9 with regard to the on-going fee. Those are all done.
10 Those cases are over with. They're final. They're not
11 appealable. There is just nothing left to be done with
12 respect to those on-going fee issues. And yet that
13 remains an important subject that Mr. Callen addresses in
14 his testimony. We think it's a waste of time to go back
15 through all that.

16 And then the second point is just to
17 reiterate that throughout Mr. Callen's testimony he is
18 engaging in offering various legal opinions. Those go
19 well beyond just sort of setting the stage for other
20 expert testimony or providing some background so that his
21 other expert opinions might make sense. He is in there
22 pitching actual legal advice and taking, offering legal
23 opinions about extremely complicated matters regarding
24 the availability of contractual remedies, whether
25 remedies have been waived. I mean, these are not just

1 sort of casual offhand comments regarding the law that
2 sometimes witnesses make in cases before the Commission.
3 He has gone way beyond that. And so we don't believe any
4 reasonable person would rely upon the legal advice of Mr.
5 Callen with respect to these matters, and so for that
6 reason, those portions of his testimony should be
7 stricken as well.

8 Now I can go through --

9 JUDGE FELDMAN: What --

10 MR. ROBINSON: -- his testimony and give
11 very precise, with respect to the testimony that relates
12 to the on-going fees and the testimony that relates to or
13 where he is giving legal opinions. I'd be glad to do
14 that right now if that would be helpful to your thinking
15 about this. I did a little bit of that in the motion, in
16 the written motion.

17 JUDGE FELDMAN: Yes.

18 MR. ROBINSON: But again because you
19 issued the PFD that you did, it seemed to me it made
20 sense to make these distinctions a little more refined.

21 JUDGE FELDMAN: Well, you may refine
22 them.

23 MR. ROBINSON: Let me do that.

24 JUDGE FELDMAN: I will try to follow
25 along.

1 MR. ROBINSON: All right. The testimony
2 that we think should be stricken with respect to the
3 on-going fees, the first piece is on page 10 starting on
4 line 8, the sentence that begins "in addition" and it
5 runs through the end of line 12. The next portion is
6 page 11, line 14, through the end of that page, and then
7 on page 12 through line 4, through the end of line 4.
8 The next piece is page 22, line 9, all the way through
9 page 24, line 30. The next piece is page 27, line 11,
10 through the first word "refunded" on line 15. The next
11 one is page 28, lines 4 through 12. And then this would
12 also include Mr. Callen's exhibits MCAA 3 and 4.

13 Now the legal opinion testimony is a
14 different list. The first piece of that testimony is
15 page 12, line 20, starting with the word "simply",
16 through line 21 through the word "rates". Then we go to
17 page 13, lines 3 through 5, line 8 starting with "a
18 contractual obligation" through line 9. Staying on page
19 13, line 20 starting with "inexplicable" through line 22
20 with SNF. The next one is line 14, line 14.

21 JUDGE FELDMAN: Page 14, line?

22 MR. ROBINSON: Page 14, line 4, through
23 the word "contract" on line 6. Also on page 14, line 14,
24 through page 15, line 5. Page 15 also starting on line 8
25 with "all available", through line 10 the word

1 "disposal". We go to page 19 starting with line 17, with
2 the number in parens, (2), through the end of that page
3 on line 22. Page 20, line 6 starting "within these",
4 through line 8 ending with "have done". Also page 20,
5 line 18, starting with "it would appear", through line
6 21, with the date there, 2007. Page 25, line 22,
7 starting with "and in waiving", through the end of that
8 line. Page 26 --

9 JUDGE FELDMAN: Excuse me. What was that
10 last one, Mr. Robinson?

11 MR. ROBINSON: It was page 25, on line
12 22, and it's the last part of that line, starting with
13 "and in waiving", and then through the end of that
14 sentence.

15 Page 26, line 21, through page 27, line
16 8. Page 28, line 19, through page 29, line 5. And page
17 29, lines 16 through 18.

18 That's the end.

19 JUDGE FELDMAN: All right. You also
20 addressed hearsay concern in your motion. Are you --

21 MR. ROBINSON: Well, I'm not really --
22 I'm not abandoning that, your Honor. I'll just rely on
23 the written motion for that, I guess. I don't have
24 anything to add to what we said in the written motion.

25 JUDGE FELDMAN: All right. Mr. Keskey.

1 MR. KESKEY: Thank you, your Honor.

2 MR. ERICKSON: Your Honor, before Mr.
3 Keskey speaks, I'd like to make two points in support of
4 the motion.

5 JUDGE FELDMAN: Any objection?

6 (No response.)

7 All right, Mr. Erickson.

8 MR. ERICKSON: Your Honor, I do support
9 the motion, generally speaking. The two points I'd like
10 to point out is that in the last order issued by the
11 Commission in U-16191, it did authorize the Company to
12 negotiate a settlement with the Department of Energy and
13 the Departments of Justice. And then it required the
14 Company to report in an independent application, which is
15 this case, the results of that negotiation, so that I
16 disagree with the characterization of the results in
17 15645 and U-16191 as being in defiance of the
18 Commission's order.

19 The other point that I would make is that
20 the argument that the Company is attempting to control a
21 process by not following the MPSC orders referenced above
22 is, shall we say, incomplete because the Commission,
23 although there are many things you can find in the orders
24 in U-16191, there is still the outstanding point that the
25 Commission did authorize the company to negotiate a

1 settlement. The company -- the Commission did not
2 pre-approve any settlement, did not pre-establish any
3 terms and conditions for such a settlement, but I believe
4 that it would be incorrect to conclude that the Company
5 in filing this application and in reaching a settlement
6 with DOE was acting in defiance of the Commission's prior
7 orders. And that's all I have, your Honor.

8 JUDGE FELDMAN: Thank you. Mr. Keskey.

9 MR. KESKEY: Thank you, your Honor.

10 First of all, let's talk about the scope of this case.
11 That has not been altogether clear throughout the cases
12 that have been going on before the Commission over the
13 last year or two, and the Commission's order in 16191
14 didn't make it clear. The Company, after its rehearing
15 petition was denied in U-16191, filed a three-page
16 petition to have the trust obligation extinguished even
17 though the Commission in two orders had found that a
18 trust should be established. And of course they didn't
19 support that petition with any record evidence of the
20 newly developed situation where they entered into a
21 settlement in July of 2011 and also paid the \$163 million
22 of ratepayer supply funds for SNF disposal to the federal
23 government when it had no obligation to do so under the
24 final orders of the appellate courts in 2008.

25 Then we came to the Consumers Energy rate

1 case U-16794, where again the Commission in rate cases
2 has predominate authority and therefore can continue with
3 the trust remedy as it had in the previous two rate
4 cases, U-15645 and U-16191. So we presented evidence in
5 that case to provide a record for the Commission to act
6 on the trust remedy and the other remedies that we
7 recommended if the Commission so chooses to do so. And
8 the Commission has not yet ruled. Mr. Callen provided
9 extensive testimony on the background of the federal
10 program and the contractual repudiation and all the facts
11 underlying that, which he has developed over years on
12 this, in this area, and in recent years following closely
13 the developments at the federal government as they have
14 now proceeded to disable their ability to perform the
15 contract.

16 That testimony was challenged by a motion
17 to strike by the Company, and it was allowed in its
18 entirety in U-16794. And the Administrative Law Judge in
19 U-16794 determined that the issue should be determined in
20 this case. In fact, the Company's own application in
21 this case asks that these issues be decided in this case.

22 JUDGE FELDMAN: O.K. Let me see if I can
23 focus this. If we just generally, for the purposes of
24 argument, treat this case as involving the reasonableness
25 and prudence of the Company's decision to enter into this

1 settlement agreement, which I believe is Exhibit A-1 in
2 this proceeding, how are the on-going fee payments
3 relevant to that determination?

4 MR. KESKEY: O.K. I was just getting to
5 that; I was setting a background for it. But in answer
6 to your specific question, first of all I think everybody
7 agreed that the one-time fee of 163 million and the trust
8 remedies were in the scope of this case. We would also,
9 I hope everybody would agree that dealing with what
10 portion of the proceeds of the \$120 million settlement
11 should be refunded to ratepayers is within the scope of
12 this case. And the on-going fee, which is for the period
13 April 7, 1983, through the time of their sale of the
14 Palisades and Big Rock facilities on April 10, 2007, is
15 relevant because by entering into the 2011 settlement
16 they waived any rights to any other remedies other than
17 what they settled on in that case in this settlement.
18 And by doing so they have waived the right to
19 restitution, claim of restitutional refund of past fees
20 paid when it is declared that a total breach has
21 occurred.

22 Utilities around the country are not only
23 seeking damages in the Court of Claims, they are also
24 retaining, many of them, the right to seek restitution of
25 past fees paid. And so that goes to the very importance

1 of that on-going fee, to the reasonableness and prudence
2 of entering into the settlement.

3 Now Mr. Erickson indicates that the
4 Commission allowed them or authorized them to enter into
5 the settlement. Well, to be more precise, I believe the
6 Commission recognized that it can't order Consumers to
7 enter into any particular settlement or tell them how to
8 resolve the case. The Commission can review the
9 reasonableness and prudence of what they do to protect
10 ratepayers. That's what the function is here.

11 Now the so-called on-going fee, which is
12 no longer on-going for Consumers Energy, is also relevant
13 because the Commission in the law undertakes a balancing
14 test. It looks as the balancing of interest of the
15 ratepayer and the utility stockholders. And in balancing
16 what the Company did in settlement, the on-going fee has
17 to be considered. In other words, by entering into the
18 settlement, unlike for example the Yankee utilities which
19 we briefed in U-16191, where the utility is suing for
20 damages every single six-year period, is not paying any
21 one-time debts, and is not waiving a right for
22 restitution for all past fees, in contrast to that
23 Consumers Energy here, despite the Commission's finding
24 that it would be imprudent to pay the federal government
25 \$163 million in a one-time fee, proceeded nevertheless to

1 pay the fee and to reach this kind of a settlement where
2 they have done all these waivers. They've waived
3 everything that could be on-going if they hadn't done
4 this.

5 That's imprudent, your Honor, that's
6 understanding reasonable. And it fits into the balancing
7 test of how the Commission should resolve this case, not
8 only with respect to the split of the proceeds, but also
9 with to the one-time fee.

10 Let me turn to the objection about Mr.
11 Callen testifying about the on-going fees.

12 This is all necessary for the reasons I
13 indicated, but he has factually laid out what he was able
14 to determine from the information that was available why
15 he believes that this is an issue. And we have discovery
16 responses from the Company that we are going to enter in
17 to the record on cross-examination where the Company
18 itself in many ways confirms Mr. Callen's figures. He is
19 an expert witness in this field and he should be able to
20 present the factual background, information, and
21 foundation for the on-going fee claim; should not be
22 precipitously excluded from the issues to be briefed in
23 this case.

24 Now with respect to the argument about
25 his offering legal opinions, again Mr. Callen has been

1 heavily involved in review of these issues, following
2 litigation, reviewing the statute, the standard contract,
3 having been in many conferences on that subject, having
4 been in many cases on the subject, having read many
5 resource materials on the subject. As an expert he can
6 testify about what his understanding, his opinion is of
7 that situation.

8 JUDGE FELDMAN: His understanding or his
9 opinion?

10 MR. KESKEY: His opinion and
11 understanding. The point is, obviously we're not
12 presenting him as a lawyer but if we did present him as a
13 lawyer, your Honor, the Company is presenting a lawyer,
14 but that doesn't make that lawyer's opinion and
15 presentation the law. The parties still have to brief
16 the law. And what he presents as his expert opinion --

17 JUDGE FELDMAN: Yes.

18 MR. KESKEY: -- and understanding is not
19 the law. We have to brief law. And as an expert he can
20 provide that vantage point, and it goes to the weight of
21 the testimony. This is a sophisticated body that can
22 well deal with that. So on that basis this objection on,
23 the legal objection should be denied as well, as it was
24 in the rate case, U-16794. And for the additional reason
25 that cross-examination by the Company is a remedy. The

1 Company can cross-examine Mr. Callen. They have seen the
2 testimony before as they met and they cross-examined Mr.
3 Callen in the rate case U-16794, so they have another
4 chance to do that.

5 One last point, and that is of course on
6 the hearsay. Again that goes to what an expert can
7 present in terms of supplying his opinion, and background
8 supporting that opinion, and we have put our response in
9 writing on that.

10 But there is one other sort of a gap
11 here, your Honor, and that is. We have been striving to
12 provide a record in any case that's relevant to these
13 issues so the Commission would have an adequate record to
14 make decisions in support of our remedies. Win or lose
15 we're going to make sure there's an adequate record. We
16 have, because of the way this procedurally has unfolded,
17 we've had to do it in U-16191, in U-16794, and now in
18 this case.

19 The fact that all of Mr. Callen's
20 testimony was granted in the rate case and he was
21 cross-examined on these same remedies increases the
22 reasons why it should be treated similarly here. Your
23 Honor has ruled that the issues belong in this case, so
24 therefore the record should be the same. There's
25 almost -- and I would say there is sort of a due process

1 procedural problem here, and that is that we still don't
2 know how the Commission is going to rule on it, in what
3 case, or in what case it has the most authority. We have
4 a full record of Mr. Callen's testimony in the rate case
5 U-16794. We should have a similar complete record here.
6 Otherwise we create an unnecessary procedural breach or
7 gap which we can simply avoid by putting the information
8 on the record in briefing the issues.

9 And that's all I have, your Honor, unless
10 you have any questions.

11 JUDGE FELDMAN: Let's look at a couple of
12 the passages specifically identified by Mr. Robinson.
13 For example, page 19, beginning at line 17, and his
14 argument that that would appear to be improper legal
15 testimony.

16 MR. KESKEY: Well, improper legal
17 testimony? You're looking at what lines again?

18 JUDGE FELDMAN: I am looking at page 19,
19 beginning with lines 17 through 22.

20 MR. KESKEY: 17 through 22?

21 JUDGE FELDMAN: Yes.

22 MR. KESKEY: Well, your Honor, Mr. Callen
23 has been in this subject area for many years and in
24 recent years is aware of the of some of the other cases
25 that have been litigated at the Court of Claims, and also

1 settlements, but in his opinion Consumers is waiving
2 their ability to file future lawsuits or to seek
3 restitution of past fees paid.

4 JUDGE FELDMAN: Again let me ask you: Is
5 he giving his opinion or his understanding of what the
6 Company has done?

7 MR. KESKEY: I think it's still both,
8 your Honor. Because for example, your Exhibit A-1, which
9 is the settlement agreement, makes it absolutely clear
10 that this is final, binding, can't be re-opened. I mean
11 the exhibit, it's a complete settlement, Consumers in
12 these cases keeps repeating that it is out of the nuclear
13 business and all trailings from that, lock, stock, and
14 barrel. Well, the point is, they have waived these
15 things. The record in this case and other cases show
16 this. The very settlement in this case is an exhibit and
17 it shows that.

18 If the Company witness sponsoring the
19 settlement agreement can get up and says no, that they
20 still have the right to seek damages every six years, or
21 that they have a right to seek restitution of fees paid
22 up to 2007, let him say so. If he wants to get up and
23 say that the federal courts in 2008 did not rule that
24 there was no obligation to pay the SNF fee debt, let him
25 say so. But the Company witness will have to, we would

1 urge, unquestionably agree with the statement.

2 JUDGE FELDMAN: What about the testimony
3 at page 20, beginning at line 18, "It would appear that
4 CECo had a valid claim for past and on-going damages",
5 continuing through line 21?

6 MR. KESKEY: That relates to the same
7 kind of thing as page 19.

8 Until they settle the case, they have the
9 ability to keep filing damage suits, they have the right
10 to retain the right in a future time when a total breach
11 is declared to seek refund of past fees. But they have
12 settled that. They waived it in their settlement,
13 Exhibit A-1. Entergy can't step in and claim something
14 that Consumers paid. Entergy took over in April 2007.

15 JUDGE FELDMAN: All right.

16 MR. KESKEY: I mean the Company can
17 cross-examine Mr. Callen's basis for this, but you know,
18 if we know that the world is round and someone wants to
19 strike the testimony that the world is round and try to
20 proceed with the case on the basis of the theory the
21 world is flat, I mean there is some basics here.

22 JUDGE FELDMAN: All right. What about
23 the discussion of Mr. Jerry Stouck's statements beginning
24 on page 17 of Mr. Callen's testimony? I believe that the
25 Consumers Energy motion identifies a portion of that as

1 hearsay and asks that it be stricken on that basis.

2 MR. KESKEY: First of all, I have been at
3 great disadvantage here because I have not been able to
4 take complete notes of what he is seeking to strike on an
5 extemporaneous basis here. It should have been in their
6 motion.

7 JUDGE FELDMAN: This part, I believe, was
8 in their motion. Mr. Robinson, let me turn to you
9 briefly for a moment. I identified a portion of the
10 testimony that was covered in the Company's motion,
11 paragraph 5, page 3.

12 MR. ROBINSON: Yes, your Honor. The
13 specific piece of testimony that we think should be
14 stricken because it's inadmissible hearsay starts on page
15 15, line 22, and continues through page 18, line 5. It's
16 this whole discussion by Mr. Callen of some meeting that
17 he attended and where other individuals apparently said a
18 bunch of things.

19 MR. KESKEY: Your Honor.

20 JUDGE FELDMAN: I am focussing
21 specifically on Mr. Stouck's testimony at the moment, Mr.
22 Keskey. I mean Mr. Stouck's statement.

23 MR. KESKEY: Your Honor, Mr. Callen, as
24 an expert, can outline his understanding of the situation
25 as of the time he is speaking, as of the meeting, based

1 on readings, it can be based on studies, it could be
2 writings, it could be on verbal conversations. It can be
3 based on attending seminars. It could be based on
4 attending think tank discussion groups with the Nuclear
5 Waste Strategy Coalition, in which this meeting occurred
6 and which Mr. Stouck, who represents many of the
7 utilities, made his presentation. And there were many
8 people at the meeting, including commissioners and
9 utility executives and representatives and public
10 interest groups. And this is what Mr. Stouck presented
11 as the approach that many utilities were taking.

12 Mr. Callen heard it, he was there, he
13 attended the meeting. This is his understanding. Now
14 it's illustrative to present background as to why, among
15 many other reasons, Consumers Energy was imprudent and
16 unreasonable in waiving remedies which other utilities
17 are not waiving. Now this was admitted in U-16794. The
18 Company could cross-examine it. It may go to the weight
19 of it. But that is what occurred at those sessions.

20 Now in matters as complex as Commission
21 regulatory matters and rate proceedings, many expert
22 witnesses get on the stand and refer to studies done by
23 other persons or in fact, in cases of utilities, much of
24 the testimony is a compilation of many people's works to
25 come up with the figures, the backgrounds, the concepts,

1 the opinions that are formulated in expert testimony.
2 That happens all the time. The Commission rules do not
3 require striking of the testimony on the basis of
4 hearsay. It can rely on what reasonable people would
5 rely upon viewing the experience of the expert witness,
6 the credibility of the witness and having the witness
7 explain it on cross-examination. And then it goes to the
8 weight and it goes to the briefing.

9 JUDGE FELDMAN: O.K. But I mean I am
10 very concerned that in particular with Mr. Stouck's
11 comments that we not get bogged down in a great deal of
12 discussion or, you would say, the Company could
13 cross-examine Mr. Callen on this, I'm not really sure
14 where it would get us. Whether he might really have
15 talked about dates of 2014 rather than 2013, or 2012
16 rather than 2013, in that as counsel for parties pursuing
17 litigation against the government would his position as
18 expressed at this meeting actually ultimately be relevant
19 anyway?

20 MR. KESKEY: Yes, it is relevant because
21 it illustrates at the time very close to the time
22 Consumers entered into the settlement what the other
23 utilities were discussing. And it was -- it's also
24 indicating the remedies that they were not waiving.
25 Consumers Energy was undertaking settlement discussions

1 for many years, and we have discovery responses to
2 establish that. So they settled this in July of 2011.
3 This group which meets about every three or four months
4 and has on-going conference calls every two weeks, had
5 this presentation by the attorney that's handled many of
6 the cases for the utilities. And it illustrates the kind
7 of remedies that other utilities are preserving. That's
8 to illustrate in contrast what Consumers Energy is not
9 preserving.

10 Now is your concern about how, what kind
11 of detail can we get into on cross-examination? This
12 exact same testimony was in the rate case U-16794, and
13 Consumers Energy had cross-examination and it did not bog
14 us down.

15 I just think there has to be consistent
16 rulings in these cases, your Honor. The evidence
17 shouldn't be truncated in one case and accepted in full
18 in another case when we're dealing with the same issues,
19 the same remedies. Otherwise I guess I'd have to request
20 that complete judicial notice be given to the complete
21 Callen testimony and cross-examination in U-16794 because
22 this is the same issues and remedies, and the Commission
23 has not yet ruled, and we are in a procedural breach of
24 due process problem if we don't handle the record
25 consistently. And there's no particular burden on any

1 party for it being handled inconsistently, your Honor.

2 JUDGE FELDMAN: Mr. Robinson, anything
3 further?

4 MR. ROBINSON: Just a couple things, your
5 Honor. With respect to the testimony regarding the
6 on-going fees, the argument in support of allowing that
7 almost exactly illustrates why it's inappropriate. Here
8 we have a witness who is not qualified to make these
9 kinds of judgments and give these kinds of opinions, and
10 we're hearing that, that kind of testimony has to be
11 allowed.

12 The fact is, even if you want to make an
13 argument that Consumers Energy unreasonably waived some
14 remedies, and that those remedies might somehow relate to
15 these on-going fees, that doesn't justify all the
16 testimony we have here that says the Commission should
17 undo the result of 24 years of PSCR cases. At most it
18 relates to the reasonableness of the DOE settlement,
19 which is already going to be at issue in this case. But
20 it doesn't justify setting up trusts for \$260 million of
21 on-going fees or refunds of that amount of money.

22 Now, the only competent witness on this
23 subject who is going to be testifying today will say that
24 that whole premise is wrong. So I mean I want that to be
25 really clear, that Consumers Energy didn't waive any of

1 these remedies, but there's a right way and a wrong way
2 to do things. And the right way is almost never to put
3 an unqualified witness on the stand to make a bunch of
4 statements about things. That's what's going on here
5 with respect to these on-going fee pieces of testimony.

6 With respect to the legal opinion stuff
7 that I identify, it's not -- this is just pure legal
8 argument. I mean Mr. Callen isn't offering facts to
9 support some legal opinion that Mr. Keskey will be
10 arguing about in brief. He is offering the opinions
11 themselves. And to make it even worse, he is not even
12 offering any facts to support them. He just states them
13 as bald conclusions and opinions. And there is no
14 explanation whatsoever in his testimony about how he got
15 there.

16 Now I can speculate about how they got
17 there, but I won't.

18 But in any event, it's not proper
19 testimony from this witness. Mr. Callen may deserve a
20 lot of people's admiration and thanks for raising the
21 attention of an important issue where the federal
22 government has basically done a pretty lousy job of
23 managing its SNF disposal responsibility. Probably
24 everybody in the room would agree with that. But it
25 doesn't justify coming in, making the same proposals that

1 have been made over and over in other cases, and that
2 have consistently been rejected.

3 On the hearsay piece of testimony, your
4 Honor, your question basically illustrates the problem.
5 Mr. Callen is here reporting about statements made by
6 other people at some meeting that occurred some years
7 ago. The meeting was not transcribed. There is no
8 reports or studies or anything else that Mr. Callen
9 identifies or provides that might form some sort of more
10 solid basis for this testimony. He's just reporting
11 things that he says other people said. There's no way I
12 can cross-examine about them. Those people aren't here.
13 And it's the most perfect case of -- in a regular civil
14 court there wouldn't be any question, this stuff would be
15 stricken.

16 Now at the Commission, granted hearsay
17 testimony is at times allowed and at times appropriate,
18 but not in these circumstances, your Honor. This stuff
19 is non cross-examinable and it's just inherently
20 speculative and unreliable. So I'll be glad to answer
21 any questions, but that's all I've got.

22 MR. KESKEY: Two brief points in reply.
23 Number one, Consumers Energy has seen this testimony of
24 Mr. Stouck's presentation at the meeting in March of 2011
25 at least once if not twice or three times. Now they had

1 plenty of time to call up Mr. Stouck and get a slide show
2 or whatever he wants, and do their background research on
3 this or ask us discovery, and they did none of those
4 things. O.K. That's one thing.

5 So again for illustration of what was
6 presented at those meetings as to things that other
7 utilities have not waived, it does illustrate that
8 difference with what Consumers has done and it goes
9 directly to the reasonableness and prudence of what
10 Consumers has done in their settlement. The weight to be
11 given is for your Honor and the Commission.

12 The other implication that the claim for
13 the on-going fees of 2007 is somehow retroactively trying
14 to overturn past PSCR cases is wholly beside the point
15 and irrelevant because that's not what the focus of this
16 case is.

17 The focus of this case is what is
18 reasonable and prudent relative to what Consumers settled
19 on in 2011. And Mr. Callen presents the calculations and
20 the information he has which would be augmented on our
21 cross-examination exhibit of Consumers own responses on
22 discovery, the facts of what was collected from
23 ratepayers during that period. The fact that these
24 on-going fees remain unaddressed, that goes to
25 reasonableness and prudence of the settlement agreement.

1 Mr. Callen is well qualified to present those facts and
2 to present that point.

3 What the Company would like to do is
4 unreasonable, truncate and limit the record in this case
5 so that it can put on its lawyer witness and suggest we
6 should have a one-sided record on these issues, or that
7 its lawyer is going to tell us what the law is. And I'm
8 sorry, your Honor, that is not going to work because
9 it'll be a one-sided record. It will damage what this
10 case was supposed to be about, and we don't have to
11 unnecessarily create that procedural problem.

12 The solution is to put the evidence of
13 all the witnesses in and then brief the issues.

14 JUDGE FELDMAN: All right. First I do
15 believe that the scope of this proceeding does encompass
16 somewhat broadly the question of reasonableness and
17 prudence of the settlement agreement, and I understand
18 that the thrust of Mr. Callen's testimony relates to that
19 question. So I do not believe it would be appropriate to
20 strike Mr. Callen's testimony in its entirety.

21 As far as the on-going fee issue goes,
22 and I appreciate Mr. Robinson's going through the
23 testimony and identifying the portions that relate to
24 that, but I'm going to accept the testimony with the
25 understanding that it's based on MCAAA's claim that the

1 Company has waived certain rights with regard to the
2 potential future recovery of those payments in the
3 settlement agreement, Exhibit A-1.

4 I'm not going to rule now in advance of
5 briefing on this, whether the settlement agreement does
6 in fact make any such waivers.

7 In terms of the breadth of the remedies
8 also I'm not going to rule at this point regarding the
9 potential remedies for something that is still an open
10 issue regarding whether in fact there is such a waiver.
11 So I think it's easier to leave that in than to try to
12 decide in advance what remedies might be appropriate in
13 the hypothetical or speculating what the ultimate
14 conclusion might be regarding the effect of the
15 settlement agreement.

16 I am troubled, as Consumers Energy has
17 called my attention specifically to certain passages of
18 this testimony, however. I have looked at the portions
19 that are identified as potentially containing improper
20 legal testimony. Many of these statements I'm willing to
21 allow with the understanding, or on the basis that they
22 reflect Mr. Callen's understanding of court decisions, et
23 cetera, rather than testimony providing his opinion as to
24 how the Commission should interpret case law. Certainly
25 I think it's appropriate for the witness to have an

1 understanding of pertinent cases and administrative or
2 regulatory statements made by regulatory bodies.
3 Nonetheless, I believe that the testimony beginning at
4 page 28, discussing the Commission's authority or
5 precedent, beginning at line 17 of page 28, "authority or
6 precedent for adopting a downward rate adjustment or to
7 fund the SNF fee trust", I believe that testimony is
8 unnecessary in these proceedings. The parties can brief
9 the scope of the Commission's authority. We do not need
10 the testimony on that. So on that basis I am ruling that
11 the testimony beginning at page 28, line 17, through page
12 30, line 12, should be stricken.

13 And also specifically looking at that
14 sentence on page 20, line 18 through line 21, beginning
15 "It would appear that," Mr. Robinson called my attention
16 to that statement, I believe that it should also be
17 stricken.

18 That said, other of the statements that
19 may contain references to legal matters, for example the
20 testimony at pages 14 and 15, I believe that's background
21 to the testimony that begins at page 15, line 6, despite
22 these rulings, so I am allowing that testimony and the
23 other testimony for similar reasons. For example at page
24 12, line 20, the reference to ratepayers simply
25 abandoning any remedy, I am interpreting that as Mr.

1 Callen's lay characterization based on his understanding
2 and not intending to offer legal opinion.

3 Turning to the -- and I don't intend to
4 bog down the record by going through all of them, but I
5 generally view those other statements as consistent with
6 providing his understanding and background in the context
7 of presenting his policy analysis and recommendations to
8 the Commission.

9 But turning to the hearsay issues, there
10 are two statements in these pages beginning at page 15
11 through 17, one is a statement of a director of a
12 government office, he seems to be identified as a
13 government official, he makes certain statements
14 regarding the activities of the agency that he seems to
15 be charged with representing, and I think that that's
16 appropriate for a witness such as Mr. Callen to rely on
17 those statements.

18 But I am more troubled by the more
19 detailed discussion of the statements of Counsel Stouck.
20 I know that it is difficult to draw some of these lines
21 and find distinctions. I think that the understanding
22 that the parties to those proceedings may pursue a
23 standard settlement agreement is generally reflective of
24 Mr. Callen's awareness of what may be going on in the
25 other litigation is reasonable for him to have such an

1 understanding to testify to it. But really in terms of
2 the counsel's specific testimony regarding what is being
3 discussed, I think that's very dangerous territory to get
4 into. I find the testimony beginning at page 17, line
5 12, with Counsel Stouck, and continuing through page 18,
6 line 5, should be stricken. The specifics of the
7 settlement agreement that he may be working on behalf of
8 his clients, there may be all sorts of potential
9 miscommunications or misunderstandings associated with
10 that, as Mr. Robinson argued also. I am not sure all the
11 relevancy it has to this proceeding. I am not convinced
12 that what the parties may be arguing for by way of
13 settlement agreement in other cases has any real bearing
14 on whether Consumers Energy was reasonable and prudent in
15 entering into the settlement agreement it entered into,
16 that is the subject matter of this case.

17 Any questions about those pages?

18 MR. KESKEY: Yes, your Honor.

19 JUDGE FELDMAN: All right.

20 MR. KESKEY: I wasn't sure where you,
21 when you were looking at the bottom of page 28.

22 JUDGE FELDMAN: Bottom of page 28,
23 beginning with the question, "Please discuss the
24 Commission's authority or precedent", through the
25 conclusion of the answer on page 30, line 12.

1 MR. KESKEY: Page 30?

2 JUDGE FELDMAN: Line 12.

3 MR. KESKEY: But on page 30 I presume
4 lines 13 through 22 are still in?

5 JUDGE FELDMAN: Yes.

6 MS. UITVLUGT: Your Honor, did you
7 indicate that you were striking testimony on page 19?

8 JUDGE FELDMAN: I did not.

9 MS. UITVLUGT: You did not, O.K.

10 JUDGE FELDMAN: I believe that Mr.
11 Robinson called my attention to the testimony beginning
12 at line 17 with Roman numeral II there, but that is,
13 appears to be me less a statement by Mr. Callen about
14 what the settlement agreement would do rather than a
15 statement about, based on his review of the record in
16 this case regarding information that the Company has
17 presented or what he believes is a deficiency in the
18 Company's presentation.

19 MS. UITVLUGT: Thank you.

20 JUDGE FELDMAN: All right. Mr. Robinson,
21 it's 10:15. Should we take a break and allow you to get
22 your witness, first witness situated?

23 MR. ROBINSON: That would be fine. The
24 Company's first witness is Mr. Theuer.

25 JUDGE FELDMAN: All right. Let's go off

1 the record.

2 (At 10:14 a.m., a 10-minute recess was taken.)

3 - - -

4 J E F F R E Y S. T H E U E R

5 was called as a witness on behalf of Consumers Energy
6 and, having been duly sworn to testify the truth, was
7 examined and testified as follows:

8 JUDGE FELDMAN: If everybody is ready
9 back on the record. Mr. Robinson, your witness has been
10 sworn. You may proceed when you are ready.

11 MR. ROBINSON: Thank you, your Honor.

12 DIRECT EXAMINATION

13 BY MR. ROBINSON:

14 Q Mr. Theuer would you state your name and business address
15 for the record, please.

16 A It's Jeffrey Scott Theuer. The business address is 124
17 West Allegan, Suite 700, Lansing, Michigan 48933.

18 Q Mr. Theuer, in connection with appearing here this
19 morning did you cause to be prepared a document
20 consisting of a cover sheet and nine pages of questions
21 and answers to which is attached a cover sheet bearing
22 the caption of this case and is labeled Direct Testimony
23 of Jeffrey S. Theuer on behalf of Consumers Energy?

24 A I did.

25 Q Did you similarly prepare a document consisting of four

1 pages of questions and answers to which is attached a
2 cover sheet bearing the caption of this case and is
3 labeled rebuttal testimony of Jeffrey S. Theuer on behalf
4 of Consumers Energy?

5 A Yes, I did.

6 Q Do you have copies of that direct and rebuttal testimony
7 with you this morning?

8 A I do.

9 Q If I were to ask you the questions contained in that
10 prefiled testimony this morning would you respond with
11 the answers contained therein?

12 A Yes, I would.

13 Q Mr. Theuer, I want to show you copies of what has been
14 identified by the reporter as proposed Exhibits A-1 and
15 A-2. I'd ask you if those are the exhibits that you
16 reference in your direct testimony in this case?

17 A Yes, they are.

18 MR. ROBINSON: Your Honor, I would ask
19 that Mr. Theuer's direct and rebuttal testimony be bound
20 in the record, offer for admission Exhibits A-1 and A-2,
21 and Mr. Theuer is tendered for cross-examination.

22 JUDGE FELDMAN: Thank you. Let's go off
23 the record for a moment. I have a question.

24 (Brief discussion was held off the record.)

25 JUDGE FELDMAN: Back on the record.

1 Mr. Robinson, you may proceed when you are ready.

2 MR. ROBINSON: Your Honor, I guess I'd
3 ask that you bind Mr. Theuer's testimony in, and I've
4 already offered Exhibit A-1 and A-2, and he is tendered
5 for cross-examination.

6 JUDGE FELDMAN: All right. That is where
7 we left off. Is there any objection to binding in the
8 prefiled direct and rebuttal testimony of Mr. Theuer?
9 Hearing none, the prefiled direct and rebuttal testimony
10 of Jeffrey S. Theuer is bound in the record.

11 - - -

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of)
CONSUMERS ENERGY COMPANY)
for approval of refunds to retail electric)
customers and for related relief.)
_____)

Case No. U-16861

DIRECT TESTIMONY
OF
JEFFREY S. THEUER
ON BEHALF OF
CONSUMERS ENERGY COMPANY

September 2011

JEFFREY S. THEUER
DIRECT TESTIMONY

1 Q. Please state your name and business address.

2 A. Jeffrey S. Theuer. My business address is Loomis, Ewert, Parsley, Davis & Gotting,
3 P.C., 124 W. Allegan St., Suite 700, Lansing, Michigan.

4 Q. Where are you employed?

5 A. I am a shareholder with the law firm of Loomis, Ewert, Parsley, Davis & Gotting, P.C., in
6 Lansing, Michigan. I have been employed at the Loomis Law Firm since 1993.

7 Q. Are you a licensed attorney?

8 A. Yes. I was admitted to practice law in the State of Maryland in 1989, and in Michigan in
9 1990. I am also admitted in several Federal Courts, including the United States Court of
10 Federal Claims in Washington, D.C.

11 Q. Please briefly describe your education.

12 A. I have an LL.M. in Environmental Law from the George Washington University National
13 Law Center in Washington, D.C. I received a J.D. degree from the University of
14 Kentucky, where I was Associate Editor of the Kentucky Law Journal, and an
15 undergraduate degree, with honors, from the University of Michigan.

16 Q. What was your role in the lawsuit filed by Consumers Energy Company (“Consumers
17 Energy” or “the Company”) in the United States Court of Federal Claims to recover spent
18 nuclear fuel storage costs?

19 A. I served as principal litigation counsel from the filing of the case through its conclusion.

20 Q. What is the purpose of your testimony?

21 A. The purpose of my testimony is to provide background for the Application that has been
22 filed by Consumers Energy with the Commission in this case. I will include a description
23 of the Settlement Agreement that has been entered into by Consumers Energy and the

JEFFREY S. THEUER
DIRECT TESTIMONY

1 federal government that has resolved the Court of Federal Claims lawsuit, and that has
2 resulted in the recovery of amounts previously paid by electric customers of Consumers
3 Energy, and that the Company now proposes to refund to customers.

4 Q. Are you sponsoring any exhibits?

5 A. Yes. I am sponsoring the following exhibits:

6 Exhibit A-1 (JST-1) Settlement Agreement Between Consumers Energy
7 Company and United States

8 Exhibit A-2 (JST-2) Department of Energy letter dated August 24, 2011

9 Q. Please describe the Court of Federal Claims lawsuit.

10 A. The federal Nuclear Waste Policy Act (“NWPA”) states that the federal government has
11 the responsibility to provide for the permanent disposal of spent nuclear fuel (“SNF”)
12 from commercial nuclear reactors in the United States. Standard contracts were entered
13 into between the federal Department of Energy (“DOE”) and electric utilities, including
14 Consumers Energy, that set forth the details of how this responsibility was to be carried
15 out, including the timing of the acceptance of the SNF by the federal government. Under
16 the Standard Contract, the federal government was required to begin accepting,
17 transporting and disposing of SNF on January 31, 1998. Consumers Energy, and many
18 other electric utilities that owned and operated nuclear power plants, contended that the
19 federal government had breached its obligation under the Standard Contract to accept
20 delivery of the SNF at the specified time, and therefore commenced litigation against the
21 government seeking recovery of damages incurred as a result of the federal government’s
22 delay. These cases have been slowly working their way through the litigation process;
23 there have been some judgment awards, and in some cases settlements. Consumers
24 Energy commenced its case against the federal government in 2002, and the case was

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1 docketed in the Court of Federal Claims as *Consumers Energy Company v. United States*
2 *of America*, Court of Federal Claims No. 02-1894 C. After extensive discovery and
3 pretrial proceedings, Consumers Energy engaged in discussions with the federal
4 government in an effort to settle this litigation, and recently finalized a settlement with
5 representatives of the federal government of its claim.

6 Q. Please summarize the terms of the settlement.

7 A. The principal terms of the settlement are (1) Consumers Energy agreed to settle its
8 damage claims for the amount of \$120 million; (2) Consumers Energy extinguishes its
9 liability for payment of the one time fee associated with Palisades and Big Rock, which is
10 based on power generation prior to April, 1983; and (3) because the \$120 million
11 settlement amount includes the recovery of a \$30 million payment Consumers Energy
12 made to Entergy Nuclear Palisades, LLC (“Entergy”) in exchange for Entergy assuming
13 ownership of the Big Rock ISFSI and SNF, Consumers Energy agrees, under certain
14 circumstances, to indemnify the federal government for the first \$30 million of damages
15 claimed by Entergy arising out of the DOE’s failure to accept delivery of SNF after
16 April 11, 2007 (the closing date of the sale of the Big Rock ISFSI to Entergy).

17 The Company concluded that the terms of this settlement were very favorable,
18 and proceeded to finalize the settlement. It was finalized on July 11, 2011. The final
19 payment fully satisfying Consumers Energy’s obligations with respect to the one-time fee
20 was made July 13, 2011.

21 Q. Please explain the term “one-time fee” that you used in your prior answer.

22 A. As noted above, the NWPA states that the federal government has the responsibility to
23 provide for the permanent disposal of SNF. Pursuant to the NWPA, the DOE imposed an

JEFFREY S. THEUER
DIRECT TESTIMONY

1 ongoing fee for SNF disposal costs that commenced in 1983, and also imposed a one-
2 time fee associated with pre-April 7, 1983 generation from nuclear power plants. As
3 noted by Company witness Michael Torrey, the *ongoing fee* had been included in
4 Consumers Energy's power supply cost recovery ("PSCR") proceedings and recovered
5 through the PSCR process until April 2007, when the Company sold the Palisades Plant
6 and Big Rock ISFSI to Entergy. Utilities had several options for paying the *one-time fee*,
7 including a deferral option that required the payment of the fee at any time prior to the
8 first delivery of the SNF to the DOE. With respect to pre-1983 generation from the
9 Palisades and Big Rock Point nuclear power plants, Consumers Energy selected this
10 contractual option. As of the date the settlement agreement was finalized, July 11, 2011,
11 the one-time fee, (also sometimes referred to as the DOE Liability) was, including
12 principal and interest, \$163,102,173.

13 Q. Was the claim asserted by Consumers Energy in the Court of Federal Claims litigation
14 for recovery of the DOE Liability, or for recovery of any of the fees imposed by the
15 NWPA?

16 A. No. The DOE Liability, as well as the post-1983 fees paid during the time Consumers
17 Energy owned and was operating the Palisades and Big Rock Point plants, are payments
18 that operators of nuclear power plants were required to make to the federal government
19 pursuant to the NWPA. Those fees cannot be recovered because the federal government
20 still has the statutory obligation to dispose of SNF from the nuclear industry. The claim
21 litigated in the Court of Federal Claims concerned the damages incurred by Consumers
22 Energy due to the *delay* on the part of the federal government to accept delivery of the
23 SNF that is currently stored at the Palisades and Big Rock Point sites in accordance with

JEFFREY S. THEUER
DIRECT TESTIMONY

1 the terms of the Standard Contract. These claimed damages include the costs of
2 constructing and maintaining the Independent Spent Fuel Storage Installations
3 (“ISFSI’s”) at these sites, the cost of fabricating and loading dry fuel storage casks, and
4 related expenses, as well as the \$30 million payment to Entergy.

5 Q. Please summarize the terms of the settlement of the Court of Federal Claims lawsuit.

6 A. The Settlement Agreement has been identified as my Exhibit A-1 (JST-1). The principal
7 terms of the tentative settlement are:

8 (i) A damage award of \$120 million;

9 (ii) Acknowledgment that the award covers all of Consumers Energy’s claims
10 through April 11, 2007, the date that Consumers Energy transferred the Palisades plant
11 and Big Rock ISFSI and SNF to Entergy;

12 (iii) Full payment of the DOE Liability (\$163,102,173) and the debt
13 extinguished;

14 (iv) The \$120 million settlement amount includes recovery by Consumers
15 Energy of the \$30 million payment that was made to Entergy in exchange for Entergy’s
16 agreement to accept title to and all future responsibility for the Big Rock ISFSI and SNF.
17 Thus, Consumers Energy agrees to indemnify the federal government under certain
18 circumstances for the first \$30 million of claims asserted by Entergy arising after
19 April 11, 2007 that result from DOE’s failure to accept delivery of the SNF stored at the
20 Big Rock site. This indemnification provision is simply recognition that Entergy
21 effectively recovered that amount of costs when it accepted title to the ISFSI in exchange
22 for the \$30 million payment from Consumers Energy, and that Consumers Energy is
23 recovering the \$30 million payment via the settlement.

JEFFREY S. THEUER
DIRECT TESTIMONY

1 Q. With respect to the indemnity provision, how did you view that term of the settlement?

2 A. With respect to this provision, the terms of the Asset Sales Agreement (“ASA”) that set
3 forth the terms of the sale of the Palisades and Big Rock assets to Entergy Nuclear
4 Palisades, LLC (“Entergy”) provide that Entergy is prohibited from bringing a claim for
5 the first \$30 million of post-closing costs incurred at the Big Rock ISFSI. Thus, in
6 evaluating the terms of the settlement, we judged that it is highly unlikely that this
7 indemnity provision will ever be triggered, since it would require Entergy to breach the
8 ASA, and Consumers Energy would, in such an event, have a claim against Entergy for
9 any resulting damages.

10 Q. Is it reasonable to conclude that interest costs are not included in the \$120 million
11 recovered in the DOE settlement?

12 A. Yes. The Government was unwilling to compromise on the payment of interest. Interest
13 is not recoverable in cases brought against the Government in the Court of Federal
14 Claims unless allowed by a contract or an Act of Congress expressly providing for
15 payment of interest on claims. The Standard Contract and Nuclear Waste Policy Act
16 (“NWPA”) do not include a provision for payment of interest. During the litigation, and
17 during settlement discussions, the Department of Justice attorneys made clear that the
18 Government would not pay interest, whether characterized as interest, cost of capital, or
19 otherwise, under any circumstances, and that the Government would appeal any award of
20 interest at trial. As a result, interest was not discussed as a component of the settlement
21 amount.

JEFFREY S. THEUER
DIRECT TESTIMONY

1 Q. Did Consumers Energy include a claim for interest in its claim against the Government?

2 A. Yes, Consumers Energy did include a claim for the cost of capital as part of its damages
3 claim because there is a very narrow exception to the prohibition against recovery of
4 interest for borrowing costs associated with mitigation activities under certain types of
5 fixed cost government contracts. Most other SNF Plaintiffs also included these types of
6 claims.

7 Q. Have such costs ever been allowed in the SNF cases that have been litigated?

8 A. No. Consumers Energy's initial time price differential claim was dismissed as a claim
9 for interest by the trial court. Consumers Energy subsequently amended its damages
10 claim to assert a cost of capital claim. However, all claims for interest or cost of capital
11 in other SNF cases have been unsuccessful. The Federal Circuit Court, which is the
12 appeals court for the Court of Federal Claims, issued an opinion in April, 2011 denying
13 recovery of cost of capital damages in an SNF case, which largely resolved the issue.

14 Q. If the Court of Federal Claims matter had been tried, is it likely that the Company would
15 have been required to pay the DOE Liability as part of any judgment?

16 A. The federal government has consistently taken the position that the DOE Liability should
17 be a set-off against any damage award. In fact, there was initially a ruling in the
18 Consumers Energy Court of Federal Claims matter that such a set-off would be required.
19 More recently, the Company had been successful in getting that ruling reversed by the
20 presiding judge. The government never gave up on that issue, however, and would have
21 been expected to raise it in any appeal from a decision awarding a judgment. Thus, while
22 the odds of being required to pay the DOE Liability as part of a judgment in the litigation
23 had recently decreased, the possibility had not been entirely eliminated. I will also note

JEFFREY S. THEUER
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1 that Consumers Energy believes that the \$120 million settlement award is as large as it is
2 due in part to the term of the settlement that required extinguishing the DOE Liability.

3 Q. Please identify Exhibit A-2 (JST-2).

4 A. Exhibit A-2 (JST-2) is a letter dated August 24, 2011 from the Department of Energy to
5 Consumers Energy to confirm that, pursuant to the Settlement Agreement between
6 Consumers Energy and the United States, the one-time fee for nuclear generation prior to
7 April 7, 1983, including all principal and accrued interest, has been paid in full.

8 Q. Please summarize the benefits of the Settlement Agreement from your perspective.

9 A. There are substantial customer benefits to be realized from the Settlement Agreement.
10 These are discussed in Mr. Torrey's testimony. Additional benefits that I believe deserve
11 mention include the following:

12 (1) Consumers Energy and its customers have avoided the risk that the outcome
13 of the Court of Federal Claims Lawsuit, if litigated, would have been less than
14 \$120 million; i.e., would be insufficient to permit a refund of the \$23.3 million previously
15 collected from customers, and/or would be insufficient to eliminate the \$54.6 million
16 ISFSI cost and \$30 million Entergy payment as a potential future customer liability.
17 Based on the analysis we conducted of awards and settlements in other SNF cases, the
18 \$120 million damage award was very favorable.

19 (2) Consumers Energy and its customers have avoided the risk that, whatever
20 the outcome of the trial, the federal government would appeal the outcome. The
21 settlement therefore avoids the risk that a judgment would be reduced or reversed on
22 appeal, as well as avoids what would likely have been a multiple year delay in collecting
23 any damage award as a result of an appeal. For example, the federal government has

JEFFREY S. THEUER
DIRECT TESTIMONY

1 recently been successful in the federal circuit court of appeals in preserving its ability to
2 present an “unavoidable delay” defense in connection with these SNF cases. Had that
3 defense been allowed in the Consumers Energy case, it would at least have resulted in a
4 significant delay in the litigation, and could constitute a complete defense to liability.

5 Q. Does this complete your testimony?

6 A. Yes.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of)
CONSUMERS ENERGY COMPANY)
for approval of refunds to retail electric)
customers and for related relief.)
_____)

Case No. U-16861

REBUTTAL TESTIMONY
OF
JEFFREY S. THEUER
ON BEHALF OF
CONSUMERS ENERGY COMPANY

March 2012

JEFFREY S. THEUER
REBUTTAL TESTIMONY

1 Q. Please state your name and business address.

2 A. Jeffrey S. Theuer. My business address is Loomis, Ewert, Parsley, Davis & Gotting PC,
3 124 West Allegan St., Suite 700, Lansing, Michigan.

4 Q. Are you the same Jeffrey S. Theuer who filed direct testimony in this matter?

5 A. Yes.

6 Q. What is the purpose of your rebuttal testimony?

7 A. The purpose of my testimony is to rebut certain statements made by Michigan Community
8 Action Agency Association witness Ronald C. Callen.

9 Q. At page 20 of his direct testimony, Mr. Callen states as follows: "It would appear that
10 CECo had a valid claim for past and ongoing damages and for refunds of all SNF fees, at
11 least for the period until it sold and transferred its nuclear facilities and SNF sites to
12 Entergy Nuclear Palisades LLC (ENP) on or about April 10, 2007." Do you agree with
13 that statement?

14 A. No. CECo did not (and does not) have a claim for a refund of all SNF fees. A refund of
15 those fees would require a change in the law and declaration of a total breach of the
16 Standard Contract. The Federal Circuit Court of Appeals has ruled that utilities are
17 precluded from declaring a total breach. The Nuclear Waste Policy Act ("NWPA") made
18 the Department of Energy ("DOE") exclusively responsible for collection and disposal of
19 spent nuclear fuel ("SNF"), and required DOE and all nuclear utilities to enter into
20 Standard Contracts for the disposal of SNF. 42 U.S.C. Section 10222(a)(1). Both the
21 NWPA and the Standard Contract prohibit any nuclear utility from seeking alternative
22 disposal of SNF. Nuclear utilities such as CECo were, therefore, locked into the NWPA
23 disposal program by statute and by contract. The SNF fees paid to DOE were statutorily

JEFFREY S. THEUER
REBUTTAL TESTIMONY

1 prescribed to fund the cost of SNF disposal. Unless the NWPAs are changed, or the
2 government repudiates the Standard Contracts, no utility has a claim for refund of the SNF
3 fees paid under the NWPAs and Standard Contracts for SNF disposal. There is, however,
4 one caveat to the foregoing response. The caveat is that CECO did have a valid claim for
5 past and ongoing damages for storage costs through the date it transferred its nuclear assets
6 to ENP. Those damages were recovered in the Settlement Amount.

7 Q. At page 19 of his testimony, Mr. Callen alleges that, in the Settlement Agreement,
8 Consumers Energy waived its ability to seek refund of SNF fees paid to the federal
9 government in the event of a complete breach of the government's duty to dispose of the
10 SNF. Do you agree?

11 A. No. As discussed above, there is no present claim for refund of SNF fees. However, in the
12 unlikely event that the law were to be changed, or the government were to declare a
13 complete breach of its duty to dispose of SNF, the Settlement Agreement releases only
14 claims that arise out of DOE's delay in performance. Any hypothetical claim for a refund
15 of SNF fees arising from a total breach or repudiation of the Standard Contract is not
16 released by the language of the Settlement Agreement.

17 Q. At page 20 of his testimony, Mr. Callen alleges that Consumers Energy "may have been
18 awarded the same \$120 million, or perhaps more, by completing its litigation through
19 hearings as many other utilities have done." Has anything occurred since the date of the
20 Settlement Agreement that would support Mr. Callen's statement?

21 A. No. In fact, events subsequent to the Settlement Agreement suggest that CECO may have
22 been awarded substantially less at trial than by settling. CECO relied upon the Court of
23 Federal Claims (trial court) opinion in the Boston Edison case in support of its claim for the

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1 \$30 million Big Rock Payment. Boston Edison recovered an analogous payment in the
2 trial court after selling the Pilgrim plant in 1999. However, that award was reversed by the
3 Federal Circuit in a decision issued in September, 2011, after the CECo Settlement
4 Agreement was finalized. The Boston Edison Federal Circuit opinion would likely have
5 foreclosed the recovery of the Big Rock Payment at trial, and required Consumers Energy
6 to file a series of lawsuits every six years to attempt to recover the costs as they were
7 incurred. Further, the Federal Circuit expressly reserved ruling on the Government's
8 argument that the transfer of expected future breach related costs to a purchaser relieves
9 DOE of its obligation to pay those costs once they are incurred. If the government were to
10 prevail on that theory, CECo might never have recovered the Big Rock Payment. The \$30
11 million Big Rock Payment was included in the Settlement Amount in CECo's settlement.
12 By settling, CECo recovered the Big Rock Amount, and also avoided substantial litigation
13 costs, expert witness fees, and litigation risk.

14 Q. At page 19 of his testimony Mr. Callen alleges that the Settlement Agreement "effectively
15 waive[s] CECo's ability to file future law suits every six (6) years for incremental damages
16 arising from the federal default". Do you agree?

17 A. Under the Settlement Agreement, CECo recovered SNF storage costs through the date of
18 the sale of its nuclear assets to ENP, April 11, 2007. Because all claims for DOE's delay
19 through the date of the sale were resolved in the settlement, and CECo sold all of its SNF
20 and assigned the Standard Contract to ENP, there will be no incremental damages incurred
21 by CECo after the date of the sale, and therefore, no need to file future lawsuits every six
22 years. The government expressly recognized and accepted the assignment of the Standard
23 Contract in the Settlement Agreement.

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REBUTTAL TESTIMONY

1 Q. Does this complete your rebuttal testimony?

2 A. Yes.

1 JUDGE FELDMAN: Who has cross-examination
2 for Mr. Theuer? Mr. Keskey.

3 Mr. Erickson, do you have your hand up?

4 MR. ERICKSON: I do not.

5 JUDGE FELDMAN: All right. Mr. Keskey,
6 you may proceed when you're ready.

7 MR. KESKEY: Thank you, your Honor.

8 CROSS-EXAMINATION

9 BY MR. KESKEY:

10 Q Good morning, Mr. Theuer.

11 A Good morning.

12 Q You have indicated now that you served as counsel for
13 Consumers Energy on the case that resulted in the
14 settlement agreement; is that correct?

15 A That is correct.

16 Q How would you describe your role?

17 A I was the lead litigation counsel for the entire period
18 of litigation.

19 Q What does that entail?

20 A That entails primary responsibility for drafting all
21 pleadings, discussions with the client concerning
22 strategy and litigation going forward, participation in
23 all settlement discussions, also participation in
24 industry-wide discussions regarding settlement and
25 coordination of the cases, and arguing motions in front

1 of the court.

2 Q Were there other lawyers or law firms involved?

3 A There was a number of co-counsel in the case, yes.

4 Q How would you describe your role in relation to their
5 assignments?

6 A They were assigned tasks by me on an as-needed basis.

7 Q Now in your role did you review other court of claims
8 cases by other utilities?

9 A I did.

10 Q Did you review those cases that were litigated through a
11 court decision?

12 A I did.

13 Q Did you review settlements by other utilities?

14 A When they were available.

15 Q How many cases did you review?

16 A Well, they were not -- there was not a general ability to
17 get terms of settlements. There was a settlement in the
18 Excelon case fairly early on that was made relatively
19 public information. That document I had and reviewed in
20 total. I got bits and pieces from other settlements as
21 they occurred. But for the most part the government
22 wanted to keep the terms of most of those fairly secret.

23 Q Well, let's look at settlements first. How many
24 different utility settlements did you review?

25 A Well, the Excelon settlement, and I had bits and pieces

1 of a few other settlements. I know a little bit about
2 the Excel settlement, for example, and Florida Power
3 settlement.

4 Q And now with respect to those cases that were litigated
5 through a court decision, how many cases?

6 A I can't tell you the exact number, but we analyzed every
7 case that went to a published opinion, which was every
8 case that was actually tried to a decision by the Court
9 of Claims. It was probably 15 to 20.

10 Q Did you review the appellate decisions from those Court
11 of Claims cases?

12 A I have. In most cases I've also listened to oral
13 argument.

14 Q How many appellate cases did you review?

15 A Appellate SNF cases, there's -- well, I guess it depends
16 on how far back you want to go. If you're talking about
17 just the cost recovery type cases, there's probably five
18 to eight.

19 Q Did you review the court decisions in the three Yankee
20 Atomic cases?

21 A Yes.

22 Q Did you review the appellate decision in 2008 in those
23 cases?

24 A Yes.

25 Q Now, is it your understanding that the Yankee Atomic

1 utilities have sued for more than one six-year period
2 since the contract deadline of 1998 was missed?

3 A Sitting here today, I guess I wouldn't be willing to say
4 for sure. I know that there have been some secondary
5 cases brought within that six-year period after the
6 initial filing.

7 Q Are you aware of other utilities who have brought the
8 second six-year claim of damages after the first six-year
9 period?

10 A I know that some have been filed. I don't know the
11 specific ones.

12 Q Have you reviewed any Court of Claims decisions on cases
13 that involve not only one six-year period but a second
14 six-year period?

15 A Yes. There have been opinions that I have reviewed that
16 involve an initial opinion with a reference to a second
17 case having been filed. I couldn't tell you which cases.

18 Q Is it correct that the court decision in the Yankee
19 Atomic cases ruled that the DOE's claim for an offset for
20 SNF debt for pre-1983 generation was rejected?

21 A In Yankee Atomic, yes, that's correct.

22 Q Did the federal government appeal that to the Supreme
23 Court?

24 A I do not know the answer to that.

25 Q Is it correct that in your specific case involving

1 Consumers Power, that your judge in January 2011 ruled
2 that DOE's claim for an offset of the pre-1983 fee debt
3 was to be rejected?

4 A The judge ruled in our case reversing the prior opinion
5 in our case, that a one-time fee was not yet due, that is
6 correct.

7 Q So Consumers Energy did not have an obligation to pay the
8 SNF fee debt of \$163 million to the federal government at
9 this time?

10 A Well, with the caveat of the last phrase that you added,
11 I would agree with that. It's not a matter of not owing
12 the debt, it's always a matter of timing with respect to
13 the one-time fee. They do owe the debt.

14 Q And if the utility -- Well, Consumers Energy selected the
15 option of not paying the SNF fee debt when it entered
16 into the standard contract; isn't that right?

17 A That's correct.

18 Q And was it also true that the payment obligation did not
19 arise until the federal government started accepting
20 Consumers Energy's SNF?

21 A The option that Consumers elected under the standard
22 contract was payment prior to delivery, that is correct.

23 Q So Consumers had no obligation to pay the SNF fee debt
24 until the federal government started commencing SNF,
25 disposal of Consumers Energy's SNF?

1 A Yes, that's the election they chose.

2 Q Are you aware of the fact that the federal government in
3 2010, March of 2010, filed a motion that the Nuclear
4 Regulatory Commission withdraw its application for a
5 license for a Yucca Mountain repository with prejudice?

6 A I'm aware that the motion was filed. Yes.

7 Q Are you aware of the fact that starting in 2009 and then
8 continuing into 2010, that the administration reduced the
9 budgets for the disposal program?

10 A For the disposal program generally?

11 Q Yes.

12 A Well, the disposal program is paid through the Nuclear
13 Waste Fund. So when you say the program, the program
14 still exists. Yucca Mountain was a proposal for a final
15 disposition of spent nuclear fuel. That does not mean
16 that there is nothing else that the government is
17 interested in looking for. They are still looking, as
18 they are obligated to do under the Nuclear Power Waste
19 Policy Act, for a permanent location.

20 Q Are you aware of the fact that the administration
21 eliminated the Office of Civilian Radioactive Waste
22 Management?

23 A Well, yeah. To say it's eliminated I think is
24 incomplete. The entire civilian office of the Nuclear
25 Waste Management was re-organized into other areas of DOE

1 as a cost saving measure, as I understand it.

2 Q Is it correct that the administration's budget for the
3 SNF repository program is zero?

4 A I do not know that that's true.

5 Q Is it your understanding that the budget allowed or given
6 to the Nuclear Regulatory Commission to review the
7 application is zero?

8 A License application for Yucca. But again it's an
9 incomplete question because Yucca Mountain is not the end
10 of the story. Yucca Mountain is a single repository.
11 The federal government still has an obligation under the
12 Act to provide a permanent repository for spent nuclear
13 fuel. The fact that it's not going to be funded through
14 Yucca Mountain apparently does not end the government's
15 obligation to dispose of spent nuclear fuel.

16 Q Could you tell us where the government is going to locate
17 its repository?

18 A I can't tell you. There are several under consideration.

19 Q What are the several?

20 A The testimony that I have reviewed have indicated
21 another, a number of options potentially for that
22 disposal. One would be the Whip site. Another would be
23 in play, what they refer to as in-place disposal or
24 storage, which would be sort of a cost savings means of
25 keeping the SNF in place at where it is located but

1 transferring the cost and the title to SNF to the current
2 utility owner. They are, I believe, discussing a number
3 of different ways of finding that permanent repository.

4 Q Would you agree generally the Yucca Mountain studies took
5 30 years?

6 A They took a long time. 30 years is probably about right.

7 Q Would you agree that approximately ten billion dollars
8 was spent on those studies?

9 A I don't know the exact number.

10 Q Are you aware of the fact the administration has
11 withdrawn transportation rights and water rights for the
12 Yucca project?

13 A Well, again the Yucca project is not the end of the story
14 for federal repository. The Act itself requires the
15 federal government to provide spent nuclear fuel
16 disposal.

17 JUDGE FELDMAN: O.K. Mr. Theuer, I'm
18 going to chime in here because if you can answer
19 Mr. Keskey's questions yes or no, please do so. And if
20 elaboration is required, or qualification, either Mr.
21 Keskey or Mr. Robinson will ask you about that at the
22 appropriate time. If you cannot answer yes or no, can
23 you let Mr. Keskey know?

24 THE WITNESS: Certainly. I apologize.

25 JUDGE FELDMAN: Can you repeat the last

1 question?

2 Q (By Mr. Keskey): Are you aware that the administration
3 has withdrawn water rights for the Yucca Mountain
4 repository?

5 A Yes, I am aware of that.

6 Q Are you aware that they have ceased all transportation
7 planning for the Yucca Mountain repository?

8 A I am not aware of that.

9 Q Did you update yourself on what the transportation
10 arrangements are for SNF?

11 A Not for today.

12 Q Are you aware of what the administration has done with
13 respect for the planning or designing of shipping casks
14 for the SNF?

15 A I am generally aware, yes.

16 Q Is it true that they have discontinued that program?

17 A Discontinued the program for designing shipping casks?

18 Q Well, could you explain what is going on in the
19 administration relative to the designing of shipping
20 casks to transport spent nuclear fuel?

21 A There are a number of shipping casks that have already
22 been designed that are in existence today.

23 Q And as far as the DOE approval of such shipping casks,
24 what is the status?

25 A I don't know that they are -- I don't know that a

1 specific transportation cask has been approved.

2 Q Are you aware that the Nuclear Regulatory Commission
3 issued a nuclear waste confidence decision in December of
4 2010, I believe the date is?

5 A Approximately then, yes.

6 Q And were you aware of the fact that the nuclear
7 confidence decision that the NRC adopted in the 1970,
8 late '70 through the 1990s, provided for assurance that
9 there would be a repository by 2025?

10 A I don't recall the specific date.

11 Q First quarter of the century, was that about right?

12 A Approximately, yes.

13 Q And is it correct that the NRC's new nuclear waste
14 confidence decision would provide for the SNF to be
15 stored on site at the plants up to 60 years beyond the
16 licensed life of a plant, including all extensions of
17 licenses?

18 A I don't recall the specific dates, but that's
19 approximately correct, yes.

20 Q And is it your understanding that under that rule making
21 SNF could be stored on site for a period of ranging
22 between 100 to 300 years?

23 A I understand that that is possible, yes.

24 Q Have you been following the proceeding in that rule
25 making process?

1 A Not intimately, no.

2 Q Now, when you look at the Nuclear Waste Policy Act and
3 the standard contract, could you describe specifically
4 what part of the repository program exists at this time?

5 A I'm not sure I understand the question. Could you
6 rephrase it?

7 Q Well, if you look at the Nuclear Waste Policy Act as it
8 was amended in 1987 and also the standard contract, could
9 you describe specifically what remains of the repository
10 program?

11 A Well, what remains is an obligation under the Act itself
12 for, as well as the standard contract, for the federal
13 government to provide assistance in disposal of services
14 for SNF throughout the country.

15 Q And the obligation was in the Act and was supposed to be
16 performed by 1998, was it not?

17 A That's correct. It was supposed to begin in 1998.

18 Q And so that obligation hasn't been followed by the
19 current administration, has it?

20 A They did not begin their performance by 1998, yes, that's
21 correct.

22 Q In fact, they have disabled some major elements of the
23 program by their various actions relative to licensing
24 appropriations, water rights, transportation, progress on
25 the license application; isn't that right?

1 A They have, they appear to have walked away from a single
2 option, the Yucca Mountain, for that permanent disposal,
3 yes, I would agree with that.

4 Q And these events occurred -- well, let me ask it this
5 way. It's correct that you entered into the settlement
6 in July of 2011; is that correct?

7 A That's correct.

8 Q So when you entered into the settlement Consumers Energy
9 was fully aware of all of these events at the time it
10 decided to enter into the settlement, were they not?

11 A Well, Consumers was aware of the status of Yucca Mountain
12 and the disposal program in July of 2011, yes.

13 Q Does Consumers Energy have any information at all as to
14 when there would be a repository?

15 A I don't know that anyone does. But no, Consumers does
16 not to my knowledge have any specific information.

17 Q The federal government continues to collect the one mill
18 per kilowatt hour fee, does it not?

19 A Not from Consumers, but they do from the industry.

20 Q In your testimony various places you talk about the delay
21 in the DOE performance. You're suggesting that it's a
22 partial breach at this point?

23 A Yes, that was the allegation in the complaint, Count I of
24 the complaint. That's the allegation that every SNF has
25 made.

1 Q And your complaint was filed in what year?

2 A 2002.

3 Q And that was well before these more recent events, 2009
4 through 2012; is that right?

5 A That's true.

6 Q Now, would you agree that at some point a breach could be
7 established, a full breach?

8 A Yes, but it would require a change in the law.

9 Q What kind of change in the law?

10 A It would require an amendment to the Nuclear Waste Policy
11 Act.

12 Q What kind of amendment?

13 A It would require an amendment that does not make the
14 exclusive responsibility for SNF disposal the obligation
15 of the federal government.

16 Q Well, let's see. The law required an obligation that
17 they have a repository program and they accept SNF. And
18 the law was reinforced by requiring a contract which
19 would set up contract remedies that also established the
20 same obligation. So I guess I don't follow your logic
21 that you can't enforce the contract further and declare a
22 breach unless the law is changed. It seems that the law
23 that the contract has as it presently exists is what
24 provides you these contract remedies.

25 A Well, to the extent that's a question, the answer is that

1 the Act and the contract itself both require the
2 government to be the exclusive entity responsible for the
3 disposition of SNF. The fact that they have delayed
4 their acceptance, that has led to a partial breach.
5 However, as was made clear in the Yankee Atomic 2 case
6 and the Indiana Michigan 2 case, because the government
7 is the exclusive responsible party for SNF, if a total
8 breach were declared, then this SNF could essentially
9 become the responsibility of the utility which is
10 contrary to law. So until the law is changed and the
11 interpretation of that law in those two cases is changed,
12 utilities are not able to bring a total breach case.

13 Q Are you trying to articulate a fear that if the utilities
14 were to declare a total breach, that that would provide
15 the federal government an out so they wouldn't have to
16 ever perform any disposal duties?

17 A Well, I don't know if it's a fear, but the legal effect
18 of a total breach would be that the SNF remains with the
19 utilities, to be disposed of by the utilities.

20 Q And that's one of the options that you stated earlier is
21 unraveling as one of the potential options anyway, isn't
22 it?

23 A No, it's different. The option that's being talked about
24 with respect to in-place storage and disposal is an
25 option where the federal government would accept title

1 and responsibility under the Standard Contract and the
2 Nuclear Waste Policy Act for the spent nuclear fuel as it
3 sits in place. Then the costs of that storage on-going
4 would then be a responsibility of the federal government,
5 not the utilities.

6 Q And the SNF could sit at the current plant sites
7 indefinitely?

8 A Potentially, yes.

9 Q And the utilities would at that point also have the
10 continuing right to seek damages every six years and to
11 then seek a re-dress of the past fees paid with it?

12 A Well, I think that would have to be worked out.

13 Certainly past fees are a different issue. The fees
14 going forward if this, if the concept of an in-place
15 disposal were adopted, the costs going forward would be
16 the federal government. How that would be arranged is
17 anybody's guess at this point. It could be that the
18 government makes those, incurs those costs directly and
19 pays them. It could be that the utility would get
20 reimbursed. It really hasn't been decided.

21 Q Now the standard -- now, the settlement agreement that
22 you have entered into in July of 2011, which is your
23 Exhibit A-1, is that a final settlement?

24 A It's a final settlement of all claims that were brought
25 in the lawsuit, yes.

1 Q Has Consumers Energy retained the right to file another
2 lawsuit in the future?

3 A Potentially. If it were to occur, that a change in law
4 occurred and a total breach claim could be brought, we
5 believe that this settlement agreement preserves that
6 right.

7 Q First of all, would you have to face the statute of
8 limitations by filing such a claim within six years after
9 it arose?

10 A Well, the six-year statute of limitations is only
11 relative to incremental costs. In other words,
12 continuing cost that is incurred for storage. Consumers
13 Energy doesn't have any of those costs anymore because
14 they don't own the plants.

15 Q Where in the settlement agreement is it, has Consumers
16 preserved the right to potentially file a damage suit or
17 another suit in the future?

18 A In Article II on page 5 of the settlement agreement, this
19 refers to the release language. It says "Consumers
20 Energy releases, waives, and abandons any and all of
21 Consumers Energy's claims against the United States, its
22 political subdivisions, its officers, agents, and
23 employees that arise out of DOE's delay in performance."
24 It's those words, delay in performance, that are the
25 critical distinction. This is a partial breach case and

1 it's a partial breach release. The partial breach is
2 based on the delay in performance, not a complete breach
3 in performance obligation.

4 Q And do we see any evidence here that the DOE would accept
5 the same interpretation or understanding that you're
6 asserting relative to that?

7 A I don't know what the DOE believes.

8 Q How long under that provision would a delay exist, how
9 many years?

10 A Would a delay exist? Well, it exists from 1998 until
11 disposal activities begin.

12 Q Could that be 300 years?

13 A I couldn't tell you. It's speculation.

14 JUDGE FELDMAN: Do you have any basis to
15 believe that DOE shares your interpretation of that
16 phrase, delay in performance?

17 A Well, your Honor, I can tell you that every word in this
18 document was arrived at through a great deal of
19 negotiation. The fact that the release refers only to
20 claims related to delay we believe was significant as
21 opposed to a whole release. Had Consumers intended to
22 release all claims, we would have simply said that.

23 JUDGE FELDMAN: O.K. But I am -- I guess
24 I understand what you're saying Consumers Energy's
25 interpretation of this language would be. Presumably, or

1 would I be mistaken, you concluded that that was a
2 reasonable objective construction of this language?

3 A Yes.

4 JUDGE FELDMAN: And do you have any -- I
5 mean is this -- Would the interpretation of that type of
6 language be something that would have been discussed in
7 negotiations to make sure that the parties to the
8 settlement were generally in agreement? Or was it just
9 undiscussed?

10 A Well, it was discussed in the sense that the original
11 language did not say delay. That language was added
12 during the negotiations. And if it didn't mean anything,
13 I think we would all agree that if it didn't mean
14 anything, then it wouldn't have been added. What it
15 meant from our perspective was delay in performance is a
16 partial breach waiver.

17 JUDGE FELDMAN: Was your understanding of
18 that distinction clearly communicated to the government?

19 A We had numerous discussions about this and every other
20 word in this document with the government. So I believe
21 so, yes.

22 Q (By Mr. Keskey): You have included in this settlement
23 agreement no definition of delay.

24 A Well, that's correct. I don't know that we needed to
25 though because of the legal status of a total breach

1 claim. It was impossible to bring a total breach claim
2 so we didn't have a total breach claim to release in this
3 document. We could only release a partial.

4 Q Well, it appears that you're placing on a fulcrum a
5 mighty broad and deep result based simply on the word
6 delay. It has no definition in here. Was there any
7 third party in the settlement meetings other than the
8 federal government and Consumers Energy that wrote this
9 document?

10 A No, that's all that was there.

11 Q Was there any regulatory pre-approval of the document?

12 A There is a lengthy approval process after the document is
13 drafted that DOJ, Department of Justice, has to go
14 through in order to get it approved.

15 Q And that's the federal government also?

16 A Yes.

17 Q Depending on what person's imaginations were and the
18 discussions about what delay meant, delay could
19 potentially be forever, could it not?

20 A I'm not sure it makes a difference within the context of
21 this settlement as Consumers doesn't own the properties
22 anymore, so it doesn't incur any incremental costs going
23 forward on this. This document waived the existing
24 claims that existed as of the date of the settlement.
25 And a total breach claim was not a claim that could have

1 existed at the time of the settlement.

2 Q What happens if there is objective declarations of a
3 total breach that come up in a few years and findings of
4 a breach from an objective source such as a court, how
5 does that change this settlement?

6 A It doesn't change the settlement at all.

7 Q Because in the world of Consumers Energy and the federal
8 government, a delay is still happening even if a court
9 were to declare a breach?

10 A I guess I'm not sure what you're asking.

11 Q Well, if a court or some objective third party were to
12 rule that there has been a total breach and other
13 remedies can flow, would Consumers then also determine
14 under this settlement agreement that there has been a
15 breach and then pursue other remedies?

16 A It could, yes.

17 Q And where is that stated in the document?

18 A It's in the language that I just read to you.

19 Q The word "delay"?

20 A Yes, it is, because Consumers could only release the
21 claims that it had. The only claim that it had to
22 release was a partial breach of claim based on delay in
23 performance, not repudiation of performance.

24 JUDGE FELDMAN: What do you mean that
25 Consumers could only release the claims it had? Do you

1 mean as a matter of law or as a matter of intent?

2 A Well, I mean as a matter of law. The fact is that at the
3 time that this document was drafted there were two
4 federal circuit court claims interpreting, or decisions
5 interpreting the Nuclear Waste Policy Act to preclude a
6 claim for total breach.

7 Q (By Mr. Keskey): You are referring to the 2005 Indiana
8 Michigan decision?

9 A I believe it's 2000 -- there's an Indiana Michigan and
10 what's referred to as Indiana Michigan 2 and the Yankee
11 Atomic 2 case. Those are the same thing.

12 Q And is that because the parties of those cases were
13 pursuing their claim of partial breach and were not yet
14 themselves claiming a breach?

15 A I guess I would have to go back and look at it in more
16 detail to tell you. But the cases were absolutely clear
17 in those cases, that SNF plaintiffs at that point did not
18 have a total breach claim and were precluded from
19 bringing such a claim.

20 Q Well, the utilities in those cases were not claiming a
21 total breach, were they?

22 A I'd have to look at it.

23 Q And the court didn't rule for all times that this was
24 going to be partial breach, that change in circumstances
25 could not result in a finding of a breach, right?

1 A Without a change in the law, it would be forever until
2 the law is changed.

3 Q Well, until a court decision changes the law?

4 A Well, I would argue that the statute itself would have to
5 be amended.

6 Q And other lawyers could disagree with you, right?

7 A Potentially.

8 Q Now, when there is a change in circumstances and a
9 disabling by the federal government of its own
10 obligations or ability to perform its obligations under
11 the existing Nuclear Waste Policy Act and the existing
12 Standard Contract, could not a party bring then a claim
13 for total breach now because there has been a major
14 change in circumstances?

15 A Now?

16 Q Yes.

17 A I don't know.

18 Q I mean a court has not faced someone yet claiming a total
19 breach; isn't that right?

20 A To my knowledge -- well, I say that. They have not faced
21 a spent nuclear fuel utility that has made that claim,
22 that is correct.

23 Q But nothing in the federal court decisions prohibit a
24 utility from declaring a breach and then filing a case
25 for more remedies based on the theory of a total breach,

1 right?

2 A I believe that's incorrect. The Indiana Michigan case
3 and the Yankee Atomic case both say that a utility is
4 precluded from bringing a total breach claim.

5 Q In the facts and circumstances at the time, existing at
6 that time, right? In other words, the court was not
7 ruling for all time and all circumstances, was it?

8 A The court was interpreting the Nuclear Waste Policy Act
9 as it existed at the time, and it has not changed since
10 then.

11 Q Has Consumers preserved the right to seek restitution of
12 the fees that it paid to the federal government under the
13 contract during the period April 7, 1983, through
14 April 10, 2007?

15 A Has it reserved the right?

16 Q Yes.

17 A Those are the damages that were awarded in the
18 settlement.

19 Q I'm not talking about the damages. I'm talking about the
20 fees that were paid for a contract that has not been
21 performed. Has Consumers Energy preserved the right to
22 seek restitution of the past fees paid under a contract
23 that has failed?

24 A You mean the quarterly fee payment?

25 Q Yes.

1 A O.K. That would be potentially damage in a total breach
2 case. So yes, I would argue that the release in Article
3 II of the settlement agreement does not preclude
4 Consumers from bringing a case like if a total breach
5 claim were ever brought.

6 Q Wouldn't Consumers have to bring such a claim within six
7 years of the, of some event?

8 A They would have to bring it within six years of the total
9 breach claim arising.

10 Q And you have no idea as to what date, decade, or century
11 such a breach would be pursued by Consumers Energy?

12 A Well, I don't know when it could occur. I know that it's
13 tied to the Nuclear Waste Policy Act pursuant to the
14 opinions of the federal circuit court.

15 Q Do you know of any specific directive or plan by
16 Consumers Energy to file another claim for either damages
17 or restitution against the federal government relative to
18 the SNF that Consumers Energy generated?

19 A I don't know.

20 Q In all of your discussions you know of no Consumers
21 Energy plan to pursue such a breach case remedy in the
22 future?

23 A I have not discussed it with them, but I am outside
24 counsel.

25 Q With respect to the one-time fee of the \$163 million that

1 Consumers Energy paid to the federal government in July
2 of 2011, are you aware of any other utility in their
3 settlements or in their litigated cases that have paid
4 their one-time debt fee?

5 A No, I am not.

6 Q To your knowledge, Consumers Energy is the only utility
7 that has agreed to pay the debt fee in a settlement; is
8 that right?

9 A I don't know whether the one-time fee was a part of any
10 other settlement agreement.

11 Q Now let me turn to page 3 of your direct testimony, lines
12 10 through 13. You indicate that the \$120 million
13 settlement amount includes the recovery of a \$30 million
14 payment Consumers Energy made to Entergy Nuclear
15 Palisades in exchange for Entergy assuming ownership of
16 the Big Rock ISFSI and SNF. Do you see that?

17 A I do.

18 Q That \$30 million payment was a payment that Consumers
19 negotiated with Entergy Nuclear Palisades, right?

20 A Yes.

21 Q Was that \$30 million ever included in net plant of
22 Consumers Energy Company?

23 A Included in what?

24 Q Net plant.

25 A I don't know what you mean by that.

1 Q Was any portion of that \$30 million included in the cost
2 of service for Consumers Energy Company for ratemaking
3 purposes?

4 A I don't know the answer to that.

5 Q Was there any regulatory approval of the \$30 million
6 payment by Consumers Energy in advance of the obligation
7 being negotiated?

8 A I don't know the answer to that either.

9 Q Isn't that \$30 million payment a matter solely between
10 Consumers Energy and Entergy and has nothing to do with
11 the ratepayers?

12 A I couldn't answer that, I'm sorry.

13 Q On page 7 of your direct testimony, starting at line 16,
14 you indicate that the federal government has consistently
15 taken the position that DOE liability should be a set-off
16 against any damage award. At the time that Consumers
17 Energy reached its settlement in July of 2011, as we've
18 already indicated in your cross-examination, Consumers
19 Energy already had in hand not only an appellate decision
20 but also a decision or ruling by the judge in your own
21 case that there was no such offset remedy at this time?

22 A That's correct.

23 MR. KESKEY: Your Honor, I'd like to
24 identify some exhibits. The first one I would hand out
25 is proposed Exhibit MCAA-7.

1 (Document was marked for identification by the Court
2 Reporter as Exhibit No. MCA-7.)

3 Q (By Mr. Keskey): Have you had a chance to look at
4 proposed Exhibit MCAAA-7?

5 A I have.

6 Q Now this again may be a matter for another witness but I
7 wanted to make sure that you had an opportunity to see
8 it. Are you aware of the fact that the Company filed the
9 final report with the Commission in Case U-14992 that
10 reported the proceeds from the sale or transfer of the
11 Palisades and Big Rock facilities?

12 A I'm aware a report was filed.

13 Q Are you aware of whether this or not is the report that
14 they filed?

15 A I do not know.

16 Q Are you aware of the fact that Consumers Energy received
17 proceeds from the sale or transfer of the facilities in
18 an amount that was higher than the net plant rate base?

19 A I do not know that.

20 MR. KESKEY: Your Honor, we'd like to
21 identify another exhibit, which unfortunately I marked
22 out of order, but it's MCAAA-10.

23 (Document was marked for identification by the Court
24 Reporter as Exhibit No. MCA-10.)

25 Q (By Mr. Keskey): These are some discovery responses of

1 the Company that are identified on the front cover of the
2 exhibit. Mr. Theuer, have you had a chance to look this
3 over or would you like a few more minutes?

4 A I have looked at it, yes.

5 Q Would you identify these responses as ones that you
6 prepared and signed?

7 A Yes, they are.

8 Q And if we look at the response CE-11, which is Bates
9 stamp 86100030 --

10 A I'm sorry, which one?

11 Q The answer which is question CE-11.

12 A CE-11.

13 Q The Bates stamp is 86100030.

14 A I have that.

15 Q You see in there you indicate the sentence, "The
16 government agreed that construction of the Palisades
17 ISFSI-II was required in the 'breach' world." You see
18 that statement?

19 A Yes, I do.

20 Q Now did the government also agree that the construction
21 of the Big Rock ISFSI was required in the breach world?

22 A Yes, it did.

23 Q And the federal government has provided in its settlement
24 to you coverage of the cost of the ISFSI at the Big Rock
25 plant as well as the Palisades 2 plant, has it not?

1 A The government provided to us?

2 Q Your damage settlement of a \$120 million includes your
3 claim relative to the Big Rock ISFSI and the Palisades 2
4 ISFSI, does it not?

5 A It includes portions of it, yes.

6 Q So does that mean the federal government views itself as
7 being in the breach world?

8 A The government has no choice but to view itself as being
9 in the breach world. In reality there was an order
10 entered in the Consumers case finding the government
11 liable for partial breach contract.

12 Q Now if you look at the last page of this exhibit, which
13 is your responses to CE-12, what do these items show?

14 A Of the chart you're referring to?

15 Q Yes.

16 A The government did not analyze our claim in the way that
17 we presented it. They analyzed it in the way that they
18 felt appropriate, which I think is probably a template
19 that they used from other cases. They look at various
20 items and I guess try to treat them consistently across
21 cases. But these were a list of the specific line items
22 of costs that were contained within detail of our claim
23 that they were specifically contesting at the time of
24 trial.

25 Q So these were the cost items out of the \$150 million

1 damage claim that Consumers had, these were the items
2 that they were contesting?

3 A They were -- Well, it's not quite that simple. They were
4 contesting more than that because there were various
5 offsets. And what they believed were benefits they would
6 provide an offset to damages as well. These were the
7 specific items from the claim itself, not including those
8 other offsets which they believed would have resulted in
9 no recovery for Consumers.

10 Q Well, you said you have reviewed the settlements and/or
11 litigation decisions of other utilities. Would it be
12 true that many of those utilities received rather
13 substantial portions of their original damage claims?

14 A I'm not sure what you mean by rather substantial, but
15 they -- except for Indiana Michigan, which was zero, they
16 received something.

17 Q But for the Yankee Atomic utilities, didn't they receive
18 a large portion of the percentage of their claim?

19 A Well, they received a little over \$140 million, I
20 believe, for three plants, which came out to about
21 45 million per plant, which was still less than the
22 60 million we received.

23 Q But I'm asking about what percentage of the Yankee Atomic
24 lawsuits, comparing their damage claim and the final
25 result, what percentage of it did they receive?

1 A I couldn't tell you sitting here today. We did do an
2 analysis of that.

3 Q It was a rather substantial portion, was it not?

4 A I don't recall sitting here today.

5 Q So would these numbers shown on your answer to CE-12,
6 which is Bates stamped 86100033, be sort of the hard
7 pre-settlement positions of DOE as to what they viewed as
8 disallowables?

9 A Well, I'm not sure what they would have said, but they
10 certainly attached some value to their offset claims as
11 well. So it was -- These were what they viewed as being
12 proper deductions on a line item basis from our claim,
13 and then in addition to whatever accounting they did for
14 their offset claims as well, I assume that's how they
15 came up with the number.

16 Q Now, what are the offset claims? Could you describe each
17 of them?

18 A Well, I can describe a couple of them. That is, there is
19 one that is an allegation that Consumers Energy avoided
20 the costs of loading SNF to transportation casks. That
21 was, as I recall, about \$7.8 million. That is, under the
22 Standard Contract DOE is supposed to give you a
23 transportation cask and then the utility has to add its
24 own costs to load those casks, and then DOE takes it
25 away.

1 The government's allegation was that
2 because of partial breach, they have not actually
3 incurred that cost. And if you compare the hypothetical
4 world against the breach world, that the costs that
5 Consumers avoided.

6 Q With respect to that item, they didn't have any
7 transportation casks to give you, did they?

8 A They did not, that's correct.

9 Q Then what was the second item?

10 A The second one was a much larger item. It was proposed
11 by Dr. Newburgher, who was one of their experts. It was
12 a one-time fee deferral benefit, I believe is what he
13 called it. What he said is that because there was a
14 delay in the government's performance and Consumers
15 Energy was not required to pay the one-time fee for a
16 specific period of time, there was a benefit to not
17 paying that amount in 1998. It was a continuing benefit
18 until the obligation to pay. He calculated it as about
19 \$79 million at the time of pretrial conference, and they
20 were asserting that as an offset to damages.

21 Q And that's related to the offset claim that the judge
22 ruled against, their offset claim; isn't that true?

23 A No. Actually that is kind of an interesting claim. The
24 judge at the pretrial conference, we had ten motions in
25 limine that were filed. One of them was our motion to

1 strike that claim, and the judge did not strike it. She
2 said that she was going to take evidence with respect to
3 that claim. So it wasn't a viable claim during the
4 trial.

5 Q Well, it's viable unless the judge ends up granting it
6 after the trial, right?

7 A Well, it was viable in the sense that we were going to
8 have contested it at trial, and it was a potential risk
9 at litigation.

10 Q Do you know of any other case where the DOE made that
11 same argument and won?

12 A I do not. I know -- I do not.

13 Q Do you know of any case where they made that same
14 argument and lost?

15 A I do.

16 Q What cases were those?

17 A There were two cases where after trial that offset was
18 rejected. They were both court of federal claims court
19 cases which would not have been binding on our judge.
20 But they were coordinate cases.

21 Q Did those go up on appeal?

22 A I don't recall sitting here today.

23 Q What were the two cases by name?

24 A I believe it was System Fuels 4 and Dominion Energy.

25 Q Now looking back at your answer to CE-12, you see the

1 line item there for Big Rock, an amount of \$30 million?

2 A Yes.

3 Q And despite the fact that that was one of the items the
4 DOE was contesting with the number -- well, let me ask
5 you first: Was the DOE vigorously contesting that item?

6 A Oh yes. Yes, they were.

7 Q And on what basis were they contesting that item?

8 A They challenged it on a number of grounds, primarily
9 foresee-ability and cause case. The argument was that
10 that fee was caused by a sale of the properties, which
11 could not have been reasonably foreseeable at the time
12 that the standard contract was entered into. And as a
13 result it did not meet the foreseeable contract for a
14 contract damage claim.

15 Q Wasn't a primary basis the fact that the 30 million
16 payment represented future damages or monetization of
17 future damages not existing, actual damages?

18 A That was also an argument that they made, yes.

19 Q But as it ended up, that \$30 million ended up in your
20 settlement, did it not?

21 A It did.

22 Q Did any of the rest of the items shown on your answer to
23 CE-12 end up in the settlement?

24 A Not expressly. It was impossible to tell because each of
25 us I believe had different analyses of what was a

1 reasonable amount for us, and we have no way of knowing
2 what DOE and DOJ thought was in it when it was done.

3 Q Do you have any knowledge as to what the DOE or the
4 federal government would have done to agree to give you
5 that \$30 million for Big Rock, if in fact you had not
6 agreed to pay the \$163 million of the one-time fee to the
7 federal government on a contemporaneous basis?

8 A I'm not sure I understand the question.

9 Q Well, would it be correct that the claim that the DOE had
10 that damages do not include future damages was one of the
11 claims that DOE did win in the Court of Claims?

12 A Yes, that's right.

13 Q And in what cases did they win that claim?

14 A Indiana Michigan was one of the cases that established
15 that. But there were others.

16 Q And the court, the Federal Court of Appeals that reviews
17 the Court of Claims decisions affirmed that position of
18 the DOE on that kind of an item, that they don't recover
19 future damages?

20 A That is correct.

21 Q And do you recall what appellate decisions those were?

22 A I believe it was the Indiana Michigan case.

23 Q Was it also Boston Edison?

24 A Well, the Boston Edison federal circuit case came after
25 the settlement, so it would not have any impact on us.

1 Q Your settlement was in 2011, right?

2 A Yes.

3 Q And the Boston Edison case was about -- was before that,
4 wasn't it?

5 A The one I'm thinking of, I believe, was September of
6 2011.

7 Q You're not aware of the other one then, the other
8 decision?

9 A There are a number of Boston Edison cases.

10 Q So the DOE, the \$30 million payment of the Big Rock costs
11 going forward had a strong, had a strong case on that
12 point, did it not?

13 A Well, I think the DOJ, the DOJ had a strong case going
14 forward. The court, we filed a motion. One of our
15 pretrial motions was to request that the \$30 million
16 damages figure be deemed reasonable litigation, and the
17 court declined to rule in our favor on that. So it was
18 still --

19 Q So they preserved it for the trial?

20 A It was going to go to trial, yes.

21 Q Was the \$163 million payment to the federal government of
22 the one-time fee an incentive for the federal government
23 to agree to include the \$30 million Big Rock payment in
24 your damage settlement, if you know? If you don't know,
25 don't speculate.

1 A Was the -- I'm sorry. The \$30 million figure was
2 expressly referenced in the settlement agreement, that is
3 correct. And payment of the one-time fee was also
4 referenced in the settlement as part of the obligation of
5 Consumers Energy.

6 Q So this was a trade-off, was it not?

7 A Well, it's not a one-to-one trade-off. It's a -- the
8 settlement is as a whole.

9 Q That was part of the compromise?

10 A Well, the \$30 million was included in the \$120 million
11 that was credited to Consumers, yes.

12 Q And in order to get that you paid the 163 million?

13 A Well, again it's not a one-to-one relationship. It's a
14 deal as a whole. But those were both terms of the
15 settlement agreement, that's right.

16 Q The list of items that you show on the answer to exhibit
17 CE-12, was that the list of items that was reserved for
18 the trial or the hearing?

19 A These were all -- well, yes, along with many other
20 things. But these were the specific line items that the
21 government intended to question at trial, yes.

22 Q On the top of page 2 of your rebuttal testimony, you
23 indicate, lines 1 and 3, that "Unless the NWPA is
24 changed, or the government repudiates the Standard
25 Contracts, no utility has a claim for refund of the SNF

1 fees paid under the NWPA and Standard Contracts for SNF
2 disposal." You have not referenced any federal court
3 decisions or anything with this. This is your opinion,
4 is it?

5 A No, it's not my opinion. It's the language of the
6 Nuclear Waste Policy Act as interpreted by the Indiana
7 Michigan federal circuit court decision and the -- let's
8 see, the Indiana Michigan. I think there's one other
9 federal circuit court, appeals court, that holds the
10 same.

11 Q Now you also make the statement here that "or the
12 government repudiates the Standard Contracts." Are you--

13 A Yes.

14 Q Are you saying that the federal government has not, by
15 its actions, repudiated the Standard Contract?

16 A I'm saying that the government has repeatedly not gone
17 out of their way, that they are not repudiating the
18 Standard Contract.

19 Q I'm not talking about mere words. I'm talking about
20 actions.

21 A You're asking me sitting here today if I believe that the
22 government has repudiated the contract by their actions?

23 Q Yes.

24 A I really could not offer an opinion on that.

25 Q Has the government undertaken actions to make it harder

1 for it to comply with the Standard Contract?

2 A Well, it's a difficult question to answer too. The
3 government can take SNF when it chooses to and when it
4 feels prepared to do so.

5 Q Well --

6 A It does not have to use Yucca Mountain, I guess is what
7 I'm going back to.

8 Q You're back to your default option of keeping it on site
9 and taking title, is that what you're --

10 A They could do that in a relatively short amount of time
11 if that's the route they decide to go.

12 JUDGE FELDMAN: Without a change in the
13 law enacted by Congress?

14 A Without a change in the law, yes.

15 JUDGE FELDMAN: And when you say that the
16 federal government has taken pains to indicate that it
17 has not repudiated the Standard Contract, what's the most
18 recent statement or representation that you would be
19 aware of?

20 A Well, I wish I could cite specific testimony, but I
21 reviewed testimony in the middle of 2011 where DOE
22 representatives, they periodically go before Congress and
23 give testimony with respect to the status of the disposal
24 program. And at that time they were continuing to say
25 that there would be a permanent repository constructed at

1 some point. They were not indicating that the government
2 was backing away from that obligation.

3 JUDGE FELDMAN: Thank you.

4 Q (By Mr. Keskey): Did you review statements by DOE in the
5 1980s and early 1990s that they were committed to start
6 disposing of SNF by 1998?

7 A In what period of time?

8 Q 1980s and early 1990s.

9 A Yes, I have seen that type of testimony.

10 Q So it's pretty easy for DOE to say that they're going to
11 carry through on their Standard Contract and to say
12 things but never perform; is that right?

13 A Yes. It's easy to say.

14 Q The bottom of page 2 of your rebuttal testimony, you
15 indicate starting on line 22 of page 2, "CECo relied upon
16 the Court of Federal Claims (trial court) opinion in the
17 Boston Edison case in support of its claim for the
18 \$30 million Big Rock Payment."

19 Is that the Boston Edison case you
20 referred to earlier?

21 A No. That's a decision before the September 2011 Boston
22 Edison case. The trial court, the Court of Claims had
23 awarded an analogous, shall we say, type of payment as
24 damages in the Boston Edison case, and that was reversed
25 on appeal.

1 Q When you entered into the settlement in July of 2011 you
2 had no way of predicting how the court would rule in that
3 case; is that right?

4 A That's right.

5 Q Now, is it correct that at the time -- well, is it
6 correct that at the beginning of 2011, that the trial in
7 your damage case was scheduled for the summer of 2011?

8 A Was scheduled for June of 2011, yes.

9 Q And that was scheduled to occur in Lansing, Michigan; is
10 that correct?

11 A That is correct.

12 Q And the court was going to set aside two weeks for that
13 trial; is that correct?

14 A Yes.

15 Q If you had pursued the trial of the case through a court
16 decision, you may have recovered more or less than
17 120 million; isn't that right?

18 A I suppose that's possible, yes.

19 Q If you had pursued through trial you would not obviously
20 have had to obligate yourself to paying the 163 million
21 of the one-time fee to the federal government; is that
22 right?

23 A Pending reversal on appeal, that's right.

24 MR. KESKEY: Your Honor, that would
25 conclude our cross-examination at this time. We would

1 propose the admission of Exhibit MCA-10, which is the
2 discovery responses by the witness, and reserve a ruling
3 on Exhibit MCA-7 until further witnesses are presented by
4 the Company. And that would conclude my cross at this
5 time.

6 JUDGE FELDMAN: All right. Thank you,
7 Mr. Keskey. Any redirect, Mr. Robinson?

8 MR. ROBINSON: Your Honor, could we have
9 just a very short recess?

10 JUDGE FELDMAN: Yes, we can. I take it
11 people would like to finish up with Mr. Theuer before we
12 break for lunch?

13 MR. ROBINSON: Yes, your Honor.

14 JUDGE FELDMAN: All right. Then we'll
15 take a short recess. Off the record.

16 (At 11:47 a.m., a five-minute recess was taken.)

17 JUDGE FELDMAN: Back on the record. Mr.
18 Robinson.

19 MR. ROBINSON: Thank you, your Honor.

20 REDIRECT EXAMINATION

21 BY MR. ROBINSON:

22 Q Mr. Theuer, referring to Exhibit MCAAA-1 and then the
23 answer identified as CE-11?

24 A Yes.

25 Q You were asked a couple questions about the reference to

1 the term "breach world" in that answer. Was the
2 reference that you made to the "breach" world in that
3 answer, is that a reference to a partial breach scenario
4 or a total breach scenario?

5 A It's a reference to a partial breach. It's a shorthand
6 version of how we referred to the comparison of damages,
7 the breach world being the world in which a partial
8 breach occurred. And the other being where it didn't.

9 MR. ROBINSON: That's all I have, your
10 Honor.

11 JUDGE FELDMAN: All right.

12 MR. KESKEY: I have some recross, your
13 Honor.

14 RECROSS-EXAMINATION

15 BY MR. KESKEY:

16 Q How do you define partial breach the way you use it?

17 A A partial breach is a breach which occurs in which there
18 are still obligations owing on the part of the breaching
19 parties. That's how it's been defined by the federal
20 circuit court.

21 Q And how would you define a breach, total breach?

22 A A total breach? A total breach is a complete breach of
23 all obligations under the contract.

24 Q And how is a total breach under a contract determined?

25 Objectively or subjectively by the parties or --

1 A Well, that's an interesting question. I think it's case
2 fact specific in each case.

3 Q Well, the Standard Contract applies to all the SNF
4 utilities in the country. It was a standard contract,
5 that's why it was called that, was it not?

6 A That's correct.

7 Q So it can't be a breach of, a total breach of the
8 contract can't be case specific because it applies to all
9 of the utilities alike; is that right?

10 A With respect to SNF, I suppose it could be. But more
11 than likely it would be an industry-wide total breach if
12 it occurred.

13 Q In your various reviews did you review the 1996 decision
14 of the U.S. Court of Appeals, D.C. Circuit, Indiana
15 Michigan versus DOE?

16 A Yes.

17 Q Did you review the partial mandamus decision of the U.S.
18 Court of Appeals D.C. Circuit Northern States Power
19 versus DOE?

20 A In which case?

21 Q Northern States.

22 A Northern States Power, yes.

23 Q 1997?

24 A Yes.

25 Q And do you recall the partial mandamus that the Court of

1 Appeals issued in that case was that the DOE's defense of
2 unavoidable delay was removed from their ability to claim
3 in the U.S. Court of Claims?

4 A The court enjoined the Department of Justice from raising
5 that as a defense to liability, that is correct.

6 Q I see. So how did you apply that court ruling on delay
7 to your settlement negotiations in this case?

8 A Well, it's kind of a different issue. The impossibility
9 defense that was raised by the Department of Justice way
10 back in the 90s essentially said that because one
11 congress, one arm of the government did not adequately
12 fund the Department of Energy, then it was impossible for
13 the Department of Energy to perform. And under a sort of
14 common law concept of impossibility, that should be a
15 defense to a breach of the Standard Contract.

16 Q Was it more accurate to say that what the DOE was
17 claiming is that they had no duty to commence accepting
18 SNF for disposal until a repository was ready, and they
19 essentially absolved themselves of any part of the duty
20 to make the depository ready?

21 A That was the claim that they made, yes.

22 Q It's rather circular. In other words, they have a lot of
23 obligation to make a repository, but as long as they
24 don't do it, they don't have to do it?

25 A I would agree. It's a circular argument.

1 Q And so now you have inserted this concept of delay in
2 your settlement agreement and given it huge breadth and
3 depth without any definitions or intent of the parties,
4 and you've similarly now authorized the DOE to rest on
5 delay as a defense. Am I right?

6 A I would disagree with that. I don't know how delay would
7 be a defense under that language.

8 Q Well, you have no mass or bounds to the length of the
9 delay, the definition of delay, or the elements of delay.
10 You have none of that kind of stuff in your settlement
11 agreement, do you?

12 A Well, as I indicated before, it's not necessary. We did
13 not view it as being necessary because it was impossible
14 to bring a total breach claim based on the status of the
15 statute that existed at the time. So until the statute
16 is removed we don't really have to worry about delay
17 until a total breach. If the statute is amended at some
18 point or something else happens and a total breach claim
19 is allowed, presumably then we would have the option,
20 Consumers Energy would have the option to go forward with
21 some other cause of action.

22 Q But the breach is a contractual concept and you can fully
23 enforce your contract without changing the statute, can
24 you not?

25 MR. ROBINSON: Your Honor, I think I will

1 object now. We are well beyond the scope of my redirect.
2 And we are really getting pretty repetitive.

3 JUDGE FELDMAN: Mr. Keskey.

4 MR. KESKEY: Well, I'm just about
5 finished. I just would like to get an answer to that
6 question.

7 MR. ROBINSON: Don't be enticed, your
8 Honor, by that. It's a valid objection and it ought to
9 be sustained.

10 JUDGE FELDMAN: I believe his only
11 question on redirect did have to do with whether he was
12 referring to partial or total breach in one of his
13 discovery responses.

14 MR. KESKEY: Well, that is what we're
15 finding out. It's a huge universe and very important,
16 and we appear to have a situation where two parties to a
17 secret settlement basically are entering into a marriage
18 of convenience that this delay, this word "delay" is a
19 wide, expansive, non-defined --

20 JUDGE FELDMAN: O.K. Putting --

21 MR. KESKEY: -- construct which --

22 JUDGE FELDMAN: Putting aside your
23 characterizations, which I'm sure Mr. Robinson would
24 dispute, I understand ask that you focus on the
25 settlement agreement use of that delay. I actually also

1 asked a question or two about that phrase. But I guess
2 what I'm looking for is specifically to tie to the
3 question of the discovery response and the use of the
4 phrase "breach world." That's really the only basis of
5 Mr. Robinson's redirect.

6 MR. KESKEY: Well, I have to have the
7 question re-read.

8 JUDGE FELDMAN: Well, let's not. You can
9 ask another question. If Mr. Robinson also objects to
10 that that goes beyond the scope, then we'll go from
11 there.

12 MR. KESKEY: Well, I was winding up, and
13 it was perhaps the last question I had, but I can't quite
14 recall the exact wording. If I could get it read back?
15 Off the record is fine.

16 JUDGE FELDMAN: All right. Could you
17 read back Mr. Keskey's question?

18 (The record was read aloud as follows:

19 "Q But the breach is a contractual concept and you
20 can fully enforce your contract without changing the
21 statute?")

22 JUDGE FELDMAN: All right.

23 MR. KESKEY: Can we get an answer to the
24 question?

25 JUDGE FELDMAN: No, not unless you tie it

1 to -- not unless you can tie that to the question that
2 Mr. Robinson asked on redirect.

3 MR. ROBINSON: Well, the breach world is
4 a contractual situation. It's not an NWPA statutory
5 problem. The reason why the NWPA used the vehicle in the
6 contract was to enforce contractual remedies which
7 includes the ability to declare a partial breach, a full
8 breach, or to use objective facts to determine that a
9 breach has occurred.

10 JUDGE FELDMAN: O.K.

11 MR. KESKEY: And my question is, he keeps
12 up coming up with this idea that he's got to change the
13 statute to enforce the contract. I'm simply asking:
14 What's the basis for that?

15 JUDGE FELDMAN: O.K. But the subject
16 matter of the testimony on redirect deals only with a
17 sentence on Bates number 86100028, referring to the
18 hypothetical world and breach world. So I would ask that
19 you limit your cross-examination to that. And if you --
20 if you would like to ask a question that makes clear that
21 that is what the subject of the cross-examination is,
22 then you may do so.

23 MR. KESKEY: Well, I asked my questions
24 in cross on that page in conjunction with Bates page
25 8600030 where the statement is made, "The government

1 agreed that construction of the Palisades ISFSI-II was
2 required in the "breach" world." That's a contractual
3 concept.

4 JUDGE FELDMAN: O.K.

5 MR. ROBINSON: Your Honor, that's just
6 going, diving back into the original cross-examination.
7 The only thing I asked was a clarification of that term
8 "breach world," was it a partial or was it referring to a
9 partial or total breach. He answered that question.
10 That's pretty narrow.

11 JUDGE FELDMAN: Yes, I agree that's
12 pretty narrow. He has pointed out I cited a page, he
13 cited another one. All right.

14 Mr. Keskey, what I am ruling now is that
15 your question, your next question to this witness --
16 because I don't understand your connection to the last,
17 for the last question to this testimony -- but your next
18 question needs to relate to the use of the phrase "breach
19 world" in this discovery response.

20 Q (By Mr. Keskey): Mr. Theuer, the word "breach" is a word
21 that is utilized with respect to contract law, is it not?

22 A Yes.

23 Q And the breach that we're talking about, whether it be
24 total or partial, relates to the Standard Contract, does
25 it not?

1 A It does.

2 MR. KESKEY: That's all the questions I
3 have.

4 JUDGE FELDMAN: Anybody else? All right.
5 Thank you, Mr. Theuer, for your time this morning. You
6 may step down at your leisure.

7 (The witness was excused.)

8 JUDGE FELDMAN: Are there any objections
9 to the admission into evidence of Exhibits A-1 or A-2 or
10 MCA-10? Hearing none, all three of those exhibits are
11 admitted.

12 Let's go off the record and discuss our
13 schedule for lunch.

14 (At 12:05 p.m., the hearing recessed for lunch.)

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Lansing, Michigan

Tuesday, April 10, 2012

1:15 p.m.

- - -

(Hearing resumed after the luncheon recess.)

(Documents were marked for identification by the Court Reporter as Exhibits A-3 through A-6.)

P A T R I C K M. F I T Z G E R A L D

was called as a witness on behalf of Consumers Energy Company and, having been duly sworn to testify the truth, was examined and testified as follows:

JUDGE FELDMAN: Back on the record. Mr. Robinson, your witness has been sworn. You may proceed when you're ready.

MR. ROBINSON: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. ROBINSON:

Q Mr. Fitzgerald, would you state your name and business address for the record, please.

A My name is Patrick M. Fitzgerald. My business address is One Energy Plaza, Jackson, Michigan 49201.

Q Sir, in connection with your appearance here today did you cause to be prepared a document consisting of five pages of questions and answers, to which is attached a cover sheet bearing the caption in this case and which is

1 labeled Direct Testimony of Patrick M. Fitzgerald on
2 behalf of Consumers Energy Company?

3 A Yes, I did.

4 Q Do you have a copy of that prefiled direct testimony with
5 you today?

6 A Yes, I do.

7 Q Do you have any corrections, additions, or modification
8 to make to that direct testimony at this time?

9 A No, I do not.

10 Q If I were to ask you the questions contained in that
11 document today while you were under oath, would you
12 respond with the answers contained therein?

13 A Yes.

14 Q I would like to show you what's been marked for
15 identification as proposed Exhibit A-6 and ask you if
16 that is the A-6 that you refer to in your testimony.

17 A Yes.

18 Q And was that document prepared by you or under your
19 supervision?

20 A Yes, it was.

21 MR. ROBINSON: Your Honor, I'd ask that
22 Mr. Fitzgerald's prefiled direct testimony be bound into
23 the record. I offer for admission into evidence Exhibit
24 A-6, and the witness is tendered for cross-examination.

25 JUDGE FELDMAN: Thank you. Any objection

1 to binding in Mr. Fitzgerald's prefiled testimony?
2 Hearing none, the direct testimony of Patrick M.
3 Fitzgerald as prefiled will be bound into the record.

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of)
 CONSUMERS ENERGY COMPANY)
 for approval of refunds to retail electric)
 customers and for related relief.)
 _____)

Case No. U-16861

DIRECT TESTIMONY
OF
PATRICK M. FITZGERALD
ON BEHALF OF
CONSUMERS ENERGY COMPANY

September 2011

PATRICK M. FITZGERALD
DIRECT TESTIMONY

1 Q. Please state your name and business address.

2 A. Patrick M. Fitzgerald, One Energy Plaza, Jackson, Michigan 49201.

3 Q. By whom are you employed, and in what capacity?

4 A. I am employed by Consumers Energy Company (“Consumers Energy” or “the
5 Company”) as the Director of Property Accounting & Depreciation.

6 Q. How long have you been employed by Consumers Energy?

7 A. I have been employed by Consumers Energy since 1979.

8 Q. Please state your educational background and work experience.

9 A. I graduated from Saginaw Valley State University in 1979 with a Bachelors of Business
10 Administration degree with an Accounting major. I have been the Director of Property
11 Accounting & Depreciation for Consumers Energy since October 2006. From June 2002
12 to September 2006, I was the Director of Property Accounting & Property Tax. From
13 1999 to 2002, I was the Team Leader for the Business Segment Reporting team in the
14 Corporate Accounting & Reporting Department. From 1997 to 1999, I was the Property
15 Tax Team Leader in Consumers Energy’s Financial Services & Reporting Department.
16 From 1992 to 1997, I held the position of Property Records Supervisor in Consumers
17 Energy’s Property Accounting Department. I started my career with Consumers Energy
18 in the Internal Audit Department in 1979. During that time I received the Certified
19 Information Systems Auditor designation from the EDP Auditors Association (now the
20 Information Systems Audit and Control Association). I have also attended various
21 industry sponsored seminars.

PATRICK M. FITZGERALD
DIRECT TESTIMONY

1 Q. What are your responsibilities in your present position?

2 A. As Director of Property Accounting & Depreciation, I am responsible for providing
3 leadership, managing and administering the Property Accounting, Book Depreciation
4 Accounting, and Depreciation Regulatory groups whose primary responsibilities are to
5 ensure that the Company's long-lived fixed and leased assets are accounted for properly.
6 In addition, I am responsible for depreciation and decommissioning related regulatory
7 filings, in partnership with the Rates Department.

8 Q. Have you previously testified before this Commission?

9 A. Yes, I have previously testified in Case No. U-14292.

10 Q. What is the purpose of your testimony in this proceeding?

11 A. The purpose of my testimony is to discuss the journal entries recorded and the proposed
12 journal entries to be recorded in Consumers Energy's general ledger in connection with
13 the settlement of litigation commenced by the Company against the Department of
14 Energy (DOE) for the delay in meeting its obligation to accept delivery of spent nuclear
15 fuel (SNF) ("DOE Settlement").

16 Q. What affect does the DOE settlement have on Consumers Energy's general ledger?

17 A. One of the important effects of the settlement is the extinguishment of Consumers
18 Energy's liability under the Nuclear Waste Policy Act. The liability was for a one-time
19 fee related to the spent nuclear fuel used to generate electricity at the Palisades Nuclear
20 Power Plant and the Big Rock Point Nuclear Power Plant prior to April 7, 1983. The
21 Company recognized the DOE Settlement in July 2011 business by recording a reduction
22 (debit) to *Other Long-Term Debt* with offsetting credits to *Other Regulatory Liabilities*,
23 and to *Cash*.

PATRICK M. FITZGERALD
DIRECT TESTIMONY

1 Q. Are you sponsoring any exhibits in this proceeding?

2 A. Yes. I am sponsoring the following exhibit:

3 Exhibit A-6 (PMF-1) DOE Settlement Journal Entries

4 Q. Was this exhibit prepared by you or at your direction?

5 A. Yes.

6 Q. Please describe Exhibit A-6 (PMF-1).

7 A. Exhibit A-6 (PMF-1) lists the DOE Settlement journal entries, accounts, account
8 descriptions, and amounts for the journal entries recorded in July 2011 business and the
9 proposed journal entries to be recorded following an MPSC Order in this proceeding.

10 Q. Please describe journal entry A of Exhibit A-6 (PMF-1).

11 A. Journal entry A recognized the DOE Settlement when implemented in July 2011. The
12 journal entry reduced (debits) account 224 - *Other Long-Term Debt*, for the full amount
13 of Consumers Energy's liability to the DOE under the Nuclear Waste Policy Act,
14 \$163,102,173. The credits were to account 254 - *Other Regulatory Liabilities*, for
15 \$120,000,000 and to account 131 - *Cash*, for \$43,102,173. The amount of the cash
16 payment was calculated as follows:

DOE liability at 6/30/2011	\$163,102,173
DOE settlement	<u>120,000,000</u>
Remaining one-time fee obligation	<u>\$ 43,102,173</u>

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21 Payment of the remaining one-time fee obligation of \$43,102,173 was made by
22 Consumers Energy to the DOE on July 13, 2011. The DOE liability was payable by
23 Consumers Energy to the federal government no later than the first delivery of spent
24 nuclear fuel to the DOE; it is a federally mandated one-time fee for the disposal of
25 nuclear fuel used to generate electricity prior to April 7, 1983, plus interest. Journal

PATRICK M. FITZGERALD
DIRECT TESTIMONY

1 Entry A reflects the elimination of the one-time fee liability, and identifies the source of
2 the funds for that elimination as \$120,000,000 from the DOE Settlement and a further
3 cash payment of \$43,102,173.

4 Q. Please describe journal entry B of Exhibit A-6 (PMF-1).

5 A. Journal entry B represents the distribution of the \$120,000,000 of DOE Settlement
6 Proceeds recorded as *Other Regulatory Liability* in journal entry A. This journal entry
7 will be recorded following an MPSC Order in this proceeding.

8 Q. Please describe journal entry B, items (2) through (9) of Exhibit A-6 (PMF-1).

9 A. Journal entry B items (2) through (9) represent the individual components making up the
10 portion of the \$120,000,000 DOE settlement amount that the Company proposes to
11 refund to electric customers. As explained by Mr. Torrey, these are amounts that have
12 been included in the Company's retail electric rates. The total amount to be refunded to
13 electric customers, \$23,300,000, will be recorded in account 254 - *Other Regulatory*
14 *Liabilities*.

15 Q. Please describe journal entry B, items (11) and (12) of Exhibit A-6 (PMF-1).

16 A. Journal entry B items (11) and (12) of the journal entry credit account 108 - *Accumulated*
17 *Provision for Depreciation* for \$54,614,287 and account 182.3 - *Other Regulatory Assets*
18 for \$30,000,000. The account 108 amount is currently included in the Company's general
19 ledger as a debit balance in accumulated depreciation. Accumulated depreciation is
20 normally recorded as a credit balance, which is a contra to the asset account 101 - *Electric*
21 *Plant in Service*. The costs in account 108 represent costs incurred by Consumers Energy
22 in the construction of the Big Rock Nuclear Plant Independent Spent Fuel Storage
23 Installation ("Big Rock ISFSI"). These costs were funded out of corporate funds and

PATRICK M. FITZGERALD
DIRECT TESTIMONY

1 were incurred during years 1997 thru 2007. As noted in testimony by Company witness
2 Michael Torrey, electric customers have not paid any portion of these costs.

3 Account 182.3 - *Other Regulatory Assets*, represents a payment made in April
4 2007 by Consumers Energy to Entergy Nuclear Palisades, LLC for Entergy's assumption
5 of the Big Rock ISFSI assets and related SNF liabilities. The payment was part of
6 Consumers Energy's sale agreement to sell the Palisades Plant to Entergy. Again, as
7 noted by Company witness Michael Torrey, electric customers have not paid any portion
8 of this cost.

9 Q. Please describe journal entry B item (13) of Exhibit A-6 (PMF-1).

10 A. Journal entry B item (13) will record the remaining proceeds from the DOE Settlement of
11 \$12,085,713, which represents reimbursement for ISFSI related costs incurred by
12 Consumers Energy which have not been included in customers' electric rates and are to
13 be retained by the Company. These costs are further addressed in testimony by Company
14 witness Michael Torrey. The amount will be recorded as a reduction (credit) to account
15 426.5 - *Other deductions*.

16 Q. Does this conclude your testimony?

17 A. Yes. This concludes my testimony.

1 JUDGE FELDMAN: Who has cross-examination
2 for Mr. Fitzgerald?

3 Mr. Keskey, you may proceed when you are
4 ready.

5 CROSS-EXAMINATION

6 BY MR. KESKEY:

7 Q Good afternoon, Mr. Fitzgerald.

8 A Good afternoon.

9 Q Can you please describe what role you played in terms of
10 negotiation or entering into the settlement?

11 A I was not involved in the settlement negotiations.

12 Q Could you describe your involvement in Consumers Energy's
13 Case U-14992 which involved the sale or transfer of the
14 Palisades plants or the Big Rock plants?

15 A I would have been responsible for accounting for that
16 transaction as far as retiring assets, working with other
17 corporate accounting groups to remove any assets from the
18 books.

19 Q Were you a witness in that case?

20 A I was not.

21 Q Did you assist a witness in that case?

22 A Yes, I would have, just supplying information.

23 Q What was your involvement in Consumers Energy electric
24 case U-15645?

25 A It would have been the same thing. My department

1 supplies information to the rates department as part of
2 their cost of service study every year. We provide them
3 with any information they require to help them, to assist
4 them with completing their case.

5 Q What was your involvement in Consumers electric,
6 Consumers Energy's electric rate case U-16191?

7 A It would have been the same as the previous answer.

8 Q How about Consumers electric rate case U-16794?

9 A It would have been the same.

10 Q Now, you indicated that you participated in Consumers
11 case U-14292?

12 A Yes.

13 Q What was that case about?

14 A That case was the ARO accounting case, Asset Retirement
15 Obligations. There were many utilities involved in that
16 case. It was trying to establish the proper accounting
17 for asset retirement obligations.

18 Q I take it from your testimony you were not a witness in
19 any of Consumer Energy's power supply cost recovery cases
20 or electric rate cases; is that right?

21 A No, I was not.

22 Q On the bottom of page 3 of your direct testimony you make
23 the following statement, "The DOE liability was payable
24 by Consumers Energy to the federal government no later
25 than the first delivery of spent nuclear fuel to the DOE;

1 it is a federally mandated one-time fee for the disposal
2 of nuclear fuel used to generate electricity prior to
3 April 7, 1983, plus interest."

4 With respect to that statement, would you
5 agree that Consumers Energy did not have to make a
6 one-time fee payment so long as the federal government
7 did not commence disposing of Consumers Energy's SNF?

8 A I would agree that we would comply with the contract, the
9 Standard Contract.

10 Q Well, that's not my question. I'm asking you about what
11 you mean by this statement. Would you agree that when
12 you use the word federally mandated one-time fee, that
13 you did not -- meaning you, meaning Consumers Energy --
14 did not have an obligation to actually pay that to the
15 federal government until the federal government started
16 disposal of Consumers Energy's spent nuclear fuel?

17 A I believe that was the last day. Once they started to
18 take fuel, then we had to pay.

19 Q And if the federal government never picks up Consumers
20 Energy's SNF for disposal, then they never would have to
21 make the payment, right?

22 A I guess that's true.

23 Q Now on page 5 of your testimony you mention starting on
24 line 10 that you included in your journal entry the
25 remaining proceeds from the DOE settlement of

1 \$12,085,713. Do you see that?

2 A Yes.

3 Q The Company's proposal is to retain those proceeds; is
4 that right?

5 A Yes.

6 Q Are you discussing it in any other way other than
7 explaining the journal entries?

8 A No.

9 Q Were you given a copy of what was identified earlier as
10 Exhibit MCAAA-7?

11 A I see there is a copy here.

12 Q Is that the cover letter from Consumers Energy to the
13 Commission's secretary dated January 23, 2008, with
14 attachments?

15 A Yes.

16 Q Have you had a chance to review that?

17 A Yes.

18 Q What, how would you describe that document?

19 A This document was intended to provide a final report on
20 the Palisades transaction proceeds, to the Commission.

21 Q You see attached there you have Attachment A and you have
22 Attachment B. Do you see that?

23 A Yes.

24 Q Did you assist in any way in the preparation of this
25 report or the attachments?

1 A Yes.

2 Q What was the nature of your participation?

3 A We would have calculated the Palisades plant final gain,
4 Attachment B.

5 Q And that's the gain as of the information you had at that
6 point in time, right?

7 A Yes, which I believe ended up being the final gain in the
8 final report.

9 Q On line 2 of Attachment A to that exhibit, MCAAA-7, do
10 you see the line item MPSC Decommissioning Funds?

11 A Yes.

12 Q Now, those decommissioning funds were funds that were
13 derived in rates and were paid by ratepayers, were they
14 not?

15 A Yes.

16 Q Then there would be some interest earnings then at issue?

17 A Yes. It would have been placed in a trust.

18 Q So the return of the decommissioning funds was a return
19 of ratepayer supplied money; isn't that right?

20 A Yes, plus any earnings.

21 MR. KESKEY: Your Honor, I'd like to
22 identify and hand out another exhibit, which is Exhibit
23 MCAAA-8.

24 (Document was marked for identification by the Court
25 Reporter as Exhibit No. MCA-8.)

1 Q (By Mr. Keskey): Have you had a chance to review those
2 responses to discovery that are included in Exhibit
3 MCA-8?

4 A Yes.

5 Q Were these answers, as identified on the front cover of
6 the exhibit, answers that you prepared and which you have
7 in fact signed?

8 A Yes, they were prepared at my direction.

9 Q Now, looking at the answer to Question CE-14, MCAAA-14
10 which is Bates stamp 86100034, do you see your answer 14
11 there? It says, "No interest was accumulated or accrued
12 on the principal fees paid to the federal government
13 under the Standard Contract during the period identified
14 in question 1"?

15 A Yes.

16 Q Now, isn't it true that the quarterly fees that Consumers
17 Energy paid in to the federal government's nuclear waste
18 fund would accrue interest under the Standard Contract in
19 the fund?

20 A Right. That would not have affected our accounting.

21 Q I guess that's my point. That is, that when you make
22 that statement on that answer, are you saying that
23 Consumers Energy did not pay any interest other than
24 these fees?

25 A Correct. Consumers Energy did not pay any interest on

1 the --

2 Q But were you aware that the Nuclear Waste Fund itself
3 assigned an interest rate to fee principal that the
4 federal government Nuclear Waste Fund received?

5 A Yes, I was aware of that.

6 Q So you're not trying to say that there was no interest
7 accumulating on those funds overall?

8 A No.

9 Q The last page of the exhibit, which is Bates stamp
10 86100037?

11 A Yes.

12 Q That chart shows more detail on the principal amount of
13 fee that Consumers Energy paid relative to each plan, the
14 Big Rock plant and the Palisades plant; is that right?

15 A Yes.

16 Q Are these answers accurate, to the best of your
17 knowledge?

18 A Yes, to the best of my knowledge.

19 Q Would the letter and the figures that are included in
20 Exhibit MCAAA 7 be accurate as of the time that they were
21 filed, to your knowledge?

22 A Yes.

23 MR. KESKEY: Your Honor, that completes
24 my cross-examination. And I would move for the admission
25 of Exhibits MCAAA 7 and 8.

1 JUDGE FELDMAN: All right. Anybody else
2 have questions for Mr. Fitzgerald?

3 Mr. Robinson, any redirect?

4 MR. ROBINSON: Just a couple questions,
5 your Honor, to clarify some things.

6 REDIRECT EXAMINATION

7 BY MR. ROBINSON:

8 Q Mr. Fitzgerald, with respect to this set of discovery
9 answers marked as MCA-8, these are a calculation of what
10 we have been calling the on-going fees that Consumers
11 Energy paid to the federal government, right?

12 A Yes.

13 Q And those amounts are the same amounts that were
14 considered as part of the annual power supply cost
15 recovery proceedings conducted for Consumers Energy
16 Company?

17 A Yes.

18 Q Did customers ever pay any interest associated with these
19 fees?

20 A I don't believe so.

21 MR. ROBINSON: Your Honor, that's all I
22 have. Thank you.

23 MR. KESKEY: I have one question.

24 JUDGE FELDMAN: All right.

25 - - -

1 RE CROSS-EXAMINATION

2 BY MR. KESKEY:

3 Q Would the amounts that you show for the period shown on
4 your Exhibit MCA-8, the total collections there in answer
5 to question 13 and as shown on your work paper at the
6 last page of the exhibit, those would reflect the amounts
7 in principal only that the ratepayers actually paid
8 through their Act 304 PSCR rates; isn't that right?

9 A Yes.

10 Q Consumers Energy itself as a utility did not make those
11 payments. They made the payments but they did not --
12 they got reimbursed through the rates for the exact same
13 thing?

14 A Right. My understanding is yes, they were included in
15 the PSCR filings of the Company.

16 MR. KESKEY: I have no other questions.

17 JUDGE FELDMAN: Thank you. Are there any
18 objections to the admission of Exhibits A-6 or MCAAA 7 or
19 8?

20 MR. ROBINSON: Your Honor, the only
21 objection I'll have is to MCAAA 8. It's the same
22 objection that I raised in connection with Mr. Callen's
23 testimony. The point being, all this evidence regarding
24 the on-going fees should be considered properly beyond
25 the scope of this case.

1 JUDGE FELDMAN: I understand. Mr.
2 Keskey, did you want to make a response for the record or
3 you willing to allow me to --

4 MR. KESKEY: Well, I believe their
5 arguments before were that it is within the scope of the
6 evidence to be received in the case and to permit the
7 briefing of issues, and I believe that's the way you
8 ruled earlier, and I will stand with that.

9 JUDGE FELDMAN: Yes. And consistent with
10 that, your objections to relevance are preserved, Mr.
11 Robinson. So Exhibits A-6 and MCA-7 and MCA-8 are
12 admitted.

13 And Mr. Fitzgerald, thank you very much
14 for your testimony. You may step down at your leisure.

15 THE WITNESS: Thank you, your Honor.

16 (The witness was excused.)

17 MR. ROBINSON: The Company's next witness
18 is Michael A. Torrey.

19 M I C H A E L A. T O R R E Y

20 was called as a witness on behalf of Consumers Energy
21 Company and, having been duly sworn to testify the truth,
22 was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. ROBINSON:

25 Q Would you state your name and business address for the

1 record, please.

2 A Michael A. Torrey, One Energy Plaza, Jackson, Michigan.

3 Q Mr. Torrey, in connection with your appearance here today
4 did you cause to be prepared a document consisting of 12
5 pages of questions and answers to which is attached a
6 cover sheet bearing the caption in this case and which is
7 labeled Direct Testimony of Michael A. Torrey on behalf
8 of Consumers Energy Company?

9 A I did.

10 Q And did you also cause to be prepared a document
11 consisting of nine pages of questions and answers to
12 which is attached a cover sheet bearing the caption in
13 this case and which is labeled Rebuttal Testimony of
14 Michael A. Torrey on behalf of Consumers Energy Company?

15 A I did.

16 Q Do you have copies of that direct and rebuttal testimony
17 with you today?

18 A I do.

19 Q Did you have any corrections, additions, or modifications
20 to make to that testimony at this time?

21 A No, I don't.

22 Q If I were to ask you the questions contained in that
23 direct and rebuttal testimony today while you were under
24 oath, would you respond with the answers contained
25 therein?

1 A I would.

2 Q I'd like to show you what has been marked for
3 identification by the Court Reporter as proposed Exhibits
4 A-3, A-4, and A-5, and ask if those are the exhibits that
5 you reference in your testimony?

6 A They are.

7 Q Do you have any corrections to make to those exhibits at
8 this time?

9 A No, I don't.

10 Q And were those exhibits prepared by you or under your
11 supervision?

12 A Yes.

13 MR. ROBINSON: Your Honor, I'd ask Mr.
14 Torrey's direct and rebuttal testimony be bound in the
15 record. I offer for admission into evidence Exhibits
16 A-3, A-4, and A-5, and he is tendered for
17 cross-examination.

18 JUDGE FELDMAN: Thank you. Are there any
19 objections to binding in Mr. Torrey's prefiled direct and
20 rebuttal testimony? Hearing none, the prefiled direct
21 and rebuttal testimony of Michael A. Torrey will be bound
22 into the record.

23 - - -

24

25

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of)
CONSUMERS ENERGY COMPANY)
for approval of refunds to retail electric)
customers and for related relief.)
_____)

Case No. U-16861

DIRECT TESTIMONY

OF

MICHAEL A. TORREY

ON BEHALF OF

CONSUMERS ENERGY COMPANY

September 2011

MICHAEL A. TORREY
DIRECT TESTIMONY

1 Q. Please state your name and business address.

2 A. Michael A. Torrey, One Energy Plaza, Jackson, Michigan.

3 Q. By whom are you employed and in what capacity?

4 A. I am employed by Consumers Energy Company ("Consumers Energy" or "Company") as
5 its Executive Director of Rates in the Rates and Business Support Department.

6 Q. Please describe your educational background.

7 A. I received a Bachelor of Business Administration in Accounting degree in 1982 from the
8 University of Michigan - Flint. In 1992, I received a Master of Business Administration
9 degree from Western Michigan University with a major in finance. I have also
10 completed several courses and seminars in utility accounting, economics, finance, and
11 ratemaking.

12 Q. Please describe your professional experience.

13 A. In May 1983, I joined Consumers Energy's Nuclear Operations Department as a
14 Graduate Accountant assigned to the Controllers Department at the Palisades Plant. I
15 progressed through several levels of increasing responsibility during my Palisades
16 assignment, achieving the position of Senior Accounting Analyst in April 1993. In July
17 1998, I was appointed Director of Revenue Requirements, Cost Analysis and Planning in
18 the Company's Rates Department. In December 2006, I was promoted to Executive
19 Director of Rates.

20 Q. What are your responsibilities as Executive Director of Rates for Consumers Energy?

21 A. I am responsible for ratemaking activities at Consumers Energy. My responsibilities are
22 organized in three sections of the Rates and Business Support Department. Under my
23 direction, the Revenue section develops the Company's revenue requirements, prepares

MICHAEL A. TORREY
DIRECT TESTIMONY

1 electric and gas general rate cases, performs financial analyses and decision support
2 modeling, prepares return studies, Power Supply Cost Recovery (“PSCR”) and Gas Cost
3 Recovery (“GCR”), stranded cost and securitization filings. The Cost and Pricing section
4 prepares electric and gas cost-of-service studies, customer specific cost studies, designs
5 rates and prepares pricing analyses. The Rate Administration section implements and
6 interprets the tariff, rules, and rate instructions.

7 Q. Are you a member of any professional organizations?

8 A. Yes. I am a member of the Institute of Management Accountants and Beta Gamma
9 Sigma, the honor society of the Association to Advance Collegiate Schools of Business.

10 Q. Have you previously testified before the Michigan Public Service Commission (“MPSC”
11 or “Commission”)?

12 A. Yes. I have sponsored testimony filed before this Commission concerning: (i) a recovery
13 mechanism for electric restructuring implementation costs incurred in 2000 in Case No.
14 U-12891, (ii) the revenue requirement in the gas general rate proceeding, Case No.
15 U-13000, (iii) the recovery of net stranded costs and related policy issues for the years
16 2000-2002, in Case No. U-13380, (iv) the determination of net stranded costs for the year
17 2002 and for approval of net stranded cost recovery changes in Case No. U-13720,
18 (v) the cost allocation, rate design, and statutory criteria related to securitization in Case
19 No. U-13715, (vi) the determination of net stranded costs for the year 2003 and for
20 approval of net stranded cost recovery charges in Case No. U-14098, (vii) alignment of
21 items considered in the PSCR and stranded cost proceedings in Case No. U-14274, the
22 2005 PSCR Plan, (viii) the 2006 test year revenue requirement in Case No. U-14347, an
23 electric general rate case, (ix) Case No. U-14992, the ratemaking treatment and

MICHAEL A. TORREY
DIRECT TESTIMONY

1 determination of proceeds related to the Palisades PPA and asset sale, (x) the use of
2 proceeds in the MCV sale proceeding, Case No. U-14981, (xi) cost recovery in Case No.
3 U-15290, the Balanced Energy Initiative, (xii) nuclear decommissioning issues in Case
4 No. U-15415, the 2008 PSCR Plan, (xiii) ratemaking issues in Case No. U-15611, the
5 Big Rock decommissioning reconciliation proceeding, and (xiv) the revenue requirement
6 in Case No. U-16191, an electric general rate case.

7 Q. What is the purpose of your testimony?

8 A. I will quantify the amount of costs that have been included in rates paid by retail electric
9 customers that have been recovered through the settlement of the Department of Energy
10 (“DOE”) litigation. I will identify the amount of costs that are currently recorded on
11 Consumers Energy’s books and records that are being recovered through the settlement
12 of the DOE litigation. I will also calculate the credit necessary to distribute to customers
13 the amount of money (\$23.3 million) that has been previously paid by customers.
14 Finally, I will provide a summary of various ratemaking benefits customers will realize
15 from the approval of the Company’s Application in this matter.

16 Q. Are you sponsoring any exhibits?

17 A. Yes. I am sponsoring the following exhibits in support of the settlement agreement.

18	Exhibit A-3 (MAT-1)	Department of Energy Settlement Analysis
19	Exhibit A-4 (MAT-2)	Calculation of Negative Surcharge
20	Exhibit A-5 (MAT-3)	Tariff Sheet

21 Q. Were these exhibits prepared by you or under your direction?

22 A. Yes.

MICHAEL A. TORREY
DIRECT TESTIMONY

1 Q. Please describe Exhibit A-3 (MAT-1).

2 A. Exhibit A-3 (MAT-1) is a summary of the distribution of the \$120 million settlement
3 with the DOE. The top part of this exhibit identifies costs that have been included in the
4 Company's retail electric rates. In most cases, these are items that have already been
5 collected from customers. In certain cases, such as the securitization charges, I have also
6 included amounts that are expected to be collected from customers in the future.

7 Q. Please further describe the costs that Consumers Energy collected from customers that
8 are now recovered from the DOE as a result of the settlement of the DOE litigation.

9 A. There are several instances where Palisades or Big Rock Independent Spent Fuel Storage
10 Installation ("ISFSI") costs have been included in MPSC-approved electric retail rates
11 and surcharges, including securitization, enhanced security costs, stranded costs, Section
12 10d(4) regulatory asset, general rates, and nuclear decommissioning. These individual
13 categories are identified on lines 2 through 9 of Exhibit A-3 (MAT-1). The costs
14 previously included in customer rates total \$23.3 million as indicated on line 10.

15 Q. Please describe the Palisades ISFSI costs included in securitization charges paid by
16 customers.

17 A. The securitized regulatory asset approved in Case No. U-12505 is comprised of several
18 generation-related costs, including the Palisades net investment at December 31, 2000.
19 Included in the securitized regulatory asset is \$10.4 million of Palisades ISFSI costs
20 collected through securitization bond and tax charges paid by customers. The \$10.4
21 million figure shown on line 2 of Exhibit A-3 (MAT-1) represents the Palisades ISFSI net
22 investment at December 31, 2000, net of securitization bond and tax charge offsets
23 provided to full service customers through December 2005 and retail open access

MICHAEL A. TORREY
DIRECT TESTIMONY

1 customers through November 2004. The securitization bond and tax charges are
2 expected to remain in place until at least November 2015; therefore, the \$10.4 million
3 represents both past and future collections.

4 Q. Please describe the Big Rock and Palisades ISFSI costs included in the enhanced security
5 cost surcharge paid by customers.

6 A. The enhanced security costs surcharges approved in Case No. U-14126 included post
7 September 11, 2001 enhanced security costs for both Big Rock and Palisades. Because
8 Big Rock had ceased operations the entire \$1.5 million included in the enhanced security
9 cost recovery mechanism was related to the Big Rock ISFSI and included in the DOE
10 litigation claim. However, because Palisades was an operating facility, only a small
11 portion, \$0.2 million, of the total enhanced security cost collected from customers was
12 related to the Palisades ISFSI and included in the DOE litigation claim. These amounts
13 are shown on lines 3 and 4 of Exhibit A-3 (MAT-1).

14 Q. Please describe the Palisades ISFSI costs included in stranded cost surcharges paid by
15 customers.

16 A. A stranded cost surcharge was approved in Case Nos. U-13720 and U-14098 for the
17 years 2002 and 2003. The stranded cost surcharge collection was expanded to all
18 customers in Case No. U-15744 without altering the make-up of the stranded costs
19 included in the original approvals. The stranded cost methodology was based on a fixed
20 generation revenue requirement that included, among other generation investment-related
21 costs, the post-securitization investment at Palisades, including Palisades ISFSI costs of
22 \$0.2 million, as shown on line 5 of Exhibit A-3 (MAT-1). The stranded cost surcharges

MICHAEL A. TORREY
DIRECT TESTIMONY

1 are expected to remain in place through mid-2013; therefore, the \$0.2 million represents
2 both past and future collections.

3 Q. Please describe the Palisades ISFSI costs included in the Section 10d(4) regulatory asset
4 surcharge paid by customers.

5 A. In Case No. U-14148, the MPSC approved, pursuant to 2000 PA 141 Section 10d(4),
6 recovery of certain costs incurred during the statutory rate freeze and cap period,
7 including capital expenditures in excess of depreciation. Included in the approved
8 Section 10d(4) costs were post-securitization investment at Palisades, including ISFSI
9 costs of \$0.7 million as shown on line 6 of Exhibit A-3 (MAT-1).

10 Q. Please describe the Palisades ISFSI costs included in general rates paid by customers.

11 A. In Case No. U-14347, the Commission approved general rates that included post
12 securitization investment in the Palisades ISFSI. In order to determine the amount paid
13 by customers, I converted the appropriate Palisades ISFSI costs into a rate based on the
14 sales level assumed in U-14347. This rate was multiplied by the actual sales for the
15 period the U-14347 rates were in effect, January 2006 until the plant sale in April 2007,
16 to arrive at the \$3.6 million figure shown on line 7 of Exhibit A-3 (MAT-1).

17 Q. Please describe the Big Rock ISFSI costs included in the Big Rock decommissioning
18 costs paid by customers.

19 A. In Case No. U-15611, the MPSC approved recovery of \$44 million in Big Rock
20 decommissioning costs. The \$44 million requested by the Company and ultimately
21 approved by the Commission included \$3.2 million for loading and moving the Big Rock
22 casks. The \$3.2 million cost of loading and moving the Big Rock casks shown on line 8
23 of Exhibit A-3 (MAT-1) was also included in the DOE claim.

MICHAEL A. TORREY
DIRECT TESTIMONY

1 Q. Please describe the legal costs related to the DOE litigation that have been included in
2 general rates paid by customers.

3 A. In general rate proceedings Consumers Energy typically requests recovery of corporate
4 O&M costs, including legal costs. In Case Nos. U-14347, U-15245 and U-15645 the
5 Commission approved general rates that included a small amount of O&M expense
6 related to the on-going DOE litigation. The amounts included in approved rates were
7 converted to a rate using the assumed sales levels. The resulting rate was multiplied by
8 the actual sales for the period the rates were in effect, January 2006 through July 2010, to
9 determine the \$3.5 million shown on line 9 of Exhibit A-3 (MAT-1).

10 Q. Please describe the costs that Consumers Energy recovered from the DOE as a result of
11 the settlement of the DOE litigation that have not been included in customer rates.

12 A. The bottom portion of Exhibit A-3 (MAT-1) identifies costs recovered via the settlement
13 that have not been included in customer rates. This includes (i) the \$54.6 million the
14 Company spent on the Big Rock ISFSI shown on line 11, (ii) the \$30 million payment to
15 Entergy Nuclear Palisades, LLC (“Entergy”) made by Consumers Energy in exchange for
16 Entergy’s acceptance of title to and responsibility for the Big Rock ISFSI and associated
17 SNF disposal in April 2007 shown on line 12, and (iii) costs of pursuing the DOE
18 litigation and various miscellaneous costs that were recovered as part of the DOE
19 settlement shown on line 13. The Big Rock ISFSI amount and the Entergy payment are
20 currently recorded on Consumers Energy’s balance sheet. The total amount recovered
21 via the DOE settlement that has not been paid by customers in rates is \$96.7 million as
22 indicated on line 14.

MICHAEL A. TORREY
DIRECT TESTIMONY

1 Q. What other miscellaneous costs were not included in customer rates but recovered from
2 the DOE as a result of the settlement?

3 A. The Company's claim against DOE included costs that were not collected through
4 customer rates due to the timing of general rate proceedings, the limitations of the 2000
5 PA 141 statutory rate freeze and cap period, the limitations of Commission-approved
6 recovery mechanisms and Commission policy.

7 Q. Are there other costs related to the DOE settlement that were not collected in customer
8 rates?

9 A. Yes. The Company incurred \$4.9 million in expenses from 2007 through 2011 related to
10 letter of credit fees for the one-time fee liability that was eliminated under the settlement.
11 The letter of credit payable to Entergy was required under the Palisades sale agreement.

12 Q. Do the figures on Exhibit A-3 (MAT-1) exclude financing costs, return on, interest,
13 carrying cost or time value of money?

14 A. Yes. The figures on Exhibit A-3 (MAT-1) exclude financing costs, return on, interest,
15 carrying cost or time value of money because costs of this nature are not included in the
16 \$120 million settlement amount recovered from the DOE. Company witness Jeffrey
17 Theuer can elaborate on this point.

18 Q. What are the total costs incurred by the Company in connection with the DOE litigation?

19 A. The Company's total costs related to litigating the DOE claim are \$7.7 million. This
20 includes the \$3.5 million amount I described earlier in my testimony that has been paid
21 by customers. By proposing to refund to customers the entirety of the amounts that they
22 previously paid in rates, the Company's application, if approved by the Commission will
23 result in customers paying none of these litigation costs.

MICHAEL A. TORREY
DIRECT TESTIMONY

1 Q. What is your proposal to return the \$23.3 million to customers?

2 A. The Company proposes to return the \$23.3 million to customers via a uniform per
3 kilowatt-hour negative surcharge as calculated on Exhibit A-4 (MAT-2), and as shown on
4 the tariff sheet Exhibit A-5 (MAT-3). The negative surcharge calculation assumes the
5 return of the \$23.3 million over 6 months beginning in June 2012 and includes interest at
6 the Company's short-term borrowing rate from the date of the settlement until the
7 \$23.3 million is completely returned to customers.

8 Q. Please describe the ratemaking benefits to customers that would result from the approval
9 of the Company's Application in this matter.

10 A. The principal outcomes would be as follows:

11 (1) The \$120 million damage award will be treated for accounting and
12 ratemaking purposes in a manner that will result in either a distribution of money directly
13 to customers, or in a reduction of potential future costs to customers. I have described the
14 specific allocation of this amount between the Company and its customers above.
15 Customers will receive a refund of \$23.3 million, representing the amount that has been
16 previously included in rates being paid by customers. Consumers Energy will recover
17 \$84.6 million of costs associated with the Big Rock ISFSI. This \$84.6 million consists of
18 \$54.6 million representing the capital cost of the Big Rock ISFSI, and the \$30 million
19 payment to Entergy. The remaining amount of \$12.1 million will cover other costs
20 included in the Company's damage claim that have never been included in retail
21 customer rates. The accounting that will be followed by the Company is described by
22 Company witness Patrick Fitzgerald.

MICHAEL A. TORREY
DIRECT TESTIMONY

1 (2) Consumers Energy will not seek any further recovery from customers for
2 the \$54.6 million of Big Rock ISFSI costs or the \$30 million Entergy payment or the
3 \$12.1 million of other costs.

4 (3) Consumers Energy will not seek any recovery from customers for any
5 portion of the litigation costs associated with prosecuting the Court of Federal Claims
6 lawsuit.

7 (4) Customers will receive the \$23.3 million refund upon approval by the
8 Commission in this case, rather than having to wait at least several years until the Federal
9 Court of Claims case is fully litigated, including the completion of what I am informed
10 would have been almost certain appeals.

11 (5) The extinguishing of the DOE liability eliminates a major liability from
12 Consumers Energy's balance sheet, and eliminates an issue that had spawned various
13 controversies in recent rate proceedings.

14 (6) The execution of the terms of the DOE settlement provides certainty that the
15 funds collected by Consumers Energy from customers to pay the DOE Liability were
16 used for that purpose, thereby avoiding any risk that the Company would be unable to
17 make that payment in the future, and thereby eliminating any need for the trust that had
18 been at issue in Case No. U-16191.

19 (7) Consumer Energy and its customers will avoid the potential risk that, if the
20 U-16191 trust had been established, the value of trust assets will decline and be
21 insufficient to cover the future amount of the DOE Liability.

22 (8) Future disputes and Commission proceedings concerning the recovery of the
23 Big Rock ISFSI costs, recovery of the Entergy payment, recovery of litigation costs

MICHAEL A. TORREY
DIRECT TESTIMONY

1 associated with this matter, the administration and investment policies and results of the
2 U-16191 trust, and all other associated ratemaking issues that have consumed the parties'
3 time and resources in the past, are eliminated.

4 Q. Do you believe that customers are disadvantaged in any way by the term of the settlement
5 that provided for payment of the DOE Liability?

6 A. No. In fact, customers will receive significant benefits. Customers have already paid in
7 rates for the DOE Liability. If the choice was simply whether Consumers Energy should
8 put that money into a trust, or pay it to the federal government to extinguish the DOE
9 Liability, customers would be indifferent. In either case, the ratemaking/financial impact
10 on them would be the same. The fact is, however, that the substantial benefits I have
11 identified above have been realized by entering into the settlement and paying the DOE
12 Liability. These benefits would not have been available if the money had been placed in
13 a trust. These benefits made the choice of paying the DOE Liability far superior to
14 putting the money in a trust.

15 Q. In providing some background information on the provisions of the Nuclear Waste Policy
16 Act, Company witness Jeffrey Theuer discusses the difference between the "one-time
17 fee" related to pre-April 1983 generation and the "ongoing fee" related to post-April
18 1983 generation. How were the costs incurred by Consumers Energy associated with the
19 ongoing fee recovered by Consumers Energy?

20 A. The ongoing fee payments had been included in Consumers Energy's power supply cost
21 recovery ("PSCR") proceedings and recovered through the PSCR process until, with
22 respect to Big Rock, the plant was retired in 1997, and with respect to Palisades, the
23 Company sold the Palisades Plant to Entergy in April 2007.

MICHAEL A. TORREY
DIRECT TESTIMONY

1 Q. Does this complete your testimony?

2 A. Yes, it does.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of)
CONSUMERS ENERGY COMPANY)
for approval of refunds to retail electric)
customers and for related relief.)
_____)

Case No. U-16861

REBUTTAL TESTIMONY

OF

MICHAEL A. TORREY

ON BEHALF OF

CONSUMERS ENERGY COMPANY

March 2012

MICHAEL A. TORREY
REBUTTAL TESTIMONY

1 Q. Please state your name and business address.

2 A. Michael A. Torrey, One Energy Plaza, Jackson, Michigan.

3 Q. Are you the same Michael A. Torrey that filed direct testimony in this case?

4 A. Yes.

5 Q. What is the purpose of your rebuttal testimony?

6 A. The purpose of my testimony is to rebut a number of recommendations made by the
7 Michigan Community Action Agency Association (“MCAAA”) witnesses Ronald C.
8 Callen and William A. Peloquin. Specifically, I will rebut Mr. Callen’s proposals that the
9 MPSC require Consumers Energy to establish and fund a spent nuclear fuel (“SNF”) fee
10 trust or impose a rate disallowance, and Mr. Peloquin’s recommendation that the \$23.3
11 million refund proposed by Consumers Energy be increased by \$33.7 million to a total of
12 \$57 million. I will also respond to Mr. Peloquin’s statement that certain costs that were
13 never paid by customers should not be recovered by Consumers Energy. This apparently
14 includes costs related to the DOE Letters of Credit.

15 Q. On page 9 and pages 12-14 Mr. Callen suggests that Consumers Energy “has not been
16 reasonable and prudent in enforcing its Standard Contract” with the federal government
17 for the disposal of spent nuclear fuel. Do you agree?

18 A. No. Mr. Callen has not identified any specific act or failure to act by Consumers Energy
19 in connection with its performance under the Standard Contract that might fairly be
20 characterized as unreasonable, imprudent, or contrary to the terms of the Standard
21 Contract. Indeed, it appears that Mr. Callen’s principal complaint is that the Company
22 carried out its obligations under federal law and the Standard Contract. Mr. Callen’s
23 frustrations with the federal spent nuclear fuel (“SNF”) disposal policy as discussed on

MICHAEL A. TORREY
REBUTTAL TESTIMONY

1 pages 14-20 of his testimony do not support a conclusion that Consumers Energy's
2 shareholders should be penalized for federal SNF policy shortcomings.

3 Q. On page 11 and pages 22-30 Mr. Callen describes and calculates fees paid by Consumers
4 Energy pursuant to the Standard Contract. Mr. Callen suggests that the fees either be
5 placed in an external SNF disposal trust or in the alternative refunded to Consumers
6 Energy's customers. Do you have any response to these recommendations?

7 A. Yes. Some important historical information is necessary in order to fully address these
8 recommendations. The total amount of SNF fees addressed by Mr. Callen may be
9 separated into two categories. The first is the post-April 1983 1 mill per kilowatt-hour
10 (kWh) fee that was included in power supply cost recovery proceedings. I referred to this
11 as the "ongoing fee" in my direct testimony. This ongoing fee was collected by
12 Consumers Energy during the time it owned and operated the Palisades and Big Rock
13 Point plants as part of power supply costs, and was remitted to the federal government
14 pursuant to the terms of the Standard Contract. The Big Rock plant ceased operation in
15 1997, thus terminating the collection and payment of the fee for that plant. Consumers
16 Energy has not collected nor remitted the fee for the Palisades plant since the sale of
17 Palisades in April 2007. During the time the ongoing fee was collected, the Commission
18 was repeatedly asked in multiple PSCR proceedings for Consumers Energy and other
19 electric utilities for relief in connection with these fees that is essentially identical to what
20 Mr. Callen is seeking in this case. The Commission repeatedly and consistently refused
21 to grant that relief. My research indicates that this includes at least the following cases:
22 November 20, 2001, Opinion and Order, Case No. U-12615; November 20, 2001,
23 Opinion and Order in Case No. U-12613; September 16, 2002, Opinion and Order in

MICHAEL A. TORREY
REBUTTAL TESTIMONY

1 Case No. U-12725; February 28, 2005, Opinion and Order in Case No. U-13917;
2 August 22, 2006, Opinion and Order in Case No. U-14701. I am also informed by
3 counsel that there are a series of Court of Appeals rulings that affirmed the Commission's
4 refusal to grant this type of relief. From a ratemaking perspective, the ongoing fee was
5 collected pursuant to federal law, and was remitted to the federal government pursuant to
6 federal law. These amounts are no longer in Consumers Energy's possession. The
7 Company therefore cannot place these amounts in a trust or refund them to customers.

8 The second category of fees discussed by Mr. Callen concerns the "one-time fee"
9 associated with pre-April 1983 nuclear generation. This had often been referred to as the
10 "DOE Liability" and, for ratemaking purposes, had historically been included in
11 Consumers Energy's capital structure as a low cost source of capital. In Case No.
12 U-16191, the Commission altered that treatment, and directed that the DOE Liability
13 amount be placed in a trust. The final rate order issued in that case thus was based on the
14 assumption that the DOE Liability would no longer be available as a source of capital to
15 the electric utility operations of Consumers Energy, and for ratemaking purposes,
16 effectively substituted debt financing for the DOE Liability in the capital structure. As
17 set forth in a series of orders issued in Case No. U-16191, Consumers Energy sought
18 relief from the trust requirement for the reason that the settlement of the DOE lawsuit
19 offered an opportunity to settle those claims on a favorable basis, with one of the terms
20 being the payment and extinguishing of the DOE Liability. In its March 17, 2011, Order
21 on Rehearing in Case No. U-16191, pages 7-8, the Commission ruled that it did not
22 intend its prior statements on paying the DOE liability to prejudge the terms of any
23 settlement agreement for breach of the Standard Contract and granted Consumers Energy

MICHAEL A. TORREY
REBUTTAL TESTIMONY

1 “90 days from the date of this order to consummate the proposed settlement if the
2 Company chooses to do so.” The Commission also indicated in that Order that “with
3 regard to the trust fund obligation, the Commission agrees with the Staff that if
4 Consumers Energy enters into a settlement, it may petition the Commission to be relieved
5 of the obligation to fund all or any part of the trust.” As set forth in other testimony, the
6 DOE lawsuit settlement was formally entered into on July 11, 2011, and the DOE
7 Liability was paid and the debt extinguished on July 13, 2011. On July 14, 2011, the
8 Company petitioned the Commission to formally rescind the trust obligation. As of the
9 date of this testimony, the Commission has not yet acted on that petition. In any event,
10 these funds are also no longer in Consumers Energy’s possession, and the Company
11 therefore cannot place these funds in a trust or refund them to customers.

12 Thus, since both the ongoing fee amount and the DOE Liability amount have been
13 remitted to the federal government, Mr. Callen’s recommendations, if adopted by the
14 Commission, would require Consumers Energy to obtain new financing in the amount of
15 approximately \$260 million in order to raise the funds necessary to fund the SNF disposal
16 trust, or in the alternative to refund to customers. The new financing and the trust would
17 incur costs. For illustrative purposes, if financed with long-term debt at a 6% cost rate,
18 the \$260 million would likely result in new financing costs of over \$15 million annually.
19 Imposing the burden of new financing costs to fund an SNF disposal trust or make
20 refunds would serve no useful purpose. Denying Consumers Energy recovery of the new
21 financing costs, as apparently recommended by Mr. Callen, would be unfair,
22 unreasonable and punitive.

MICHAEL A. TORREY
REBUTTAL TESTIMONY

1 Q. Do you have any additional concerns with Mr. Callen's proposals to fund an SNF
2 disposal trust, or in the alternative refund the Standard Contract fees to customers?

3 A. Yes. While imposing significant and unnecessary costs, the relief sought by Mr. Callen
4 is extremely unlikely to produce any benefits for customers. While it is clear that
5 Mr. Callen is frustrated with the federal SNF disposal program, his recommendations in
6 this proceeding to establish an SNF disposal trust or make refunds to customers are
7 unlikely to have any impact whatsoever on federal policy makers, and certainly will not
8 speed the day when the federal government accepts delivery of the SNF stored at the
9 Palisades and Big Rock sites. MCAAA's frustrations and any recommendations for SNF
10 disposal policy changes would be better directed at lobbying the federal government.
11 Further, the actions about which MCAAA complains are actions taken in compliance
12 with the Nuclear Waste Policy Act and the required Standard Contract. Mr. Callen has
13 not offered any evidence supporting a conclusion that Consumers Energy contributed to
14 the shortcomings he identified in the federal SNF disposal program.

15 Q. Do you agree with Mr. Peloquin's assertion on page 11 of his direct testimony that
16 Consumers Energy's payment of the \$163 million one-time fee was "imprudent" and that
17 Consumers Energy "had no right to use the ratepayers funds to pay the DOE"?

18 A. No. Mr. Peloquin is incorrect. Consumers Energy's payment was consistent with the
19 terms of the Standard Contract and the Settlement Agreement with the federal
20 government. As discussed in my direct testimony, in addition to the many benefits of the
21 Settlement Agreement, the funds that had been collected from customers for the DOE
22 Liability were used for the intended purpose, to satisfy the DOE liability for the pre-
23 April 7, 1983, generation from Consumers Energy's nuclear power plants. Mr. Callen is

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1 effectively requesting the Commission to engage in a re-litigation of prior PSCR cases
2 and general electric rate cases. Such a request is retroactive in nature, which I am
3 informed is unlawful in Michigan.

4 Q. Mr. Peloquin, on pages 7-10 of his direct testimony, recommends a \$33.7 million
5 adjustment to Consumers Energy's proposed refund of \$23.3 million that would result in
6 a total refund to customers of approximately \$57 million based on the premise that
7 Consumers Energy recovered certain costs from both Entergy and the DOE. Do you
8 agree with his recommendation?

9 A. No, for the following reasons. First, the Company's proposal to refund \$23.3 million to
10 customers returns all costs related to the breach of the Standard Contract by the federal
11 government that have been or will be paid by customers through MPSC approved rates.
12 Mr. Peloquin's recommendation to refund an additional \$33.7 million would distribute
13 funds to customers that they never paid.

14 Second, Mr. Peloquin's recommendation is premised on rank speculation. The
15 Settlement Agreement described by Mr. Theuer results in recovery of \$120 million.
16 However, over \$30 million in costs included in Consumers Energy's lawsuit claim were
17 not recovered. The Settlement Agreement specifically identifies that the \$30 million Big
18 Rock payment to Entergy is part of the \$120 million. For the remaining \$90 million, we
19 cannot know with any certainty what costs were specifically reimbursed and which costs
20 were not. So we have no way of knowing if in fact the book value of the Palisades SNF
21 storage costs that Mr. Peloquin now proposes to refund were part of the \$120 million
22 recovery. Mr. Peloquin asserts that it is included in the \$120 million, but there is no way
23 that he nor anyone else can possibly know that.

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1 Third, Mr. Peloquin's position is speculative in yet another respect. His position
2 is premised on the speculation that Entergy would have paid the same total purchase price
3 whether or not the book value of the Palisades plant reflected a positive amount for the
4 ISFSI. It seems just as likely that the total purchase price would have been reduced by
5 whatever amount was not reflected in the book value of the plant; i.e., that Entergy was
6 willing to pay a certain dollar premium relative to book value, and no more. If so, the
7 exclusion of the book value of the Palisades ISFSI from the sale price would have
8 resulted in the same above book value amount being received. In any event,
9 Mr. Peloquin's position is a "what if" scenario that requires speculation in several
10 important respects.

11 Fourth, while Consumers Energy proposes to use the Settlement Agreement
12 proceeds to make customers whole, the remaining proceeds are not sufficient to fully
13 reimburse Consumers Energy for the amount of its full claim. The Company absorbs
14 over \$30 million of costs that were included in its lawsuit claim and that were never paid
15 by customers. It would be unreasonable to return to customers amounts that customers
16 never paid in rates, while at the same time allowing other actual costs incurred by
17 Consumers Energy to go unrecovered.

18 Fifth, even if all of Mr. Peloquin's speculations were accepted as true, his position
19 is based upon the assumption that customers are automatically entitled to 100% of the
20 amount by which the Palisades sales price exceeded book value. I am informed that there
21 is no such automatic entitlement. In any event, customers received enormous benefits as
22 a result of the Palisades/Big Rock ISFSI sale. They received benefits from the
23 distribution of \$312.3 million that had been held in nuclear decommissioning trusts.

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1 They received benefits from the \$77.5 million by which the sales price exceeded the book
2 value. In total, customers received net distributions of \$364 million after transaction
3 costs. Since the risks associated with owning and operating a nuclear power plant and
4 two ISFSI sites were shifted away from Consumers Energy, customers were further
5 benefited. For Mr. Callen to now propose that the Commission should retroactively
6 reach back into Case No. U-14992 and effectively assign even greater benefits to
7 customers is unreasonable.

8 Sixth, if Mr. Peloquin's proposal was adopted, the remaining proceeds would be
9 insufficient to allow recovery of the \$84.6 million of Entergy payment and Big Rock
10 ISFSI costs that have been discussed in direct testimony in this case. A decision on the
11 ratemaking recovery of those costs had been deferred while the Company litigated its
12 claim with the DOE. One of the benefits of the Settlement Agreement is that recovery of
13 the \$120 million allowed recovery of that \$84.6 million, and avoided customers having to
14 pay that amount. Under Mr. Peloquin's proposal, the proceeds not allocated to customers
15 would be insufficient to reimburse the Company for those costs, and it would be
16 necessary to seek their recovery from customers. Such are clearly recoverable costs of
17 providing utility service, and thus should be paid by customers if they are not recovered
18 through the settlement proceeds.

19 Q. Please address Mr. Peloquin's recommendation on pages 9-10 where he states that he
20 opposes certain amounts included on your Exhibit A-3.

21 A. Mr. Peloquin identifies \$12.1 million in litigation costs and \$4.9 million of DOE Letter of
22 Credit costs. His testimony is not clear regarding the relief he is seeking with respect to
23 these two items. In any event, the litigation costs were reasonable and prudent and

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1 necessary costs of pursuing the DOE lawsuit. Under Consumers Energy's position
2 outlined in my direct testimony, customers will never be asked to pay for these costs;
3 therefore, the statement by Mr. Peloquin that he "opposes" these costs seems misplaced.
4 The DOE Letters of Credit were incurred because the Palisades sale to Entergy occurred
5 while the significant DOE Liability was still outstanding and in fact growing each year
6 with the accumulation of interest. The DOE Letters of Credit were but one of many
7 elements of the MPSC-approved Palisades sale transaction. Customers have never paid
8 for any portion of the DOE Letters of Credit costs. As outlined in my direct testimony,
9 the proceeds from the Settlement Agreement are sufficient to allow recovery of these
10 legitimate costs. If Mr. Peloquin's proposal is adopted, the proceeds will be insufficient
11 to cover these costs, and customers should therefore reimburse the Company for these
12 reasonable, prudent and legitimate costs.

13 Q. Does this complete your testimony?

14 A. Yes, it does.

1 JUDGE FELDMAN: Who has cross-examination
2 for Mr. Torrey?

3 Mr. Keskey, you may proceed when you are
4 ready.

5 CROSS-EXAMINATION

6 BY MR. KESKEY:

7 Q Good afternoon, Mr. Torrey.

8 A Good afternoon, Mr. Keskey.

9 Q Could you define or explain what Palisades ISFSI II
10 refers to?

11 A Palisades ISFSI II refers to the Independent Spent Fuel
12 Storage Installation, and because it's marked II I
13 believe that's the second pad that was constructed at
14 Palisades. There are two. In other words, it's a
15 portion of the dry casks that the sitting at the
16 Palisades plant today.

17 Q When was the ISFSI II started?

18 MR. ROBINSON: Do you mean when was
19 construction started?

20 Q (By Mr. Keskey): When did you first commence the
21 construction of ISFSI II and start using it?

22 A I can't be certain, but by referring to the accounting
23 records that I have included as work papers we can come
24 up with an approximate time.

25 Q O.K.

1 A This appears as though the expenditures were first made,
2 at least as far as the claim is concerned, those
3 expenditures were first made in 1999. Now, there may
4 have been some expenditures made prior to that that are
5 not part of the claim, but I can't be certain. I don't
6 have that knowledge as far as how the casks that were
7 included in the claim and not included in the claim, how
8 they were parceled.

9 Q Now, the Company transferred the Palisades and Big Rock
10 facilities on or about April 11, 2007. Is that right?

11 A That is correct.

12 Q And on that date you had included the amount of expenses
13 or investment in the Palisades II ISFSI in your net
14 plant; is that right?

15 A There was a significant amount of Palisades investment in
16 rates at that point in time, and included in that would
17 have been some dry casks.

18 Q But the Palisades II ISFSI was included in that plant as
19 of the date of closing of the transfer of facilities; is
20 that right?

21 A From an accounting perspective, yes, sir.

22 Q And do you know how much was included in that plant on
23 that date?

24 A No, I don't. Without -- I may have it captured in one of
25 my work papers here. But I don't believe my work papers

1 are going to be refined to the point to know what was II
2 versus I, Mr. Keskey.

3 Q Now, is it correct that the Company's damage claim
4 included an amount for the Palisades II ISFSI?

5 A Yes.

6 Q What was the amount that was included in the damage
7 claim?

8 A Approximately 42 -- \$42 million.

9 Q Would it be correct to suggest that the settlement
10 included the amount for Palisades ISFSI II?

11 A By settlement you're referring to the \$120 million?

12 Q That's correct.

13 A I can't know that, Mr. Keskey, because the settlement
14 itself doesn't spell out how much of any particular item,
15 other than the Entergy payment, is included in the
16 120 million.

17 Q Well, how much of the Big Rock ISFSI is included in the
18 settlement?

19 A Again I think I answered it in a discovery response that
20 you asked, and we can't know specifically how much that
21 is either. I can refer you to that discovery response if
22 you'd like.

23 Q Well, we'll get to that.

24 A O.K.

25 Q Do you have a copy of Exhibit MCAA 10?

1 A There are some documents laying here. I do.

2 Q Do you see on the last page of that exhibit, Bates stamp
3 86100032, where there is a list of items with the
4 estimated cost that we covered in the cross-examination
5 with Mr. Theuer?

6 A Yes, I do.

7 Q How many of those costs were included in the settlement?

8 A Other than the Big Rock amount we can't be sure how much
9 if any of the items listed there was included. The Big
10 Rock amount, the 30 million in the middle of that list
11 was definitely included.

12 Q Do you recall Mr. Theuer's discussion of the government's
13 position on Palisades ISFSI II and on Big Rock relative
14 to comparing the non breach versus the breach world?

15 A Generally.

16 Q Would it be correct to suggest that your damage claims
17 for the Big Rock ISFSI and the Palisades ISFSI II were
18 among the most strongest claims you had based upon the
19 cases that were being settled and tried at the Court of
20 Claims?

21 MR. ROBINSON: I'm going to --

22 A Mr. Keskey, I don't know.

23 MR. ROBINSON: I'm going to object.

24 A I wasn't a part of the negotiation with the DOE.

25 JUDGE FELDMAN: Mr. Torrey. First, let

1 me ask you not to answer a question when your counsel is
2 in the process of objecting.

3 THE WITNESS: I apologize, your Honor,
4 and to my counsel.

5 JUDGE FELDMAN: Mr. Robinson, shall we
6 just proceed?

7 MR. ROBINSON: Let's just plunge ahead.

8 JUDGE FELDMAN: Excellent. Mr. Keskey.

9 Q (By Mr. Keskey): Your Exhibit A-3 is rather specific
10 about what costs you claim were ratepayer paid costs and
11 what costs you suggest were not included in customer
12 rates. Is that right?

13 A That's our proposal, yes, sir.

14 Q Now, why are you so specific about those specific items
15 and so nonspecific and nebulous about the Palisades II
16 ISFSI investment?

17 MR. ROBINSON: Well, I'm going to object
18 to the form of that question. I think I'll also object
19 because I don't think it's understandable the way it's
20 been stated.

21 MR. KESKEY: Well, I object to the
22 objection because --

23 JUDGE FELDMAN: Well, you can't object to
24 the objection. You can respond to the objection.

25 MR. KESKEY: Cross-examination can be

1 framed in different ways by different people, and we
2 don't know that the witness doesn't understand it.

3 JUDGE FELDMAN: Well, let's see. I mean
4 you characterized the witness's testimony regarding the
5 ISFSI II or at least the Company's position as nebulous.
6 You can ask if he agrees with that characterization. You
7 can ask if he would agree there's been more detail
8 provided in the one rather than the other. But let's
9 avoid presuming that the witness will buy into the
10 characterizations that would be objectionable to the
11 Company. So you don't have to argue about that.

12 MR. KESKEY: O.K. I'll just rephrase the
13 question, your Honor.

14 JUDGE FELDMAN: Thank you.

15 Q (By Mr. Keskey): On your Exhibit A-3, you see very
16 specific detail on specific cost items, and you describe
17 it in your testimony, each one, and that's rather
18 specific. You have got it divided between what you
19 believe was the customer rates and what you believe was
20 not included in customer rates. Now --

21 JUDGE FELDMAN: Would you agree with that
22 characterization, Mr. Torrey?

23 A I have a very specific proposal here. Yes.

24 JUDGE FELDMAN: Thank you.

25 Q (By Mr. Keskey): Well, when you say proposal, is that

1 different from differentiating all of the various cost
2 items that relate to the settlement?

3 A No. Mr. Keskey, as far as this exhibit, I am able to do
4 calculations that support what I believe was in customer
5 rates, and that's where these numbers came from. And
6 then the bottom part of the exhibit are things that were
7 not included in customer rates and we know that based on
8 prior Commission decisions. O.K.

9 The rest of it is just math, in the next
10 column. And our proposal is as stated here. But my
11 specific proposal and these specific costs for each line
12 item here doesn't mean that the settlement was specific
13 on anything other than the \$30 million. We got
14 \$120 million and the 30 was called out as absolutely
15 being part of it. But other than that, I can't infer
16 that there is any more specificity in that settlement
17 agreement than the way it reads.

18 Q And none of your exhibits indicate a specific dollar
19 amount relating to Palisades ISFSI II; is that right?

20 A I guess I don't understand the question, Mr. Keskey.

21 Q I don't --

22 A My calculations are very specific on this exhibit.

23 Q And none of your exhibits assign a cost to Palisades
24 ISFSI II?

25 A Well, this would be the only exhibit. You can see where

1 the dollars came from by looking at, referring to my work
2 papers. But again those are based on Commission
3 proceedings where we can do the math and figure out what
4 customers paid through their rates for these specific
5 line items, including the period that Palisades casks
6 were included in the general rates.

7 Q You're assuming that the test for deciding any split of
8 proceeds in this case depends on what was in rates and
9 what was not in rates?

10 A Well, as far as refunds to customers, I believe it's
11 appropriate that they receive back what they paid in, as
12 I discuss in my testimony and quantify here on this
13 exhibit.

14 Q O.K. That would be good for a starter. But how about
15 the rest of it? In other words, isn't it correct that
16 the Commission in U-14992 determined that the gain
17 realized in the proceeds over and above net plant booked
18 value would be refunded to the ratepayers?

19 A That was the Company's proposal and the Commission
20 adopted it.

21 Q Now, is it also correct that the Commission in the
22 subsequent rate case assigned to the ratepayers all of
23 the transaction costs to undertake the sale or transfer
24 of the Palisades and Big Rock plants?

25 A No.

1 Q How did the Commission treat those transaction costs?

2 A There were certain transaction costs that were not
3 included in what was recovered from the sale proceeds.

4 Q How much did the Commission grant to Consumers Energy for
5 transaction costs for this transaction?

6 A \$25.8 million for the sale transaction in 14992, and then
7 the transaction costs were reviewed in 15245.

8 Q And the figure remained the same then?

9 A No. We had requested more than the \$25.8 million that
10 was granted in 15245.

11 Q How much more did you request?

12 A I don't recall. I may have that in some of the orders
13 that I have available to me here, but I don't know off the
14 top of my head.

15 Q Was that determined in the Commission order in 15245?

16 A I believe it was, sir. As I recall one item that was not
17 allowed, I believe, were the letters of credit. There
18 were others.

19 Q Now, is it also correct that in past years or decades the
20 ratepayers carried the costs for the refurbishment of the
21 Palisades plant was undertaken in the 1990s?

22 MR. ROBINSON: I'm going to object. That
23 question is way too vague to elicit any kind of useful
24 information at all.

25 MR. KESKEY: Well, I don't think it's

1 vague at all. We all realize that there was a major
2 problem with the Palisades plant, that it got corrected
3 and refurbished at very substantial costs.

4 JUDGE FELDMAN: Let's make sure that you
5 lay a foundation with the witness so we can take
6 objections precisely, and clarify what you mean by
7 refurbishment before moving on. That would be good.

8 Q (By Mr. Keskey): Is it correct that the Company
9 undertook a refurbishment project with respect to the
10 Palisades plants?

11 A By refurbishment do you mean investment? I don't
12 understand --

13 Q Yes.

14 A O.K. I was at Palisades then and we had a number of
15 significant investments.

16 Q Isn't it true that the Company invested money to improve
17 the capacity factors and the operation of the plant?

18 A I don't recall the intent of the investments, Mr. Keskey.

19 Q Is it true that comparing to the early years of
20 Palisades, that after the Company undertook a
21 refurbishment project, that the performance of the plant
22 was greatly enhanced?

23 A I don't recall.

24 Q Were the steam generators of the plant replaced?

25 A Yes, sir.

1 Q Were they? Yes?

2 A Yes.

3 Q Do you know what the approximate cost of that was?

4 A I don't recall.

5 Q Of course all of that investment would have been
6 recognized in rates, would it not?

7 A Eventually. The Company went quite a while without a
8 general rate case, approximately ten years.

9 Q Well, the Company, if it had an earnings problem, would
10 have filed a rate case, would it not?

11 MR. ROBINSON: Your Honor, I'm going to
12 object. This is so far afield that -- this case cannot
13 be a case about the entire history of the Consumers
14 Energy nuclear plant. It's just not appropriate to be
15 wandering around in ancient history here, and so I object
16 to going there.

17 MR. KESKEY: Well, we're not trying to
18 get into all kinds of details. We're pointing out just a
19 couple of short examples of how the ratepayers have
20 carried the plant, upgraded the plant, paid for
21 transaction costs, and in other ways made it an asset
22 that was capable of being sold.

23 JUDGE FELDMAN: Let's not ask this
24 witness to speculate on whether or under what
25 circumstances the Company could or should or might have

1 sought rate relief.

2 MR. KESKEY: Well, I was just responding
3 to his answer which was simply that --

4 JUDGE FELDMAN: You can argue in your
5 briefs.

6 Q (By Mr. Keskey): You weren't suggesting that the Company
7 was not earning its authorized return when it was not
8 filing rate cases?

9 MR. ROBINSON: Objection. It's
10 irrelevant whether the Company was earning its authorized
11 return at some distant point in the past. It doesn't
12 matter to anything of any material fact in this case.

13 JUDGE FELDMAN: Mr. Keskey, I'm inclined
14 to agree.

15 MR. KESKEY: Well, the implication he was
16 putting on the record was, you know, that the Company
17 somehow absorbed something or invested without getting
18 coverage in rates. And that implication is just not
19 supported.

20 MR. ROBINSON: Your Honor, it's argument.

21 JUDGE FELDMAN: I agree.

22 MR. ROBINSON: Mr. Keskey can put all
23 this stuff in his brief, which is where it belongs. It
24 doesn't belong in some kind of back-and-forth between
25 this witness and Mr. Keskey.

1 JUDGE FELDMAN: Let's --

2 MR. ROBINSON: If Mr. Keskey had some
3 theory here, he could have offered a witness to support
4 it. He didn't do that. We're wasting time.

5 JUDGE FELDMAN: Mr. Keskey, can you move
6 on, please.

7 Q (By Mr. Keskey): Mr. Torrey, the Palisades plant was
8 always in the Company rate base until it transferred or
9 sold the plant in April 11, 2007; is that right?

10 A Always is pretty broad, Mr. Keskey. When we filed rate
11 cases from time to time, we would have included Palisades
12 investment to the extent it was appropriate to do so.

13 Q And you would have included in your rate cases operation
14 and maintenance expenses of the plants, right?

15 A Yes.

16 Q Taxes?

17 A There are a number of components of cost of service
18 related to Palisades, and I'm sure we identified them and
19 included them in our rate request.

20 Q Now your Exhibit A-3 includes an item at the bottom which
21 is on line 13, litigation and miscellaneous, 12.1
22 million; is that right?

23 A Yes, sir.

24 Q The effect of what you have put on your Exhibit A-3 is to
25 propose that the Company retain that amount; is that

1 right?

2 A Yes.

3 Q Does that amount include litigation for lawyers fees?

4 A Yes.

5 Q How much of that is lawyers and litigation fees?

6 A Those are covered on my work paper MAT 15.

7 Q What is the amount?

8 A Approximately \$7.7 million.

9 Q Then does that 12.1 million include bank letters of
10 credit fees?

11 A Yes, sir.

12 Q What's the amount of that?

13 A Work paper 16 identifies the letters of credit fees that
14 total about \$4.9 million.

15 MR. KESKEY: Your Honor, we'd like to
16 identify for the record another exhibit which is exhibit
17 MCAAA 9.

18 (Document was marked for identification by the Court
19 Reporter as Exhibit No. MCA-9.)

20 MR. KESKEY: And these are response to
21 discovery received by the Company which are identified on
22 the front cover of the exhibits.

23 Q (By Mr. Keskey): Do you recognize the answers in this
24 exhibit as answers that you prepared and signed?

25 A Yes.

1 Q And do you believe these are accurate responses, to the
2 best of your knowledge?

3 A Yes.

4 Q On the page 5 of your rebuttal testimony you take issue
5 with Mr. Peloquin's assertion that Consumers Energy's
6 payment of 163 million one-time fee was imprudent. Was
7 that not also a finding of the MPSC in its order in
8 U-16191, that the payment of the one-time fee would be
9 imprudent?

10 A I'd have to go back and read the order language
11 specifically, but subsequent to that, Mr. Keskey, they
12 provided for an opportunity in this proceeding to take a
13 look what was prudent and what wasn't prudent in the
14 context of the settlement.

15 Q On the bottom of page 5, lines 21 to 23 you indicate that
16 the funds that had been collected from customers for the
17 DOE liability were used for the intended purpose, to
18 satisfy the DOE liability for the pre April 7, 1983
19 generation from Consumers Energy's nuclear power plants.
20 Would it be correct that one of the important purposes of
21 the SNF fee was to provide for SNF disposal?

22 A I'd say that was the purpose of the program. The fee was
23 to cover the eventual payment of the debt obligation
24 under the Standard Contract, and that's what we used the
25 fees, the collected monies from customers for. That debt

1 was extinguished.

2 Q But the one-time fee was connected to or had a nexus with
3 your SNF being accepted for disposal, and that SNF has
4 not been accepted for disposal; isn't that right?

5 A Well, the SNF has not been accepted for disposal, but I
6 would disagree with you, that connectedness to the
7 disposal, because in between there is a financial
8 obligation that's been on our books since 1983 and it has
9 escalated, grown over time with the accumulation of
10 interests. And the fees were intended to cover that
11 obligation, and they did.

12 Q Well, the Commission's or the inclusion of these costs in
13 rates was for SNF disposal program, from the ratepayers
14 standpoint, were they not?

15 A I believe they were to comply with the terms and
16 conceptions of the Standard Contract.

17 Q And the Standard Contract provided for the payment of the
18 fees as a reciprocal obligation to the performance by the
19 DOE to the SNF disposal; isn't that right?

20 A That would be a better question for Mr. Theuer, Mr.
21 Keskey.

22 Q How does the ratepayer benefit by having that, those
23 fees, paid to the DOE without also obtaining the SNF
24 disposal?

25 A Well, it would -- I would suggest that they benefitted in

1 the context of this settlement from the things that I
2 have outlined in my testimony and that Mr. Theuer has in
3 his testimony. It's more than what is going on at the
4 federal level as far as the eventual disposal of spent
5 nuclear fuel.

6 Q If there's no disposal of the spent nuclear fuel, then
7 the payment will have been for nothing; isn't that right?

8 A I would suggest that again Mr. Theuer is probably the one
9 to talk about theoretical things that may or may not
10 happen under the Nuclear Waste Policy Act and the
11 Standard Contract.

12 MR. KESKEY: We have no other questions,
13 your Honor.

14 JUDGE FELDMAN: Thank you, Mr. Keskey.
15 Ms. Uitvlugt?

16 MS. UITVLUGT: Can we go off the record
17 for just one second?

18 JUDGE FELDMAN: Yes.

19 (Brief discussion was held off the record.)

20 JUDGE FELDMAN: Back on the record.
21 Ms. Uitvlugt, would you repeat that, please?

22 MS. UITVLUGT: No questions, your Honor.

23 JUDGE FELDMAN: All right. Any redirect,
24 Mr. Robinson?

25 MR. ROBINSON: No, your Honor.

1 JUDGE FELDMAN: All right. Thank you
2 very much for your testimony this afternoon, Mr. Torrey.
3 You may step down at your leisure.

4 THE WITNESS: Thank you, your Honor.

5 (The witness was excused.)

6 JUDGE FELDMAN: Are there any objections
7 to the admission into evidence of Exhibits A-3, A-4, A-5,
8 or MCAAA 9?

9 Hearing none, Exhibits A-3, A-4, and A-5
10 are admitted and Exhibit MCAAA 9 is admitted.

11 Let's go off the record.

12 (Brief discussion was held off the record.)

13 JUDGE FELDMAN: Back on the record. Mr.
14 Robinson, does that complete the Company's evidentiary
15 presentation?

16 MR. ROBINSON: It does, your Honor.
17 Thank you.

18 JUDGE FELDMAN: Certainly. And then it's
19 my understanding Staff now wishes to call Mr. Meggison.

20 MS. UITVLUGT: Yes, your Honor. Staff
21 calls Staff Witness Kirk Meggison.

22 JUDGE FELDMAN: All right.

23 - - -

24 (Document was marked for identification by the Court
25 Reporter as Exhibit No. S-1.)

K I R K D. M E G G I S O N

was called as a witness on behalf of Michigan Public Service Commission Staff and, having been duly sworn to testify the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. UITVLUGT:

Q Good afternoon, Mr. Meggison. Can you please state your full name and business address for the record.

A Kirk D. Meggison, 4300 West Saginaw Street, Lansing.

Q By whom are you employed and in what capacity?

A I'm employed by the Michigan Public Service Commission as a financial specialist in the Regulated Energy Division.

Q Did you cause to be prefiled in this case the qualifications and direct testimony of Kirk D. Meggison, which consists of a cover page and I believe five pages of questions and answers?

A That's correct.

Q Do you have any changes, corrections, or modifications you'd like to make to the prefiled direct testimony?

A No.

Q And at this time do you adopt this prefiled testimony as your own today?

A Yes.

Q And Mr. Meggison, did you also cause to be prefiled a one-page exhibit labeled S-1?

1 A Correct.

2 Q And was this document created by you or under your
3 control or administration?

4 A Yes.

5 Q And do you have any changes to this document?

6 A No.

7 MS. UITVLUGT: At this time, your Honor,
8 Staff would like to request that the qualifications and
9 direct testimony of Kirk D. Meggison be bound into the
10 record, and we move for the admission of his exhibit
11 after the cross-examination, and tender the witness.

12 JUDGE FELDMAN: Thank you. Are there any
13 objections to Ms. Uitvlugt's request that the testimony
14 of Mr. Meggison be bound in? Hearing none, the prefiled
15 direct testimony of Kirk D. Meggison will be bound into
16 the record.

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S T A T E O F M I C H I G A N
B E F O R E T H E M I C H I G A N P U B L I C S E R V I C E C O M M I S S I O N

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In the Matter of the application of CONSUMERS ENERGY COMPANY for approval of refunds to retail electric customers and for related relief. <hr style="width: 50%; margin-left: 0;"/>))))))	Case No. U-16861
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QUALIFICATIONS AND DIRECT TESTIMONY OF
KIRK D. MEGGINSON
MICHIGAN PUBLIC SERVICE COMMISSION

February 14, 2012

QUALIFICATIONS OF KIRK D. MEGGINSON
CASE NUMBER U-16861
PART I

1 **Q. Please state your name, business address and occupation.**

2 A. My name is Kirk D. Megginson and my temporary business address is 4300 West
3 Saginaw, Lansing, MI 48917. I am employed by the Michigan Public Service
4 Commission (MPSC or Commission) as a Financial Specialist in the Financial
5 Analysis and Customer Choice Section of the Regulated Energy Division. The
6 MPSC's regular business address is 6545 Mercantile Way, Lansing, Michigan
7 48911, which is currently under repair.

8 **Q. Please describe your educational and professional background.**

9 A. I graduated with a Bachelor of Science degree in Mechanical Engineering from
10 Michigan State University in March 1991 and received my Masters of Business
11 Administration degree in Finance from Clark Atlanta University in May 2002.
12 Prior to graduate school, I worked for the Michigan Consolidated Gas Company
13 as a commercial accounts manager from 1991 to 2000, primarily responsible for
14 managing the natural gas transportation accounts of certain industrial and
15 commercial clients in the Wayne and Washtenaw county areas. From 1989 to
16 1991 while attending Michigan State University, I worked for the MPSC as a
17 Research Analyst. In that role, I researched the technical and financial standards
18 of utility energy conservation programs throughout Michigan.

19 In December 2002, I began work as a Financial Analyst at the MPSC.
20 As a Financial Analyst, I analyzed and reported on the financial statistics of
21 regulated Michigan jurisdictional utility companies and assisted the MPSC
22 Financial Analysis and Customer Choice Staff in utility rate case hearings. In
23 October 2008, I became a Financial Specialist and provide Staff with expert

QUALIFICATIONS OF KIRK D. MEGGINSON
CASE NUMBER U-16861
PART I

1 testimony on ratemaking capital structure development, debt and equity costing,
 2 business and credit risk analysis, overall rate of return matters, and other finance-
 3 related issues in rate case proceedings and other Staff assignments.

4 **Q. Have you received ongoing training since joining the MPSC?**

5 A. Yes. In addition to my academic training, I have attended several seminars and
 6 workshops on electric and gas sourcing and marketing, utility financial analysis,
 7 and ratings methodology and analysis while employed at the MPSC. In August
 8 2003, I attended the introductory two-week regulatory studies program offered by
 9 the Michigan State University, Institute of Public Utilities, which covered various
 10 aspects of utility regulation and energy sector fundamentals. I have also attended
 11 training sessions provided by Standard & Poor's on credit rating development and
 12 methodology.

13 **Q. Have you participated in other nuclear related, nuclear decommissioning**
 14 **and/or United States Department of Energy (DOE) related rate cases prior to**
 15 **this case?**

16 A. Yes, I have. I have participated in the following nuclear/DOE related rate cases:

17	<u>Case Number</u>	<u>Company Name</u>	<u>Description</u>
18	U-15244	Detroit Edison	Nuclear Decommissioning
19	U-15276	Indiana-Michigan	Nuclear Decommissioning
20	U-15611	Consumers Energy (Electric Div.)	Big Rock Decommissioning
21	U-16191	Consumers Energy (Electric Div.)	DOE Liability Trust Fund
22	U-16472	Detroit Edison	Nuclear Decommissioning

DIRECT TESTIMONY OF KIRK D. MEGGINSON
CASE NUMBER U-16861
PART II

1 **Q. What is the purpose of your testimony in this proceeding?**

2 A. The purpose of my testimony is to provide a recommendation on behalf of the
3 Michigan Public Service Commission Staff (Staff) regarding the proceeds that
4 Consumers Energy Company (Consumers, Consumers Energy, or the Company)
5 proposes to refund to customers for their net share of the nuclear waste damages
6 settlement that the Company entered into with the DOE. In particular, Staff's
7 testimony will focus on the reasonableness of the Company's computation of its
8 proposed refund to customers.

9 **Q. Are you sponsoring any exhibits in this proceeding?**

10 A. Yes. I am sponsoring the following exhibit:

11 Exhibit No. S-1: "Consumers Audit Response to Staff"

12 **Q. Please provide a brief background on the Company's DOE Settlement.**

13 A. According to the Company's filing, Consumers Energy entered into a settlement
14 agreement with the federal government on July 11, 2011 and settled its claim with
15 the DOE for damages incurred due to the federal government's delay in accepting
16 spent nuclear fuel for disposal pursuant to the Standard Contract entered into
17 between Consumers Energy and the DOE in accordance with the 1983 Nuclear
18 Waste Policy Act. The contract addressed nuclear waste generated by Consumer
19 Energy's Palisades Nuclear Plant and the Big Rock Point Nuclear Plant (Big
20 Rock), which have since been sold and/or decommissioned. At the time, utilities
21 that owned nuclear plants had the option of paying a one-time fee immediately for
22 nuclear waste generated prior to April 1983 or paying the fee at the time the
23 federal government disposed of the nuclear waste. Consumers Energy chose to

DIRECT TESTIMONY OF KIRK D. MEGGINSON
CASE NUMBER U-16861
PART II

1 pay the fee at the time the federal government disposed of the nuclear waste,
2 which totaled to roughly \$163 million at the time of the July 2011 settlement.
3 Prior to the settlement, Consumers Energy was ordered to place the pre-1983
4 DOE liability funds into a separate trust per the Commission's Order in Case No.
5 U-16191.

6 Consumers Energy settled their damage claim with the DOE for \$120
7 million and the settlement eliminated the Company's pre-1983 liability owed to
8 the DOE (after an approximate \$43 million payment by Consumers) and
9 extinguished the need for Consumers to establish a pre-1983 nuclear waste trust.
10 Consumers Energy proposes to return \$23.3 million to customers from the \$120
11 million settlement.

12 **Q. Did Staff review the prudence of the Company's computation in determining**
13 **an appropriate settlement return to customers?**

14 A. Yes. Consumers Energy provided a summary sheet of the \$120 million
15 settlement and a component breakdown of the settlement to arrive at the net \$23.3
16 million customer refund amount. Consumers netted out costs for the Big Rock
17 independent spent fuel storage installation (ISFSI), payment to Entergy for certain
18 nuclear waste liability damages and other outside legal fees totaling \$96.7 million.
19 Staff submitted audit requests to the Company questioning whether any of the
20 costs netted out were for expenses previously covered by ratepayers and if
21 ratepayers were receiving a 100% refund of funds provided to Consumers for
22 DOE related items. The Company confirmed that it was refunding all proceeds
23 that were collected from customers that were part of its DOE claim. The

DIRECT TESTIMONY OF KIRK D. MEGGINSON
CASE NUMBER U-16861
PART II

1 Company's responses are highlighted in Exhibit S-1: "Consumers Energy Audit
2 Response to Staff."

3 **Q. Does Staff find the Company's proposed refund to customers to be**
4 **reasonable?**

5 A. Yes. Based on a thorough review of information and data presented in this case,
6 Staff did not find any material discrepancy with the Company's computation of its
7 refund of the settlement proceeds to ratepayers. Staff endeavored on making sure
8 ratepayers were made whole with regards to ratepayer-provided funds relating to
9 DOE matters.

10 **Q. Does this conclude your testimony?**

11 A. Yes, it does.

1 JUDGE FELDMAN: Who has cross-examination
2 for Mr. Meggison?

3 All right, Mr. Keskey, when you're ready.

4 CROSS-EXAMINATION

5 BY MR. KESKEY:

6 Q Good afternoon, Mr. Meggison.

7 A Good afternoon.

8 Q Can you briefly describe the approach that you took with
9 respect to this case? In other words, were you focussing
10 upon looking primarily at the Company's case and
11 determining whether their computations were correct, or
12 did you undertake consideration of a different approach
13 for determining what proceeds should go to the ratepayers
14 and what proceeds should go to the shareholder?

15 A Approach was primarily based on the computation that the
16 Company put forward.

17 Q Now, you indicate on page 5 of your direct testimony that
18 Staff did not find any material discrepancy with the
19 Company's computation of its refund of settlement
20 proceeds to ratepayers. Did you see that on lines 6 and
21 7?

22 A Yes.

23 Q When you say material discrepancies, was there a
24 discrepancy?

25 A No, not that -- not that Staff saw.

1 Q In looking at how the proceeds should be refunded to
2 ratepayers, did you specifically refer back to the
3 Commission's order in U-14992 where the Commission
4 assigned any of the gain over net plant booked value to
5 the ratepayers?

6 A No. I was not involved with that case.

7 Q That was not your approach in this case?

8 A No, it was not.

9 Q If in fact it were determined that, that Consumers Energy
10 has recovered the costs or investment for the ISFSI II at
11 Palisades from Entergy when it transferred or sold the
12 facilities, and also now in the DOE settlement, would you
13 be in favor of the Company receiving collection for the
14 same item twice?

15 A Based on data presented here, I don't believe that the
16 Palisades II costs were even considered or mentioned in
17 the documents I reviewed.

18 Q You're talking about the Company documents?

19 A Yes.

20 Q So did the Company [sic] specifically ask an audit
21 question or undertake any investigation as to the amount
22 of Palisades ISFSI II investment that was in the net
23 plant booked figures at the time of the sale or transfer
24 of the facilities on April 11, 2007?

25 MS. UITVLUGT: Objection, your Honor.

1 Mr. Meggison is not testifying on behalf of the Company,
2 nor would he know about a Company audit request to
3 itself.

4 JUDGE FELDMAN: You did say the Company's
5 audit request.

6 MR. KESKEY: I'm sorry. I'm asking about
7 the -- let me rephrase the question.

8 Q (By Mr. Keskey): Did the Staff undertake any audit or
9 determination as to the amount of the Palisades ISFSI II
10 investment that was included in the net plant investment
11 balance as of the sale or transfer of Palisades
12 facilities on April 11, 2007?

13 A No. Staff did not.

14 Q Did the Staff undertake an audit or analysis of the
15 amount of Palisades ISFSI II investment or costs that the
16 Company recovered in the DOE settlement?

17 A No, I don't believe so. If that was based on U-14992
18 transaction, then no.

19 Q I'm not sure it has to be based on the U-14992 or not.
20 In other words, looking at the settlement amounts and the
21 settlement agreement, did the Staff determine what
22 portion of the settlement amount of 120 million related
23 to the Palisades ISFSI II investment?

24 A No.

25 Q Now, if in fact it were to be concluded that the Company

1 recovered ISFSI II Palisades investment from Entergy when
2 it sold the plant, as well as recovering Palisades II
3 ISFSI investment or costs from the DOE settlement, would
4 you be in favor of them recovering that in both places?

5 A No. If it was determined that they were able to recover
6 the costs from Entergy and also from the settlement, then
7 I don't believe Staff would be in agreement for that, for
8 a double recovery.

9 Q Now, on page 4 of your testimony you indicate, lines 6 to
10 9, as follows, "Consumers Energy settled their damage
11 claim with the DOE for \$120 million and the settlement
12 eliminated the Company's pre-1983 liability owed to the
13 DOE (after an approximate \$43 million payment by
14 Consumers) and extinguished the need for Consumers to
15 establish a pre-1983 nuclear waste trust."

16 Now, in that statement are you
17 paraphrasing the Company's proposal or position, or are
18 you yourself taking the position that the Consumers
19 Energy settlement extinguished the need for the trust?

20 A I base that statement on the fact that this pre nuclear
21 1983 waste trust that was supposed to be established,
22 since they in the settlement agreement paid that -- I
23 guess you could call it -- one-time fee off, then the
24 nuclear trust was unneeded going forward.

25 Q But now do you recognize that the Company, excuse me, the

1 Commission in the U-16191 order stated that it would be
2 imprudent for Consumers Energy to pay the federal
3 government the DOE liability?

4 A I'm aware that they stated that. I'm also aware that
5 they gave the Company the opportunity to enter into a
6 settlement agreement with the federal government.

7 Q That's true, which is a Company decision. The Commission
8 has not yet ruled in any way to detract from the trust at
9 this point; is that right?

10 A My understanding is that the Commission allowed Consumers
11 Energy to negotiate with the federal government and
12 potentially enter into a settlement agreement, which they
13 successfully completed.

14 Q And this Commission also required them to file a petition
15 to determine whether or not the trust requirements should
16 be relinquished or not, right?

17 A I do believe that's true.

18 Q And the Commission has not ruled on that aspect yet, has
19 it?

20 A I do believe that's true also.

21 Q Would you also agree that one of the purposes of the SNF
22 fee collections was to provide for the disposal of SNF?

23 A Correct, yes.

24 Q The purpose of the SNF fee was not to enhance the federal
25 government's cash flow, was it?

1 MS. UITVLUGT: Objection, your Honor.
2 Mr. Meggison cannot testify as for the federal
3 government, that the purpose is to enhance their cash
4 flow.

5 MR. KESKEY: Well, this is an
6 illustrative question, your Honor.

7 Q (By Mr. Keskey): How would you describe the purpose of
8 the SNF fees? Was it tied to something?

9 A It was tied to their -- well, the on-going fee or the
10 one-time fee.

11 Q Both of them?

12 A It's tied to the nuclear waste disposal for Consumers
13 Energy by the federal government.

14 Q When we started the program of collecting for the
15 one-time fee from ratepayers and then collecting from
16 ratepayers for the on-going fee, all of which the
17 ratepayers paid for, it was for the specific purposes of
18 providing for SNF disposal, was it not?

19 A Yes.

20 Q It wasn't tied to federal government accounting or the
21 liability as it stands on the Company books, was it?

22 A That's not my understanding. It was tied to spent
23 nuclear fuel disposal by the federal government.

24 Q And we don't have any spent nuclear fuel disposal of SNF
25 generated from Consumers Energy, do we?

1 A My understanding is it's been delayed by the federal
2 government.

3 Q Well, would you -- Are you familiar with what's happened
4 in the federal program in the last two years?

5 MS. UITVLUGT: Objection your Honor.
6 This witness isn't testifying about what's going on with
7 the federal programs. The witness is simply testifying
8 whether or not the computation for the refund put forward
9 by Consumers Energy, if he believes it's reasonable in
10 his opinion.

11 MR. KESKEY: Well, your Honor, I'm asking
12 a question because he used the word delay. And if he is
13 not updated on what the federal government is, I don't
14 think we should have him fall under the same contract
15 debate about delay versus breach. And that's --

16 JUDGE FELDMAN: Well, I'm also reluctant
17 to wade back into that, but I will allow the question if
18 the witness knows.

19 MR. KESKEY: I can restate the question.

20 Q (By Mr. Keskey): Mr. Meggison, are you familiar enough
21 with what has happened at the federal government in the
22 last two years to make a judgment as to whether the
23 federal SNF disposal program is delayed or whether it is
24 stopped?

25 A I'm not familiar enough with that. I wrote in my

1 testimony on page 3 that the federal government is
2 delaying accepting spent nuclear fuel. So that's what I
3 know.

4 MR. KESKEY: We have no other questions,
5 your Honor.

6 JUDGE FELDMAN: Thank you, Mr. Keskey.
7 Any redirect, Ms. Uitvlugt?

8 MR. ROBINSON: Your Honor, in light of
9 Mr. Keskey's questioning I have a couple questions of my
10 own, if you'll indulge me.

11 JUDGE FELDMAN: All right. I will
12 indulge you.

13 CROSS-EXAMINATION

14 BY MR. ROBINSON:

15 Q Mr. Meggison, is it correct that at least one of the
16 conclusions you lay out in your testimony is that based
17 on your review of Mr. Torrey's testimony and exhibits and
18 work papers, that you agree that if the Company gave back
19 \$23.3 million to customers, that it would be returning
20 one hundred percent of what customers had paid for costs
21 that were related to the DOE litigation?

22 A Based on our review, yes.

23 Q Now, Mr. Keskey asked you some hypotheticals. He asked
24 you to assume that Consumers Energy effectively collected
25 some element of cost from Entergy when it sold the

1 Palisades plant and then turned around and collected the
2 same element of costs through the DOE settlement. Let's
3 just assume that's true. That wouldn't change the fact,
4 would it, that customers were still getting back a
5 hundred percent of what they paid if they get the \$23.3
6 million refunded to them, right?

7 A Could you state that again? Because when you make the
8 assumption that if it was determined that costs were
9 already recovered from Entergy, then Mr. Keskey had
10 alluded to, and they were not necessarily stated per se
11 in Mr. Torrey's --

12 Q Let me back up, Mr. Meggison.

13 A O.K.

14 Q So we don't have, so we can try to clarify this.

15 Let me just start with what I thought we
16 agreed to, which was: If customers get \$23.3 million
17 returned to them, they will have gotten back one hundred
18 percent of everything they paid that's related to the
19 costs that were at issue in the DOE lawsuit. Do you
20 agree with that?

21 A Yes, I do agree with that.

22 Q Now, if it turns out that Consumers collected a dollar
23 from Entergy for something that it also collected a
24 dollar in the DOE settlement for that same thing, the
25 customers are still getting the \$23.3 million returned to

1 them, then they're still getting a hundred percent of
2 what they paid, correct?

3 A Right.

4 Q And that question was based on this hypothetical that Mr.
5 Keskey was asking you about. You don't know, do you,
6 whether Consumers Energy actually recovered some element
7 of cost from Entergy when it sold the plant and then
8 recovered that same element of cost in the DOE lawsuit
9 settlement, do you?

10 A I do not.

11 MR. ROBINSON: That's all I've got, your
12 Honor.

13 JUDGE FELDMAN: Mr. Keskey, yes, you may.

14 REXCROSS-EXAMINATION

15 BY MR. KESKEY:

16 Q If the Commission in its order in 14992 indicated a
17 policy to have any gains from the proceeds for the sale
18 of the facilities be assigned to the ratepayer so long as
19 the Company received its net book plant balances, and if
20 it were determined that the DOE settlement has resulted
21 in a further gain because they have recovered the
22 Palisades ISFSI II costs, would the Staff position be to
23 follow the Commission's order in U-14992 on that?

24 MS. UITVLUGT: Objection, your Honor.

25 This witness has indicated that he had not reviewed the

1 Commission's order in 14992. Therefore he would be
2 unfamiliar with the refund methodology and just be
3 guessing right now.

4 MR. KESKEY: Well, I did preface it with
5 "if".

6 JUDGE FELDMAN: But not, you did not lay
7 a foundation that the witness was familiar with the order
8 so as to provide or form --

9 MR. KESKEY: Well, the witness has
10 already responded to the questions about what we would
11 call a double recovery and answers to that. And I'm
12 asking him whether his answers would be different if he
13 knew the policy was that the gains from the Palisades
14 transaction were to be assigned to the ratepayer.

15 JUDGE FELDMAN: You can ask him that
16 question.

17 A If your question is would I agree if all the gains, based
18 on that transaction, would be assigned to the ratepayer
19 from the 14992, I would say yes.

20 Q (By Mr. Keskey): Now, were you aware of the fact that
21 the ratepayers paid for a substantial amount for the
22 transaction costs to undertake the Palisades transaction?

23 A I'm not aware of that.

24 Q You didn't look at that in making your recommendation?

25 A Repeat that, please.

1 Q You did not look at that factor in making your
2 recommendation?

3 A In making my recommendation for -- what costs are you
4 referring to, sir?

5 Q In your testimony you did not consider whether or not the
6 ratepayers paid for transaction costs for undertaking the
7 Palisades transfer?

8 MS. UITVLUGT: Your Honor, the witness
9 has indicated that he has not and did not refer or review
10 Case No. U-14992.

11 A I did not.

12 Q (By Mr. Keskey): No, I recognize that. I'm asking you
13 in making your recommendation or your presentation here,
14 you did not consider who paid for the transaction costs
15 for the cost of undertaking the Palisades transfer. Is
16 that right?

17 A If it's referring to 14992, I did not. Because I did
18 not -- I was not part of that case.

19 Q O.K. How about U-15425 [sic]?

20 JUDGE FELDMAN: 245.

21 MR. KESKEY: Yes, 15245.

22 JUDGE FELDMAN: That was one of Consumers
23 Energy Company's rate cases, I believe.

24 MR. KESKEY: Yes.

25 Q (By Mr. Keskey): Did you review who paid for the

1 transaction costs in that or in any other electric rate
2 case?

3 A Not U-15245, no.

4 Q O.K. Now, you indicate that -- well, your testimony and
5 your exhibit do not indicate any information about the
6 Palisades II investment?

7 A It does not.

8 Q And so therefore you didn't consider that in making your
9 recommendation?

10 A I based my testimony on the customers -- on the Consumers
11 Energy agreement. So if it's stated Palisades II on
12 there, then yes. If it didn't, then no.

13 Q Does it seem from a Staff auditing standpoint that it's a
14 little unusual that the Palisades II investment costs are
15 not detailed or reflected in the Company's case?

16 MS. UITVLUGT: Objection, your Honor.

17 JUDGE FELDMAN: I think she's objecting
18 to lack of foundation. And I think that you might have
19 gone beyond what the witness said he was familiar with.
20 I don't think you can ask him to speculate about that.

21 Q (By Mr. Keskey): Did you see anything in the Company's
22 filing, exhibits or work papers or discovery, that
23 provided a figure as to what the Palisades II investment
24 was that was -- Palisades ISFSI II investment was as
25 included in that plant in 2007 and as included in the

1 settlement?

2 A I did not, no.

3 Q Is it a little bit unusual in your judgment that that
4 item would be missing?

5 MR. ROBINSON: Your Honor, I'm --

6 MS. UITVLUGT: I'll place another
7 objection.

8 MR. ROBINSON: Unusual, ordinary,
9 routine, who cares? It's irrelevant.

10 JUDGE FELDMAN: Well, I think this
11 witness has indicated that he's not sufficiently familiar
12 with the specific cost or cost allocations that you're --

13 Q (By Mr. Keskey): Well, let's just wrap it up and say:
14 You did not look at the Palisades II investment costs in
15 making your recommendation?

16 A Correct. Yes.

17 MR. KESKEY: I have no other questions.

18 JUDGE FELDMAN: Thank you. Ms. Uitvlugt,
19 any redirect?

20 MS. UITVLUGT: No, your Honor.

21 JUDGE FELDMAN: All right. Thank you
22 very much for your testimony this afternoon, Mr.
23 Meggison. You may step down at your leisure.

24 (The witness was excused.)

25 JUDGE FELDMAN: Are there any objections

1 to the admission into entry of Exhibit S-1? Hearing
2 none, Exhibit S-1 is admitted.

3 Let's go off the record and take an
4 afternoon break.

5 (At 2:43 p.m., a ten-minute recess was taken.)

6 - - -

7 (Documents were marked for identification by the
8 Court Reporter as Exhibits MCA-1 through MCA-6.)

9 JUDGE FELDMAN: Back on the record. Mr.
10 Keskey. I believe this is the time I should turn to you
11 to call your first witness.

12 MR. KESKEY: The MCAAA calls as its first
13 witness Ronald C. Callen.

14 R O N A L D C. C A L L E N
15 was called as a witness on behalf of Michigan Community
16 Action Agency Association and, having been duly sworn to
17 testify the truth, was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. KESKEY:

20 Q Mr. Callen, could you please state your name and your
21 business address?

22 A My name is Ronald C. Callen. My business address is 505
23 North Capital Avenue, Lansing.

24 Q And did you cause to be prepared in this case direct
25 testimony and exhibits, with the direct testimony

1 comprising a cover page followed by 31 pages of questions
2 and answers, and also Exhibit MCAAA 1, Exhibit MCAAA 2,
3 Exhibit MCAAA 3, and Exhibit MCAAA 4?

4 A I did.

5 Q Subject to the ruling of the Administrative Law Judge on
6 certain lines of your testimony, and with that proviso,
7 if I were to ask you the questions in your testimony
8 would you respond with the answers therein?

9 A Yes, I would.

10 Q And do you have any changes or modifications to your
11 testimony?

12 A No, I don't.

13 Q Do you adopt these testimonies and your exhibits as your
14 evidentiary presentation in this case?

15 A I do.

16 MR. KESKEY: Your Honor, we move that the
17 testimony be bound into the record, subject to your
18 ruling, that the exhibits also be received into evidence,
19 and the witness is available for cross-examination.

20 JUDGE FELDMAN: All right. Subject to my
21 earlier, ruling the prefiled direct testimony of Ronald
22 C. Callen will be bound into the record. We will defer
23 ruling on the exhibits until the completion of
24 cross-examination.

25 - - -

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of
CONSUMERS ENERGY COMPANY
for approval of refunds to retail electric
customers and for related relief.

Case No. **U-16861**

**DIRECT TESTIMONY
AND EXHIBITS OF
RONALD C. CALLEN**

On Behalf of

Michigan Community Action Agency Association

February 14, 2012

1 **I. QUALIFICATIONS**2 **Q. Please state your name.**

3 A. My name is Ronald C. Callen.

4 **Q. What is your title and professional address?**5 A. I am consultant and technical advisor under contract with the law firm of Public Law
6 Resource Center PLLC, on behalf of the Michigan Community Action Agency
7 Association. My address is Public Law Resource Center PLLC, 505 N. Capitol Avenue,
8 Lansing, MI 48933.9 **Q. What relevant experience have you had before in this consulting role?**10 A. I served for about 25 years as a staff member of the MPSC mostly on electric issues and
11 before that approximately 15 years as a physicist in the research and development of
12 nuclear reactors. Since my retirement from the MPSC in 1997, I have served as a
13 consultant and expert witness concerning rate regulation issues involving spent nuclear
14 fuel ("SNF"). My qualifications are more specifically listed in **Exhibit MCAAA-1** filed
15 with this testimony.16 **Q. With regard to the issues before you in this case, what were some of your**
17 **responsibilities at the MPSC?**18 A. I was responsible for the investigation of the federal high-level nuclear waste program
19 operated, according to law, by the U.S. Department of Energy ("DOE"). I prepared
20 analyses of the formal long-range plans of the utilities for dealing with the federal
21 program and the storage at reactor of spent fuel. I investigated the storage of SNF at each
22 Michigan nuclear power plant, utility plans for continued storage at the plant sites, utility

1 actions to seek federal removal, and utility plans for plant decommissioning including the
2 relation between decommissioning and SNF storage. In addition, I advised the
3 Commission on nuclear waste and nuclear power matters and represented the
4 Commission and Staff at the National Association of Regulatory Utility Commissioner
5 (“NARUC”) meetings. With the assistance of another person, I issued a biennial
6 statement of the payments made by U.S. ratepayers to the federal government for the cost
7 of the federal waste disposal program. I helped form and was a Michigan representative
8 to the Nuclear Waste Strategy Coalition (“NWSC”), a group of commissions, utilities,
9 and state attorneys general from over 20 states who worked together to assure that,
10 ultimately, high level nuclear waste is disposed, and in a cost-effective way. I served as
11 technical expert to the Attorney General of Michigan for litigation in the U.S. Court of
12 Appeals and an appeal to the U.S. Supreme Court; we represented over 50 state agencies
13 from 35 states in seeking court relief to enforce the duties of the DOE to commence
14 acceptance of SNF by the statutory deadline established in the Nuclear Waste Policy Act
15 of 1982 (“NWPA”).

16 **Q. Have you worked in the area of nuclear energy or waste disposal before your**
17 **Commission employment?**

18 A. Yes, I have. After earning a Master’s degree with a research thesis in nuclear physics, I
19 worked on advanced nuclear reactor physics of fast neutron reactors as an experimenter
20 determining power density and neutron flux parameters on a mock-up nuclear reactor, a
21 critical experiment fueled with weapons grade enriched uranium. Later I became the
22 Senior Physicist. In that capacity, I designed and analyzed experiments run for me in the

1 facility by an operations crew. I also was officially qualified with the U.S. Atomic
2 Energy Commission as an operator of the critical facility.

3 **Q. Have you had further relevant experience?**

4 A. Yes, after the experience I just mentioned, I served as a physics test experimenter for the
5 Enrico Fermi I Fast Breeder Reactor. I conducted experiments designed to investigate
6 the reactor power and nuclear core thermal and physics characteristics. I also assisted
7 with the investigation of the fuel melting incident, its analysis and measures to prevent
8 reoccurrence and on means to detect similar abnormalities. Later, I became Assistant
9 Project Engineer in charge of the design and use of a new nuclear fuel for the Fermi. In
10 that capacity, I was in charge of the development of the associated Environmental Impact
11 Statement. Later, I was responsible for licensing following the end of the plant's
12 operations and the conversion of the plant to decommissioned status.

13 **Q. What have been related experiences in your duties at the Commission?**

14 A. I have been an investigator of nuclear reactor operations, especially as to licensing
15 matters subject to the authority of the U.S. Nuclear Regulatory Commission ("NRC") as
16 well as with respect to the NRC's responsibility for review and licensing the federal
17 effort to dispose of SNF. I also served as liaison between the MPSC and the NRC.

18 **Q. With regard to nuclear waste disposal, what have been some of your relevant
19 experiences?**

20 A. I have participated in most of the investigation that this Commission and Staff have
21 conducted on this subject during the period 1975 to 1997, and have been involved in
22 many conferences and cases involving these issues from 1997 to the present. For

1 example, I served as a member of the Governor's Advisory Task Force on High Level
2 Nuclear Waste Disposal in 1975, and on at least two later governor's committees. I
3 served as an advisor and contributor to the Commission's deliberations leading to the
4 formation of the NARUC program to investigate and correct the waste program by
5 formation of its Nuclear Waste Disposal Subcommittee. I was active in some of the
6 development of a state low-level waste initiative. I served as NARUC Staff
7 Subcommittee Chairman for many years and, for about ten years, as primary advisor to
8 the Chairperson of the NARUC Subcommittee on Nuclear Waste Disposal and to the
9 Chairperson of the NARUC Committee of Electricity.

10 In a related area, I have had experience in the design, writing and review of
11 environmental impact statements, both state and federal ones. I was responsible for the
12 environmental review and support of the decision to approve certificates for pipelines by
13 the Commission. I served as the Commerce Department's representative to the Michigan
14 Interagency Environmental Review Committee and, for several years, chaired the
15 Committee.

16 **Q. What has been some of your experience at the national level with respect to nuclear**
17 **waste disposal?**

18 A. I helped design the NARUC Nuclear Waste Program Assessment Office in Washington,
19 assisted in raising the funds for it and became its first Office Director, serving two years
20 in Washington on loan from the MPSC. In that capacity, I investigated the federal
21 program, and recommended action to the NARUC. I served as the NARUC's
22 representative to the federal program, including meetings with the DOE, the NRC, the
23 U.S. Nuclear Waste Technical Review Board ("TRB") and the U.S. Office of Technology

1 Assessment (“OTA”). I also was a representative to workshops of the DOE on strategic
2 issues, mission plan review and contingency planning.

3 In addition to my service for NARUC in Washington and with the Michigan
4 Attorney General in litigation, I helped form under the aegis of the National Governors
5 Association the first committee of state representatives to examine federal action on
6 nuclear waste disposal. I also created many statements for the NARUC Subcommittee
7 delivered before Congressional committees and a national conference on nuclear waste
8 disposal, and served as a Commission and NWSC representative to the U.S. Congress in
9 support of corrective legislation. In this role, I have met with more than 50
10 Congressional members and/or their staffs, appeared before a number of federal and state
11 bodies, attended many conferences and work study efforts, and have spoken at a number
12 of them. More recently, I helped set up the Wye River Dialogue on nuclear waste
13 disposal for the Aspen Institute and served as one of Dialogue participants.

14 **Q. What are some of the organizations you have spoken before?**

15 A. They include the Technical Review Board (TRB), established by the Nuclear Waste
16 Policy Act of 1982, 42 U.S.C. § 10101, *et seq.*, the Western Interstate Energy Board, the
17 Governor’s Advisory Committee of Vermont, the Radioactive Waste Review Board of
18 the National Academy of Science, the National Conference of State Legislators, the
19 National Conference on Radioactive Waste Transportation and the Decision Makers’
20 Summit on Radioactive Waste Disposal.

1 **Q. Have you visited nuclear facilities?**

2 A. I have made repeated trips to all the nuclear power plants in Michigan. I have seen their
3 storage pools for SNF and the dry cask storage facility at Palisades. Several times, I have
4 been to the Yucca Mountain site under investigation as the repository for SNF disposal
5 and have been in the exploratory tunnel. I have been in a mine adjacent to and with the
6 same geology as the Waste Isolation Pilot Plant near Carlsbad, New Mexico. I have been
7 at the Argonne National Laboratory, both at Argonne IL and the reactor test area near
8 Idaho Falls, Idaho and the Hanford Nuclear Facility of the DOE near Richland,
9 Washington. I have visited the then-proposed site for SNF storage by the Mescalero
10 Apache Tribe in central New Mexico and the proposed site of the SNF storage facility by
11 the Skull Valley Goshute Tribe in Utah. I have visited the waste disposal facility at
12 Hanford, Washington.

13 **Q. Have you done research on this issue?**

14 A. Yes. I have reviewed many reports, articles, and data over a long period of time and
15 created an extensive library on the subject. In addition, I have conducted many
16 interviews both in person, and by telephone. I have participated in workshops,
17 conferences, and discussion groups. As part of my assignments at the PSC, I reviewed
18 decommissioning reports and plans for several nuclear utilities.

19 **Q. Have you written on this subject?**

20 A. Yes, I have. I was the primary contributor to the original report to the Michigan
21 Governor in 1975. I also issued summary assessments and Congressional testimony for
22 the NARUC and this Commission, in my role as Executive Director of the NARUC

1 Washington Office. I issued a periodic newsletter on the waste program and authored a
2 comprehensive analysis at the end of my Washington Office directorship. I authored a
3 paper for the National Academy of Sciences. Mike McCarthy, of the Minnesota
4 Department of Public Service, and I prepared for the NWSC an analysis of the
5 fundamental problems of the waste program, titled *Redesigning the U.S. High Level*
6 *Nuclear Waste Disposal Program for Effective Management*, dated August 1994. I also
7 authored a published article, entitled *Congress' Nuclear Waste Contract with America -*
8 *Where Do We Go From Here?*, which appeared in "*The Electricity Journal*," Volume 8,
9 No 5, dated June 1995 (included as Exhibit MCAAA-4 to my April 14, 2011 pre-filed
10 Testimony and Exhibits in Consumers Energy's PSCR Plan Case U-16432).

11 **Q. Have you made public presentations on nuclear waste issues?**

12 A. Yes. In addition to those mentioned earlier, I have made presentations before the TRB,
13 the DOE's Strategic Principles Seminars, the National Academy of Sciences, the
14 National Conference of State Legislators, the Western Interstate Energy Board, the
15 annual nuclear waste program of the Institute for Nuclear Materials Management and, the
16 Annual Forbes Conference on the Environment.

17 **Q. Have you appeared as a witness in proceedings before the MPSC?**

18 A. Yes. I have testified or filed testimony or comments in several MPSC dockets regarding
19 nuclear waste issues, and most recently, in U-10702, U-11314, U-12121, U-12613,
20 U-12615, U-12725, U-13808, U-13917, U-13919, U-14150, U-14701, U-14992,
21 U-15244, U-15245, U-15645, U-15986, U-16191, U-16434, U-16472, and U-16794. I
22 also testified in the consolidated electric restructuring cases, U-12649, U-12650, U-12651
23 and U-12652, concerning nuclear waste issues. I also assisted with the preparation of a

1 complaint filing regarding SNF issues in U-13771, and, as noted, testified in U-14992
2 involving the sale and transfer of CECo's ownership of the Palisades Nuclear Plant, and
3 SNF sites at both Palisades and at the Big Rock Nuclear plants. I also filed pre-filed
4 testimony and exhibits in Consumers Energy Case No. U-16432, involving the
5 Company's 2011 PSCR Plan Case (which was stricken by the Administrative Law Judge
6 prior to presentation as being beyond the scope of that case) and have filed pre-filed
7 testimony and exhibits in Detroit Edison's pending PSCR reconciliation case,
8 U-16047-R.

9 **Q. Have you participated in other MPSC cases dealing with Act 304 or other electric**
10 **matters?**

11 A. Yes. As a MPSC staff member, I participated in cases in the 1980s and early 1990s
12 dealing with various electric issues, and in particular Act 304. This not only included
13 undertaking analysis in various cases and numerous assignments, but also participating as
14 a witness in numerous Act 304 cases. These matters involved most cost and rate issues
15 under Act 304 wholly aside from nuclear waste issues.

16 II. DIRECT TESTIMONY

17 **Q. What is the purpose and subject of your testimony in this case?**

18 A. The purpose of my testimony is to:

- 19 1. Respond to the application of Consumers Energy Company (CECo) in this case,
20 in conjunction with MCAAA Witness William A. Peloquin, CPA.

- 1 2. Present facts and background regarding CECo's administration and enforcement
2 (or lack thereof) of its Standard Contract,¹ with the federal government regarding
3 the disposal of spent nuclear fuel (SNF) that CECo generated in Michigan, and
4 also present facts concerning the spent nuclear fuel (SNF) contract fees that
5 Consumers Energy Company (CECo) has paid to the federal government under
6 the Standard Contract adopted pursuant to the Nuclear Waste Policy Act², and
7 related factual information;
- 8 2. Demonstrate that CECo has not established, or even attempted to meet its burden
9 of proof to establish, that it has been reasonable and prudent in administering and
10 enforcing its Standard Contract and to protect the fees paid and to save the
11 essential bargain established by the NWPA and Standard Contract for the disposal
12 of Spent Nuclear Fuel (SNF) by the federal government in exchange for the
13 contract fees collected; this subject is directly relevant to the Commission's
14 decisions to be made in this case;
- 15 3. Recommend that the Commission adopt ratemaking remedies to address the
16 situation described above including a rate disallowance or the establishment of an
17 SNF fee trust, to protect ratepayers who have paid for the SNF fees for what has
18 turned out to be a default by the federal government in performing its SNF
19 disposal duties.

¹ *The Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. Part 961.*

² *Nuclear Waste Policy Act of 1982, 42 USC § 10101 et seq. (The NWPA).*

1 4. Recommend options for the Commission to employ to: protect the state's
2 ratepayers, taxpayers, and the public's long range interests; and to address the
3 federal government's failure to meet its obligations concerning high level nuclear
4 waste; and to better prepare Michigan (and the utility and its ratepayers) arising
5 from the federal government default in meeting its obligations. In this respect, I
6 assert that the Commission should continue to adhere to its November 4, 2010
7 order in U-16191 ordering CECo to place the approximate amount of \$163
8 million of the "DOE Liability" in trust. In addition, I also propose that CECo be
9 required to also place in this trust, or a companion trust, the entire amount of fees
10 paid to the federal government (and collected from ratepayers) for the period of
11 April 7, 1983, until the transfer of CECo's nuclear facilities to Energy Nuclear
12 Palisades LLC (ENP) on or about April 10, 2007.

13 My testimony focuses upon outlining the necessity and appropriateness of the
14 Commission adopting ratemaking remedies to protect ratepayers with respect to
15 funds CECo collected from ratepayers for SNF disposal. It is essential that my
16 remedy be seen in light of the stunning decision of the President at the beginning
17 of 2009 and thereafter to totally demolish the high level nuclear waste disposal
18 program. This proposed order is necessary because the nation is in reality without
19 any disposal program at this time.

20 The issue and my proposed remedies relate to the fees that CECo collected from
21 ratepayers to defray the cost of SNF disposal, the federal program that has been
22 shut down. These fees represent SNF contract fees collected by CECo from
23 ratepayers under the Standard Contract, 10 CFR Part 961, and the Nuclear Waste

1 Policy Act of 1982 (“NWPA”), 42 USC 10101, *et seq* for the purpose of the
2 federal government developing and operating a SNF disposal facility at Yucca
3 Mountain, Nevada. The NWPA required, in return for these payments, that the
4 U.S. Department of Energy (DOE) design and build a repository for disposal of
5 SNF and HLNW and begin acceptance of these materials by January 1, 1998, a
6 duty which DOE has defaulted upon.

7 **Q. Dealing with your first issue, please provide your estimate of the SNF contract fees**
8 **that CECo paid during the overall term of its Standard Contract with the DOE?**

9 A. CECo has collected SNF contract fee costs from ratepayers both in base rates and in Act
10 304 rate factors as demonstrated by numerous past cases, including most recently
11 U-15645 and U-16191. It is now undisputed based upon evidence in these past cases that
12 CECo collected \$163 million in SNF contract fees plus associated interest for nuclear
13 generation up to April 7, 1983.

14 I have also estimated (as discussed *infra*) that CECo subsequently collected
15 approximately \$260 million (including interest) under Act 304 in SNF fees from the
16 effectiveness of Act 304 until it sold its nuclear facilities to Entergy Nuclear Palisades
17 (ENP) on April 10, 2007.

18 Based upon testimony and exhibits that I presented in CECo electric rate cases U-16191
19 and U-16794, and also that I filed in CECo's 2011 PSCR Plan case, U-16432, I am
20 sponsoring herein **Exhibit MCAAA-2** which shows SNF contract fee payments made by
21 CECO through June 30, 2006, and ENP fee payments in 2007. I have used this
22 information to calculate CECO's estimated fee payments (plus interest) during the period
23 April 7, 1983 through April 10, 2007 (when CECO sold its nuclear facilities). I am also

1 sponsoring **Exhibit MCAAA-3** which shows SNF contract fee payments and the "one-
2 time fee" (for pre April 7, 1983, nuclear generation), and interest, by state, as calculated
3 by the Nuclear Energy Institute (NEI). A similar report of SNF fee ratepayer payments
4 issued by the MPSC Staff is attached as **Exhibit MCAAA-4**.

5 Given the large duplicative capital and expenses that have been charged ratepayers in
6 rates as a direct result of the federal government's long-term breach of its legal mandate,
7 MCAAA proposes in this case to protect ratepayers with respect to the SNF fees charged
8 by CECO in rates prior to April 7, 1983 and for the subsequent period until it sold its
9 nuclear facilities on April 10, 2007.

10 **Q. Please describe why you have concluded that CECo in this case has not met its**
11 **burden of proof to establish that it has been reasonable and prudent in**
12 **administering and enforcing its contract, in protecting the fees paid, and in saving**
13 **the reciprocal bargain established by the NWPAA and the Standard Contract?**

14 A. The evidence is clear that CECo has paid significant sums in SNF contract fees since it
15 generated SNF, and has since included the SNF fees in its base and PSCR rates, despite
16 the breach of the SNF disposal contract by the federal government. It is also clear that
17 CECo by its filing in this case has failed to provide evidence of adequate responsive
18 action that CECo has or is undertaking to protect the SNF fees it paid, to enforce the
19 contractual bargain, except to propose that the ratepayers be left with no SNF disposal for
20 CECo's SNF generated waste, and that ratepayers simply abandon any remedy with
21 respect to the SNF contract fees collected in rates. In this respect, I note that CECo has
22 paid the federal government over \$163 million in "one-time" fees (including interest) for

1 pre-April 7, 1983 nuclear energy generation even though it was imprudent and
2 unreasonable for CECo to make said payment, for several reasons, such as:

3 (i) CECo was under no obligation to make the one-time fee payment because
4 the obligation to pay was not due until the federal government commenced accepting its
5 SNF for disposal, an event that now may never occur;

6 (ii) the \$163 million in contract fees was collected from CECo's ratepayers
7 based upon the premise that the payment of the fees was for the specific purpose of
8 providing for SNF disposal, a contractual obligation that the federal government has
9 breached;

10 (iii) the Commission in more than one order in U-15645 and U-16191 has
11 provided for CECo to place the \$163 million ratepayer-supplied funds in trust, which
12 remedy was accompanied by Commission findings in U-16191 that the payment of the
13 DOE Liability to the federal government would be imprudent; nevertheless; CECo
14 subsequently defied these Commission orders and findings by paying the DOE liability to
15 the federal government in July 2011;

16 (iv) CECo has separated the \$163 million in financial resources from the trust
17 remedy -- a remedy that would have protected these funds for the expressed and specific
18 purpose for which they were collected in the first instance -- to provide SNF disposal;

19 (v) CECo's payment of the \$163 million DOE Liability to the federal
20 government rewards the federal government for its contract failure; in inexplicable
21 contrast to the federal Court holdings declaring that the payment of the fees was a
22 reciprocal obligation to the federal governments disposing SNF, CECo has in July 2011

1 nevertheless thus paid the on-time fee to the federal government. CECo in 1983 selected
2 the option to hold and not pay the DOE Liability (“one time fee”) to the federal
3 government until (and unless) the federal government started to dispose of its SNF. Now,
4 when the federal government has reversed from a delay in performance of SNF disposal
5 to an outright repudiation of contract performance of SNF disposal under the Standard
6 Contract, and has also undertaken many actions to disable its future ability to perform
7 SNF disposal -- CECo now in this context has rewarded the federal government for its
8 SNF disposal contract failure by nevertheless paying the federal government the entirety
9 of the \$163 million DOE Liability, and without getting anything in return. This
10 constitutes imprudent and unreasonable conduct by CECo.

11 **Q. Please explain why the current situation involving the federal spent fuel disposal**
12 **program under the NWPA and the Standard Contract justifies the remedies you are**
13 **proposing.**

14 A. The DOE was found by the federal courts in 1996 and 1997 to have violated its duty to
15 commence SNF disposal by January 1998. The United States Court of Appeals (D.C.
16 Circuit) in reversing and vacating DOE's "Final Interpretation" in *Indiana Michigan*
17 *Power Company v DOE*, 319 US App DC 209, 88 F3d 1272 (DC Cir 1996) held that
18 there was a reciprocal obligation between payment of the SNF fee and DOE's
19 performance of its SNF disposal duties:

20 "...we hold that section 302(a)(5)(B) creates an obligation in DOE,
21 reciprocal to the utilities obligation to pay, to start disposing of the
22 SNF no later than January 31, 1998."
23

1 The Court's ruling above was reinforced in *Northern States Power Company et al v DOE*,
2 128 F3d 753 (1997). The Court in that case issued its decision adopting a partial
3 mandamus order (128 F.3d at 761) reiterating its findings in *Indiana Michigan . . .* "that
4 the NWPA imposes an unconditional obligation on the Department to begin disposal of
5 the SNF by January 31, 1998."

6 Despite these rulings, the current situation is that there is **no** federal spent fuel disposal
7 program, with the sole exception of the continued collection by the federal government of
8 the 1 mill per Kwh fee. All available information at this time demonstrates that the
9 Administration and the DOE have wholly repudiated their statutory and contractual
10 duties to undertake SNF disposal. Despite major progress demonstrated by the filing of a
11 complete License Application for the Yucca Mountain repository in 2008, the incoming
12 Administration acted in 2009-2010 to end the repository and SNF disposal program by
13 terminating all project employees and contractors, by zeroing out all appropriations for
14 the program, by withdrawing applications for water rights for the project, by terminating
15 transportation planning, and even closing the statutorily established Office of Civilian
16 Radioactive Waste Management (OCRWM) and assigning DOE staff to other duties.
17 The DOE even filed a motion in its license application proceeding before the NRC to
18 withdraw the license application for Yucca Mountain with prejudice. This represents a
19 total loss of Yucca Mountain licensing expenses of approximately \$8-10 billion in
20 ratepayer-supplied funds combined with extensive DOE efforts to assure the program
21 cannot be restarted.

22 The dismal current situation was the subject of extensive discussion by the Nuclear
23 Waste Strategy Coalition (NWSC), a group comprised of state regulatory commissioners,

1 nuclear utilities, public interest groups, and municipal and tribal members from numerous
2 states, at their meetings held in Washington DC on March 28-29, 2011. I attended and
3 participated in these discussion meetings. Invitees at these meetings included, among
4 others, a key representative from the DOE, as well as an attorney representing many
5 utilities before the United States Court of Federal Claims on the matter of federal
6 damages.

7 The DOE representatives included Mr. David Zabransky, Director, Office of General
8 Counsel, Department of Energy, an official of the DOE responsible for nuclear matters.³
9 Mr. Zabransky stated unequivocally that DOE had closed down the repository program,
10 had discontinued the Office of Civilian Radioactive Waste Management (OCRWM), had
11 removed all personnel from the program, had zeroed out all appropriation requests for the
12 program, and would not spend any funds on that program that are or may become
13 available. Mr. Zabransky also stated that no one within DOE was even assigned the task
14 of developing a contingency plan to revive the program. Thus, no resources for the
15 program exist and the program has ceased to exist.

16 To further confirm the above situation, the DOE's proposed budget for FY 2011 for SNF
17 disposal program is zero, demonstrating that the Administration proposes to no longer
18 provide a budget for waste disposal. On an unjustifiable basis, the Administration and
19 DOE have refused to terminate or suspend the 1.0 mill/ Kwh fee charged to utilities and
20 paid by ratepayers for commercial SNF disposal fees. At present, the only aspect of the
21 SNF disposal program under the NWPA that remains is the payment of this fee, which
22 now confirms the Court's observation in *Indiana Michigan Power v DOE*, 88 F 3d 1272

³ The letter included by CECo in this case as Exhibit A-2 was signed by Mr. Zabransky.

1 (1996) that DOE's position at that time should be characterized as...."Here is air; give me
2 money" (88 Fd3 1272, 1276).

3 The attorney representing numerous utilities in the federal Court of Claims, Mr. Jerry
4 Stouck, indicated during his presentation to the NWSC in March 2011 that a "standard
5 settlement agreement" may be developed due to the numerous Court of Claims decisions
6 and settlements that have been entered in that Court. These decisions have now resolved
7 key issues relating to the calculation of damages which provide a roadmap to formulate
8 damages for purposes of entering into settlements. For example, the Court of Claims and
9 the appellate Courts have resolved issues relating to the SNF "take rate" that DOE would
10 have performed if it had performed its SNF disposal duties under the Standard Contract.
11 With these and other issues now resolved by binding Court determinations, a more
12 uniform settlement framework is now possible and may be forthcoming. ~~Counsel Stouck~~
13 ~~described the key points of what is being discussed for purposes of a standard settlement~~
14 ~~agreement, as follows:~~

- 15 ~~(1) — A standard formula for calculating and paying past damages caused by~~
16 ~~DOE's breach on and after January 31, 1998;~~
- 17 ~~(2) — Using the standard formula to calculate ongoing and future damages on an~~
18 ~~annual basis, which will be determined on an administrative basis and paid~~
19 ~~each year;~~
- 20 ~~(3) — Continued use of the process described in (1) and (2) above until 2013,~~
21 ~~when the next Administration takes office, to then determine whether to~~
22 ~~continue with this settlement approach, with the utilities retaining the~~
23 ~~option at that time or thereafter to declare a "total breach" which then~~
24 ~~would give rise to a claim by utilities for a refund of all past fees they paid~~
25 ~~under the Standard Contract;~~
- 26 ~~(4) — The utilities also retain the right to file a damage suit every six (6) years~~
27 ~~(corresponding to the statute of limitations) to claim incremental or~~
28 ~~additional damages attributable to DOE's breach of the Standard Contract.~~

29

1 ~~The above situation demonstrates that a total breach of the Standard Contract has~~
2 ~~occurred, and secondly, that all or most utilities (with the exception of CECOs) with cases~~
3 ~~filed before the Court of Claims have preserved the right to collect past, ongoing, and~~
4 ~~future damages, and to seek a refund of past fees paid to the federal government under~~
5 ~~the Standard Contract.~~

6 Recent events that have occurred before other agencies having a responsibility with
7 respect to nuclear waste matters provides no solace, including the following:

- 8 • On February 20, 2011, the NRC issued a plan for a long-range update to its Waste
9 Confidence Decision (WCD) of December 23, 2010 for storage of SNF for up to 60 years
10 beyond the licensed life of each nuclear plant, including extensions. NRC estimates at
11 reactor storage may last 100 to 300 years.

- 12 • On June 6, 2011, the NRC Inspector General released a scathing report concerning
13 the recent actions of the NRC Chair, including his actions to constrict and submerge staff
14 conclusions on Yucca Mountain. Such actions were detailed in congressional testimony
15 by NRC Staff.

- 16 • On July 29, 2011, the Blue Ribbon Commission (BRC) on America's Nuclear
17 Future issued its draft final report to begin a national public review before issuance of a
18 final report. The report accedes to the DOE Secretary's demand that the BRC not
19 examine the efficacy of the Yucca site.

- 20 • On September 9, 2011, after extensive delay, the Nuclear Regulatory Commission
21 (NRC) issued its decision on DOE's application to abandon pursuit of a license for

1 Yucca. The result was a 2-2 split, with one Commissioner recusing himself from the
2 vote.

3 • On September 30, 2011, the Atomic Licensing Safety Board (ALSB) confirmed that
4 this NRC impasse upholds the Board's June 29, 2010 decision that DOE cannot withdraw
5 its Application for the Yucca Mountain repository license. However, as a practical
6 matter, the NRC's September 9, 2011 does not provide for future proceedings in the case.

7 • On January 26, 2012, the BRC issued its final report regarding SNF disposal
8 options, which reinforced the need for a geological repository, but which again avoided
9 any discussion of the Yucca Mountain repository site.

10 **Q. What actions has CECo undertaken in response to the dramatic change of**
11 **circumstances involving the federal SNF disposal program?**

12 A. CECo has rewarded the federal government for its failures by entering the settlement that
13 is subject to review in this case. CECo has presented no information as to why it has
14 recently proceeded to enter into a settlement with the federal government that would: (1)
15 pay \$163 million collected from ratepayers for SNF disposal when the federal
16 government has refused to undertake SNF disposal and has now repudiated its own
17 Standard Contract; (2) would effectively waive CECo's ability to file future law suits
18 every six (6) years for incremental damages arising from the federal default; (3) waived
19 or failed to preserve the right to seek the refund or restitution of past paid SNF contract
20 fees, in contrast to the approach undertaken by other utilities to preserve said remedy; (4)
21 fails to adhere to or take advantage of recent holdings and findings by this Commission,
22 and of the federal Courts.

1 An important point to remember is that CECo filed its damages case in 2002 and had
2 proceeded through discovery, pre-trial motions, and had its case prepared for hearings
3 scheduled for a few weeks in June 2011. CECo also had the benefit of case precedent
4 compiled in numerous other utility damages suits in the federal Court of Claims (and
5 appellate Courts) that resolved several issues in favor of utility claims on similar issues,
6 and which paved the way for success by CECo. In these circumstances CECo may have
7 been awarded the same \$120 million, or perhaps more, by completing its litigation
8 through hearings as many other utilities have done. CECo should not have paid the \$163
9 million to the federal government for (primarily) the convenience of obtaining the
10 damages by settlement rather than by obtaining the damages via completion of hearings.

11 **Q. What ratemaking recommendations are you making in this case?**

12 A. The situation described above demonstrates that a total breach of the Standard Contract
13 has occurred, and secondly, that all or most utilities with cases filed before the Court of
14 Claims have or are preserving the right to collect past, ongoing, and future damages, and
15 also to seek refund of past fees paid to the federal government under the Standard
16 Contract. Given this situation, it is now important to impute to CECo in this case the
17 same measure of remedial relief and to protect ratepayers by preserving damages and fee
18 refunds that should go to ratepayers. ~~It would appear that CECo had a valid claim for
19 past and ongoing damages and for refunds of all SNF fees, at least for the period until it
20 sold and transferred its nuclear facilities and SNF sites to Entergy Nuclear Palisades LLC
21 (ENP) on or about April 10, 2007.~~ In turn, all costs that were paid by ratepayers but
22 which comprise the basis for damage awards, and all SNF fees paid by CECo ratepayers
23 until the above transfer of facilities in 2007, should be refunded to ratepayers or placed

1 into a SNF trust as ordered by the Commission in its November 4, 2010 order in
2 U-16191. This remedy is now ripe for implementation in view of CECO's transfer of the
3 facilities as of 2007, and also the 2009-2010 federal repudiation of its SNF disposal
4 duties, which comprise major changed circumstances. Any failure by the Commission to
5 order and implement these remedies would result in an improper windfall to the federal
6 government (at the unjustified expense of CECO's ratepayers), particularly considering
7 the federal contract breach. Alternatively, a windfall to CECO also would occur to the
8 extent CECO obtains damages obtained in the settlement by paying the federal
9 government the \$163 million "one-time fee" as a prerequisite to obtaining the damage
10 settlement.

11 **Q. Please describe the downward rate adjustment that you propose to provide refunds**
12 **or credits to rates, or alternatively to fund the trust with the equivalent of contract**
13 **fee payments paid by ratepayers in rates.**

14 A. I recommend that the Commission in this case make a downward rate adjustment to
15 refund the contract fees collected under the failed SNF disposal contract or to fund the
16 SNF disposal trust. The amount of this rate adjustment would not be a cost included in
17 CECO's cost of service for ratemaking purposes (as this would cause ratepayers to pay
18 twice for the same fees). Instead, it must be a credit or downward rate adjustment to
19 ensure that CECO's shareholders are paying for (and thus refunding) the fee payments
20 made by ratepayers for SNF disposal under the Standard Contract, which is now the
21 subject of the federal default followed by CECO's substantial waiver of contract remedies
22 as noted earlier.

1 **Q. Please indicate the calculation of the amount of the SNF fees paid by ratepayers,**
2 **and the amount of the rate adjustment you are recommending for refunds or to**
3 **fund the trust.**

4 A. As noted earlier, the Commission has already adopted a trust remedy relative to nuclear
5 generated and sold prior to April 7, 1983, which has been described in various recent
6 cases as the “DOE Liability”, which totals approximately \$163 million. The Commission
7 should adhere to this remedy which the Commission ordered in its unappealed orders in
8 case No. U-16191.

9 An additional amount for SNF generated after April 7, 1983, now in excess of \$100
10 million, was paid to the federal government in fees on and after the 1983 date until the
11 date that CECO transferred or sold its nuclear facilities and SNF sites to ENP on or about
12 April 10, 2007. I have calculated an estimated amount for fees paid (and interest
13 accrued) during this period from reports obtained from the MPSC Staff, which I have
14 sponsored as **Exhibit MCAAA-2**.⁴

15 My calculation of the total principal and accrued interest to be amortized into the trust is
16 an estimate because of the unavailability of some reports for the year 2006 and 2007. I
17 have included in **Exhibit MCAAA-2** a report for the quarter ending June 30, 2006 which
18 shows total SNF fee principal payments at that time of \$96,770,210 and a report for the
19 quarter ending September 30, 2007, which report shows total principal payments for the
20 quarter ending June 30, 2007 of \$102,131,532 (see top line of Report). The amount of

⁴ These reports are obtained by the MPSC Staff from DOE reports for regulatory purposes, and has been regularly used by the Staff now and while I was on the Staff, and ever since the beginning of the federal program under the NWPA and Standard Contract.

1 principal fee payments applicable to the period ending April 10, 2007, the closing date of
2 the CECo/ENP transactions, can be estimated as follows.

Fee payments through 6/30/07	\$102,131,532
Minus fee payments for 2nd Quarter 2007 ⁵	(\$1,541,033)
Estimate fee payments for 10 days of April 2007 ⁶	\$169,514
Total	\$100,760,013

3
4 The above figures represent principal fee payments only. Accumulated interest should be
5 added to this figure at least at the T-Bill rate used by the Nuclear Waste Fund on fees
6 paid. Pending further documentation to supplement the record, a rough estimate of the
7 interest accumulated on these fee payments can be derived by looking at the portion of
8 the total Nuclear Waste Fund that comprises accumulated interest, which I estimated and
9 described in CECo's pending electric rate case (T-1604-1606) as follows:

10 The balance in the Nuclear Waste Fund as of 9/30/2010 was \$31.929
11 billion, of which \$14.165 billion comprised accumulated interest (or
12 44.4% interest), with fee payments comprising \$17.764 billion. Another
13 possible benchmark is to compare the portion of the DOE Liability (for
14 pre-April 1983 fee debt) of \$163 million that constitutes principal fee
15 obligations (\$44,286,908, or 27.2%) with the portion representing
16 accumulated interest. (The remainder of the \$163 million, or 72.8%).

17 The above interest figures provide a range of "outlier" benchmarks. The
18 portion of the DOE liability that comprises accumulated interest is most
19 likely higher than the accumulated interest that would be assignable to the
20 fee payments made to the Nuclear Waste Fund between April 7, 1983 to
21 April 10, 2007. This is because the interest portion of the DOE Liability
22 accumulated on the entirety of the \$44.286 million of fee principal on and
23 after April 7, 1983, whereas the \$100.760 million principal amount of fees
24 paid to the NWF since that date accumulated interest on a gradually
25 ascending amount of principal for the 24 or so years that payments were

⁵ The reports in **Exhibit MCAAA-2** shows fee payments of \$1,541,033 for the 3rd Quarter of 2007; thus same figure is used to estimate the fee payments for the 2nd Quarter of 2007;

⁶ This estimate for the first 10 days of April 2010 is calculated using $\$1,541,033 \times 11\% = 169,514$.

1 made. On the other hand, the amount of accumulated interest associated
2 with CECo's post-1983 payments to the NWF would likely reflect a higher
3 percent of the total (principal plus interest) compared to the overall
4 percentages reflected in the NWF. This is because the national averages
5 represented by the NWF includes many payments by many "younger"
6 nuclear facilities compared to CECo, which had both its nuclear plants in
7 full operation when the NWF started in 1983. A median of the interest
8 portion of 72.8% for the DOE Liability and 44.4% for the NWF would
9 equate to 58.6%. Using this figure for illustration purposes, the total
10 estimate of principal fee payments plus accumulated interest applicable to
11 the period ending April 10, 2007 is \$259,903,000 ($\$259,903,000 \times 41.4\%$
12 $= \$100,760,000$).

13 Acknowledging necessary corrections for exact data, the total amount
14 above should also accrue interest for the period since April 10, 2007,
15 which can be estimated and supplemented in the record. The overall
16 amount would have to be calculated as of the date of the Commission's
17 order determining the amortization period and amounts to be paid into the
18 trust year. The amortization should provide for interest to be added until
19 the total amount is either fully refunded to ratepayers, or attentively, the
20 full amount is placed in the SNF disposal trust.

21
22 It is my recommendation that the total amount paid in fees plus accrued interest be
23 amortized via a downward rate adjustment for refunds or placement into the trust fund
24 over a reasonable time period, such as 10 years or less.

25 Another issue is what interest rate should also be paid on the funds being amortized as
26 refunds or for contributions into the trust (and until the trust is fully funded). One option
27 is to use the federal T-Bill rate used by the Nuclear Waste Fund on an ongoing basis.

28 Ratepayer refunds, or alternatively, contributions to the trust, should receive an interest
29 rate no less than what the federal government has used to accumulate interest in the
30 Nuclear Waste Fund.

1 **Q. What guidelines or precedent exists relative to the alternative trust remedy you have**
2 **recommended?**

3 A. The terms of the SNF fee fund trust could be very similar to the terms for external trust
4 governing decommissioning funds as established by previous Commission orders. The
5 escrow also would earn interest and be subject to the same requirements and protections
6 as external decommissioning funds.

7 **Q. Please summarize the reasons why you feel that CECO's stockholders should be**
8 **required to make the recommended refunds to ratepayers or to place the subject**
9 **funds into a trust, equivalent to all SNF fees paid by ratepayers in rates during the**
10 **entire period that CECO generated and sold nuclear energy.**

11 A. There are several reasons for the Commission to adopt this remedy. First, the cost of the
12 SNF fees were included in rates and collected from ratepayers for a very specific and
13 defined purpose—namely, for SNF disposal as defined in the NWPA and Standard
14 Contract. The fees were not collected to enhance CECO's cash flow or earnings, or to
15 provide windfalls to the federal government, to CECO, or to a third party purchaser of
16 CECO's nuclear facilities such as ENP.

17 Second, standard contract remedies that other utilities are pursuing (or preserving)
18 include not only damages every six (6) years, but also the right to seek a refund of all fees
19 paid (as described earlier). In other words, the preservation of a fee refund remedy is
20 essential. CECO's ratepayers should not be harmed by CECO's failure to seek a refund of
21 past fees, and CECO should be found to have been unreasonable and imprudent in failing
22 to ensure a refund of said fees and in waiving this important remedy.

1 Third, requiring payments to a trust of the equivalent of the amount of fees paid (plus
2 interest) will ensure that funds are available in the event that alternative SNF disposal
3 strategies need to be invoked to protect Michigan's taxpayers, ratepayers, and
4 environment.

5 Fourth, a trust remedy balances and protects all interested parties, including ratepayers,
6 shareholders, and the public interest. The funds are available for refund to ratepayers or
7 to provide for alternative SNF disposal solutions in the event the federal breach is ever
8 resolved. In this way, the ratepayers are made whole and the public interest in ensuring
9 proper SNF disposal is better provided for. In turn, CECO's shareholders are protected
10 because the funds will be preserved in trust in the event a refund of fees is not
11 forthcoming from the federal government or if the federal government finally performs
12 and then justifies the payment of the fees for a federal SNF disposal program.

13 Fifth, the payment by CECO shareholders into the trust will ensure that CECO
14 shareholders do not obtain a windfall, or unjust enrichment, a result that would occur if
15 they receive a refund of the fees as a result of the federal breach (or a portion of damages
16 obtained at the price of paying the federal government the \$163 million that the
17 Commission found in U-16191 would be imprudent for CECO to pay). In turn, a trust
18 will prevent the federal government from being unjustly enriched by retention of the fees
19 despite its breach, or alternatively, will prevent ENP from being unjustly enriched by
20 receiving the fee refunds.

21 Sixth, if CECO is absolved by inertia or inaction in failing to ensure that a refund of all
22 fees from the federal government is preserved as a remedy under its contract, such a
23 result would constitute a **renegotiation** of its nuclear fuel disposal contract without a

1 prior order of the Commission, contrary in my view to Section 13(f)(g) and (j) of Act
2 304. CECo signed the contract, generated nuclear energy for sale for a profit for many
3 years, and collected the SNF fees from ratepayers, all with the promise that SNF would
4 be disposed. CECo thus must be held to the duty to continue to enforce its contract, and
5 to obtain all available contract remedies to address the federal breach, including
6 obtaining a refund of said fees due to the breach. CECo's waiver of and failure to
7 preserve this fee refund remedy for the entire period that the fees were paid should be
8 found to be unreasonable and imprudent.

9 **Q. As a follow-up to your rate reduction recommendation, are you recommending a**
10 **reversal of prior years' SNF disposal fees in this case?**

11 A. Yes. CECo should be required to either refund the entirety of the 1983-2007 fees
12 collected in rates, plus interest (estimated at nearly \$260 million), or at minimum, the
13 same total (principal and accumulated interest) should be amortized as a rate reduction
14 over 10 years (plus interest during the amortization on the unamortized balance not yet
15 refunded). Of course, I am recommending that CECo also comply with the
16 Commission's orders in U-16191 insofar as a trust remedy is imposed with regard to the
17 \$163 million related to pre-April 7, 1983 nuclear generation.

18 By rewarding the federal government with pre-1983 funds, they have denied ratepayers
19 the preservation of these funds for disposal, the original intent of the collections. Witness
20 Torrey (p 11) asserts ratepayers would be indifferent to making the payments to the
21 federal government, a statement to which I take strong exception.

1 **Q. What amount are you recommending under the 10-year amortization for rate**
2 **refunds or for placement of funds into an SNF disposal trust associated with the**
3 **SNF CECO generated and has abandoned in Michigan?**

4 A. I am recommending that a principal amount of \$26 million per year be amortized as a
5 downward rate adjustment for ten years, to which should be added an appropriate
6 interest rate ranging between the T-bill rate used by the Nuclear Waste Fund and CECO's
7 overall rate of return. This is one-tenth of my estimated \$259,903,000, including interest,
8 discussed earlier in my testimony. However, this figure would be subject to a more
9 precise number when information is obtained from CECO as to the total amount that
10 CECO collected in rates during the subject period (April 7, 1983 to April 10, 2007) plus
11 the interest accumulated on said fees. I have used the \$26 million principal amount as an
12 estimate for demonstration and case purposes.

13 In the event that the Commission were to alter the trust remedy for the \$163 million of
14 pre-April 7, 1983 fee collections, then a similar refund of these amounts (plus ongoing
15 interest) should be ordered, which would correspondingly increase the downward rate
16 adjustment.

17 ~~Q. Please discuss the Commission's authority or precedent for adopting a downward~~
18 ~~rate adjustment or to fund the SNF fee trust?~~

19 ~~A. First, the Commission's comprehensive authority to set just and reasonable rates and to~~
20 ~~require utilities to act reasonably and prudently (including enforcing their contractual~~
21 ~~remedies), and to absorb rate adjustments for failures to do so, is well established. In my~~
22 ~~view, the MPSC possesses the jurisdiction and authority to review SNF fee costs~~
23 ~~collected pursuant to MPSC orders governing both base and Act 304 rates, and to~~

1 consider issues and remedies relating to these costs in both Act 304 and in base rate or
2 other cases (i.e., the MPSC can adopt remedies comporting with its overall ratemaking
3 jurisdiction applicable to base rates, and as to PSCR rates in Act 304 rates, e.g. Section
4 6j(1)(a), MCL 460.6j(1)(a), Section 13j(f)(g) and (j), MCL 460.6j(f)(g), and (j), which
5 relates to PSCR reconciliation cases).

6 Second, I would point to CECo Case U-16191 where a similar trust remedy was adopted
7 in the Commission's order of November 4, 2010, as a follow-up to the Commission's
8 precedent on these issues in U-15645. The Commission also approved a trust concept in
9 its November 26, 1996 order in *Indiana Michigan Power Company*, Case No. U-12237.

10 Third, the Commission's authority to adopt a trust remedy, including direct state authority
11 and the absence of any federal preemption, was extensively litigated in the complaint
12 case, U-13771, in which CECo was a party. An extensive and thorough Proposal for
13 Decision issued by the Administrative Law Judge in that case in March 2005 determined
14 that the Commission possessed such authority and was not preempted in any way from
15 asserting such authority and adopting such remedies.

16 Fourth, the Nuclear Regulatory Commission's Rules as updated in 2002, recognize that
17 states may undertake additional remedies to ensure financial resources to address not only
18 nuclear plant decommissioning but also SNF site decommissioning.⁷

⁷The NRC's 2002 rulemaking review makes clear that the NRC authorizes and recognizes state regulatory requirements to establish additional assurances and funding mechanisms to provide for ultimate SNF disposal, 67 FR 78339-78340; 67 FR 78342-78344. (Rules and Regulations, Nuclear Regulatory Commission, 10 CFR Parts 50 and 72, RIN 3150-AG52, Decommission Trust Provisions, 67 FR 78332 *et seq.* December 24, 2002).

1 ~~Fifth, the Commission has used its long-standing ratemaking authority to require reports~~
2 ~~or comments on SNF issues. For example, the Commission required the nuclear utilities~~
3 ~~to file extensive comments on SNF issues as early as the Commission's January 28, 1997~~
4 ~~order in MPSC Case No. U-11314, entitled "*In the Matter, on the Commission's Own*~~
5 ~~*Motion of an Inquiry into Issues Concerning Ratepayer Payments to the Nuclear Waste*~~
6 ~~*Fund*" and also the requirement of such filings in DECo's and CECo's PSCR cases for~~
7 ~~some PSCR years contemporaneous or soon after the U-11314 order. Notably, these~~
8 ~~reports and filings were required by the Commission before the federal government's~~
9 ~~1998 "partial breach" of the Standard Contract, and the subsequent post-2009 and~~
10 ~~ongoing total breach of the Standard Contract. The situation now existing with respect to~~
11 ~~the federal program, including the total breach of the contract that has now occurred,~~
12 ~~provides compelling justification for enhanced remedies at this time.~~

13 **Q. Please summarize your primary recommendation.**

14 A. I recommend that the Commission provide for ratepayers all of the contract remedies that
15 a reasonable and prudent enforcement of the Standard Contract should entail. This
16 should include a refund of SNF contract fees collected in rates, or at minimum, the
17 establishment of a trust to receive all fee refunds, and that such refunds or funding of a
18 trust be accomplished via an amortized downward rate adjustment of SNF fees plus
19 interest over 10-years. These remedies would ensure that ratepayers are not deprived of
20 the funds they paid for the special purpose of SNF disposal and to ensure that these funds
21 would be available for their intended purpose and to protect ratepayers from having paid
22 for nothing.

1 Q. Does this complete your testimony at this time?

2 A. Yes it does.

1 JUDGE FELDMAN: And who was
2 cross-examination for Mr. Callen?

3 MR. ROBINSON: I do, your Honor.

4 JUDGE FELDMAN: All right. You may
5 proceed when you're ready.

6 CROSS-EXAMINATION

7 BY MR. ROBINSON:

8 Q Good afternoon, Mr. Callen.

9 A Goods afternoon.

10 Q Can you hear me from across the room here?

11 A If you speak up a bit it will help.

12 Q O.K. I'll try to do that. If I drop off, let me know.

13 Let me start off with the easy things
14 here. Mr. Callen, are you licensed to practice law in
15 the State of Michigan?

16 A No.

17 Q Are you licensed to practice law anywhere else?

18 A No.

19 Q Have you ever received a law degree from an accredited
20 law school?

21 A No.

22 Q Have you received a law degree from an unaccredited law
23 school?

24 A No.

25 Q Have you ever been a practicing attorney?

1 A No.

2 Q Have you ever been paid to provide legal advice to a
3 client?

4 A No.

5 Q At page 7 of your testimony you list a series of cases
6 that you appeared in. Have you ever been testified
7 before the federal Court of Claims?

8 A No.

9 Q Have you ever testified in any litigation against the
10 federal government seeking damages for the fed
11 government's delay in accepting delivery of spent nuclear
12 fuel?

13 A No.

14 Q Have you ever participated in negotiation of a settlement
15 of such a case?

16 A No.

17 Q Have you ever consulted on behalf of any party seeking
18 damages from the federal government for its delay in
19 accepting delivery of SNF?

20 A In a legal sense, no.

21 Q Have you ever testified in any kind of contested
22 litigation on behalf of any party regarding spent nuclear
23 fuel issues other than MCAAA, PIRGIM, or the Michigan
24 Environmental Council?

25 A Or the Michigan what?

1 Q Environmental Council, MEC.

2 A I was a staff member for the Michigan Public Service
3 Commission involved in some case.

4 Q In that context you testified on behalf of the Michigan
5 Public Service Commission Staff?

6 A Yes.

7 Q Mr. Callen, I think over the course of the day we have
8 got our terms straight but I just want to make sure you
9 and I are on same waive length here.

10 Now, the one-time fee, that term refers
11 to the amounts owed to the federal government by
12 operators of nuclear generating plants for the pre-April
13 1983 generation; is that right?

14 A Yes.

15 Q And for Consumers Energy Company that's the \$163 million
16 amount that we have discussed here today?

17 A Right, including interest.

18 Q That is, that amount includes interest?

19 A Yes.

20 Q The term on-going fee then refers to the one mill per
21 kilowatt hour fee that is being paid to the federal
22 government by nuclear facilities for generation from
23 April 7 of 1983 forward?

24 A Yes.

25 Q And for Consumers Energy the obligation to pay that

1 on-going fee ceased when Consumers Energy sold the plant
2 to Entergy in April of 2007; is that right?

3 A I don't think I agree.

4 Q We're talking about the on-going fee?

5 A Yeah.

6 Q Has Consumers Energy made any payments to the federal
7 government of that on-going fee since it sold its
8 Palisades nuclear plant?

9 A Well, there's the \$120 million payment involved.

10 Q You're referring to the damage award in the settlement of
11 the DOE lawsuit?

12 A Of course not.

13 Q Let me try it again then. The on-going fee was a one
14 mill per kilowatt hour fee assessed under the auspices of
15 the Nuclear Waste Policy Act, right?

16 A Yes.

17 Q And that amount was paid for generation from essentially
18 April of 1983 forward, correct?

19 A Yes.

20 Q Those payments were made on a quarterly basis to the
21 federal government, right?

22 A Yes.

23 Q When Consumers Energy sold the Palisades plants in April
24 of 2007, it stopped making those quarterly payments to
25 the federal government of the on-going fee, right?

1 A Yes, it did.

2 Q Does Consumers Energy currently own and operate any
3 nuclear facility?

4 A Not to my knowledge.

5 Q Does Consumers Energy currently own any spent nuclear
6 fuel storage facility?

7 A Not to my knowledge.

8 Q Other than litigation costs associated with the DOE
9 lawsuit that's the subject of this case, and perhaps
10 litigation costs associated with defending this issue in
11 cases before the MPSC, to your knowledge has Consumers
12 Energy incurred any costs associated with spent nuclear
13 fuel since April of 2007?

14 MR. KESKEY: Objection. The basis of the
15 objection is that that's a rather broad question and the
16 information would be best known by Consumers Energy
17 itself. There could be all kinds of potential
18 miscellaneous costs that they have paid, that they are
19 potentially liable for, that they haven't presented them
20 in this case with their witnesses. But it's a stretch to
21 ask this witness to try to carte blanche say that there is
22 not any other costs out.

23 MR. ROBINSON: Your Honor, it's perfectly
24 appropriate for me to ask this witness what he knows.

25 JUDGE FELDMAN: What he knows. And if he

1 has knowledge of such costs, that's appropriate.

2 Q (By Mr. Robinson): Do you know the question?

3 A I understand the question. Not to my knowledge.

4 Q Entergy Company currently owns and operates the Palisades
5 nuclear plant, right?

6 A Yes.

7 Q They have since April of 2007, right?

8 A Yes.

9 Q Do you know whether they make payments of this on-going
10 fee to the federal government for their nuclear
11 generation?

12 A I do.

13 Q Do they?

14 A They do.

15 Q Have you approached Entergy to suggest they stop paying
16 those fees to the federal government and instead put that
17 money in a trust?

18 A No.

19 Q Why not?

20 A Never occurred to me.

21 Q Has MCAA personnel approached Entergy and made that
22 suggestion?

23 A Not to my knowledge.

24 Q Would you agree that the status of the federal
25 government's spent nuclear fuel disposal program is, in

1 these one-time fee payments on a quarterly basis since
2 April of 1983. I think we agreed on that earlier, right?

3 JUDGE FELDMAN: Mr. Robinson.

4 MR. ROBINSON: Did I miss -- I got my
5 terms mixed up.

6 JUDGE FELDMAN: You were starting out
7 your cross very intent on preserving a distinction there.

8 MR. ROBINSON: I thank you.

9 Q (By Mr. Robinson): We're talking about the on-going
10 fees, Mr. Callen.

11 A Yes indeed.

12 Q And it's the on-going fees that have been paid on a
13 quarterly basis since April of 1983, right?

14 A Yes.

15 Q So just to be clear, Consumers Energy hasn't been keeping
16 those funds, right?

17 A Yes, that's the case.

18 Q And that is, one reason perhaps for that is that the
19 option of deferring making those on-going fee payments to
20 the federal government wasn't available under the statute
21 or under the Standard Contract, right?

22 A That's right.

23 MR. KESKEY: Objection on the basis that
24 he's asking for a legal opinion when it in fact he
25 objected to legal opinions from the witness before.

1 JUDGE FELDMAN: O.K. All right. Let me
2 just ask you, Mr. Callen, to please not speak as your
3 counsel is objecting. You might pause after Mr. Robinson
4 finishes his question to make sure your counsel has an
5 opportunity to object if he chooses.

6 Q (By Mr. Robinson): At page 23, line 10, of your
7 testimony Mr. Callen, you reference a \$31.929 billion
8 number. And you say that's the balance of the Nuclear
9 Waste Fund as of the end of September 2010. Is that
10 amount of cash actually sitting in a government bank
11 account somewhere? Is that your understanding?

12 A Can you please tell me what page you're on?

13 Q Page 23, starts at line 10.

14 A As best I understand it, it's not sitting there.

15 Q It's sort of more of a bookkeeping entry?

16 A I wouldn't characterize it as that.

17 Q Well, would you say that the actual cash that's been paid
18 in to the federal government has -- that's gone some
19 place else to fund other government operations, and
20 what's actually sitting in the Nuclear Waste Fund is
21 essentially an IOU from the federal government to the
22 Nuclear Waste Fund. Is that right?

23 A That's how I would characterize it.

24 Q I mean it's sort of like the Social Security Trust Fund,
25 right?

1 A In that regard I think it is.

2 Q Now again page 23, this time line 12, you reference a
3 \$17.764 billion amount. Is that a principal amount?
4 That is, that excludes any interest component?

5 A Yes, it does.

6 Q What it includes is, at least part of what it includes is
7 one-time fees paid by some utility, if you know?

8 A That's correct.

9 Q And it includes on-going fees then from presumably every
10 utility that was obligated to pay them, right?

11 A That's right.

12 Q Does it include the deferred one-time fees? That is, are
13 those deferrals considered an asset of the Nuclear Waste
14 Fund?

15 A It does not.

16 Q The next figure is also page 23, line 11, \$14.165 billion
17 that you say comprises accumulated interest.

18 Based on your understanding of what this
19 Nuclear Waste Fund actually is, does that interest
20 reflect actual cash payments made into the Nuclear Waste
21 Fund?

22 A No. It reflects the credits.

23 Q So again it's more of a -- it's really more of an IOU
24 from the government to the Nuclear Waste Fund?

25 A Emphasis on "o", yes.

1 Q Do you know how interest is computed to calculate that
2 money?

3 A What I know is that it's involved with their current
4 T-bill rates.

5 Q Do you know anything more specifically about how that
6 calculation happens?

7 A No, I don't.

8 Q Do you know how often those interest calculations are
9 made and added to the fund?

10 A They appear quarterly, updated quarterly.

11 Q You would agree, wouldn't you, that those interest
12 amounts, whatever they are and however they're
13 calculated, have never been included in the electric
14 rates of Consumers Energy Company, right?

15 A I believe that's right.

16 Q Is the \$31.929 billion that we started off talking about,
17 is that net of expenditures made or disbursed by the
18 Nuclear Waste Fund?

19 A Can you reference a line?

20 Q Well, it's the same number on page 23, line 10, of your
21 testimony, Mr. Callen.

22 A The 31.929 you said?

23 Q Yes, sir.

24 A Yes. And the question was?

25 Q The question was: Is that net of expenditure made from

1 funds in the Nuclear Waste Fund?

2 A No, it's not net. It's gross.

3 Q O.K. So that's a total amount of payments plus the
4 interest calculation?

5 A Yes.

6 Q How much has the federal government spent so far on spent
7 nuclear disposal -- spent nuclear disposal activity?

8 A Between 8 and 10 billion dollars.

9 MR. ERICKSON: Could I have that number
10 again, your Honor?

11 JUDGE FELDMAN: Mr. Callen.

12 A Between 8 and 10 billion dollars total expenditures since
13 1983.

14 Q (By Mr. Robinson: But that eight to ten billion dollars
15 didn't come out of the Nuclear Waste Fund, is that your
16 understanding?

17 A It's not reflected in the \$31 billion.

18 Q If it didn't come out of the Nuclear Waste Fund, where
19 did the eight to ten billion dollars come from?

20 A Well, it came from the federal coffers where these monies
21 are accumulated. And there's credits made on the books
22 against those expenditures and that's so reported.

23 Q Excuse me. Is the eight to ten billion dollars
24 ultimately supposed to be funded from the Nuclear Waste
25 Fund? Does that ultimately show up as a deduct from that

1 fund?

2 A Does it show up as what?

3 Q As a deduct.

4 A Yes.

5 Q From the fund?

6 A Yes, on the right ledgers.

7 Q So if we have the right ledgers, that \$31 million number
8 would be eight to ten billion dollars less if you
9 actually reflected what the government has actually spent
10 so far on spent nuclear fuel disposal activity?

11 A Yes, and also on the books would be the one-time fees to
12 be received.

13 Q The ones that have been deferred, the ones that have --
14 the ones where payments had been deferred is what we're
15 talking about?

16 A Yes.

17 Q Of the eight to ten billion dollars that's been spent,
18 did Consumers Energy Company control how that money was
19 spent?

20 A Consumers would not have, of course, had authority to
21 have it spent, but it had -- it made efforts to influence
22 what the department was doing.

23 Q That is, the Company did make efforts to influence how
24 the money was spent. Is that what you're saying?

25 A Yes.

1 Q I want to turn for a minute to your exhibits, Mr. Callen.
2 We'll start with your Exhibit MCAAA 3 and 4, and your
3 Exhibit No. 4, that is. Now as I understand these
4 exhibits, your Exhibit No. 3 has numbers that are stated
5 as of December 31, 2009. Is that right?

6 A That's correct.

7 Q And your Exhibit No. 4 has numbers that are stated, at
8 least what it says that the top is through September 30,
9 2010, right?

10 A Yes.

11 Q Now Exhibit 3, the column headed Total NWF Contributions,
12 that's amounts of cash actually paid to the Nuclear Waste
13 Fund? Or is it something else?

14 A That's payments.

15 Q If you drop down to the row, the Michigan row?

16 A Yes.

17 Q In the column headed One-time Fee Outstanding, there is a
18 figure there that I think is \$427.9 million. Do you see
19 that?

20 A No, I don't.

21 Q I'm on your Exhibit 3, the first page, the Michigan row,
22 and the column headed One-time Fee Outstanding. I show
23 you a number of 427.9. Do you see that?

24 A I do.

25 Q Is that the amount of one-time fees that Michigan

1 companies have deferred, or is it something else?

2 A My belief is that's what it is. But this was produced by
3 the Nuclear Energy Institute.

4 Q Is it fair to say you're not sure that's what it is?

5 A Yes. I can't verify.

6 Q Does that amount include interest?

7 A I believe so.

8 Q If it includes interest, move over to the next column,
9 the one headed Allocation of Interest on NWF, and explain
10 to me what that column is.

11 A That is interest accumulated on the on-going quarterly
12 payments.

13 Q So that, that column, the column Allocation of Interest
14 oh NWF, you think is just an interest computed on
15 on-going fee payments?

16 A I believe so.

17 Q Do you know that to be true or are you just sort of think
18 that might make sense?

19 A If you refer to the one, this is by the Michigan Public
20 Service Commission.

21 Q Well, I'm going to get there in a minute, Mr. Callen.

22 A Well, based on the comparison, I'm familiar with how the
23 MPSC work is done, they compare quite favorably. So the
24 number in Michigan you're talking about was interest
25 accumulated on quarterly payments.

1 Q O.K. So your answer is that there is interest included
2 in this \$427.9 million number and there's also -- and
3 then the next column, Allocation of Interest on NWF, is
4 an interest calculation only on the principal amount of
5 on-going fees?

6 A Yes.

7 Q Do you know how they calculate interest on that? Is that
8 the same calculation you referred to earlier?

9 A It is. It's done by the U.S. Department of Treasury.

10 Q And you think the interest has something to do with U.S.
11 treasury bills?

12 A Treasury bill rates, yes.

13 Q The next column on your Exhibit 3 is headed Total
14 Liabilities. I want to understand what that is. Whose
15 liability is that? Whose liabilities are those amounts
16 that are shown there?

17 A Well, it's the total liabilities of all the utilities
18 that are making payments.

19 Q It's the total of one-time fees and on-going fees?

20 A Yes, as of that date.

21 Q Sticking now again with this Michigan row, of the
22 \$567.6 million number shown in the first column, what
23 portion of that is Consumers Energy?

24 A Back on page 23, I made an estimate of Consumers'
25 liability.

1 Q Well, excuse me, Mr. Callen. Right now, for purposes of
2 these very precise numbers on your exhibit, I'm not
3 looking for an estimate. I'm looking for the portion of
4 these numbers that essentially belong to Consumers
5 Energy.

6 A I don't know.

7 Q Do you know the answer to that question with respect to
8 any of these numbers shown in the Michigan row on your
9 Exhibit 3?

10 A No.

11 Q Now, take a look at page 2 of your Exhibit 3, please.
12 And again in the Michigan row in the second column, the
13 one headed Nuclear Waste Fund Contributions, there's a
14 figure there of \$539.6 million. What does that
15 represent?

16 A You said the second page of Exhibit 3?

17 Q 3, yes, sir.

18 A You're asking what number?

19 Q You see the Michigan row?

20 A I do.

21 Q And in the second column there is a number there of
22 539.6. What is it?

23 A I'm sorry but I don't see the number.

24 MR. ROBINSON: Can I approach the
25 witness, your Honor?

1 JUDGE FELDMAN: Yes, as long as you make
2 sure Mr. Keskey sees what you're about to point to.

3 A Oh, I'm sorry. I am on page 3.

4 MR. ROBINSON: O.K. We have a different
5 problem then, because I don't have a page 3 of your
6 Exhibit 3.

7 JUDGE FELDMAN: I suspect that this is a
8 question whether the cover page counts as a page.

9 MR. ROBINSON: Oh, I'm sorry.

10 Q (By Mr. Robinson): Mr. Callen, on the page of your
11 Exhibit 3 that has three columns. The first one is the
12 list of states, the second one is labeled Metric Tons of
13 Uranium, the third one is labeled Nuclear Waste Fund
14 Contributions. Do you see that page?

15 A I do.

16 Q Do you now see the number of 539.6 that I have been
17 referring to?

18 A Yes.

19 Q Maybe just to speed this up, why is that number different
20 than the number on your first page of your Exhibit 3 in
21 the column headed Total Nuclear Waste Fund Contribution?

22 MR. ERICKSON: When we're talking about
23 the first sheet we're excluding the cover sheet, aren't
24 we, your Honor?

25 MR. ROBINSON: Yes.

1 JUDGE FELDMAN: Yes. I believe that's my
2 presumption, that we're referring to the nuclear waste
3 fund payment information page as page one and the U.S.
4 state by state commercial nuclear fuel and payments page
5 as page 2.

6 A Well, they're different because they accumulated over
7 different time periods. 539 is through December 31,
8 2009, and the other one is December 30 -- March 30 --
9 December 30, 2010.

10 Q (By Mr. Robinson): Is there some reference on, in this
11 exhibit somewhere that shows those dates, Mr. Callen?

12 A Well, the one through the first quarts, FY 2011, is in
13 the title. And the other one is given in a footnote.

14 Q O.K. That helps. Staying with that number, 539.6,
15 Mr. Callen, do you know what portion of that is Consumers
16 Energy's contribution?

17 A No. I don't have that in front of me.

18 Q Does that number exclude interest?

19 A Yes.

20 Q O.K. Let's take a look at your Exhibit 4. The second
21 page after the cover page of that exhibit, the one that's
22 got all the numbers on it?

23 JUDGE FELDMAN: You mean the second page
24 including the cover page?

25 MR. ROBINSON: O.K.

1 Q (By Mr. Robinson): The column headed payments, that's
2 only the one-time fee; is that right?

3 A Well, I've been shuffling back and forth between charts
4 so you better tell me which chart you're on.

5 Q O.K. I'm on your Exhibit No. 4, and I'm on the second
6 page of that exhibit. It's the one headed Nuclear Waste
7 Fund ratepayer payments by state, through 9/30/10,
8 millions of dollars.

9 A I have it.

10 Q And the second column there after the states is headed
11 Payments. My question is: Is that just the on-going
12 fee?

13 A Actually it is -- it's mislabeled, but it's the fee.

14 Q The on-going fee?

15 A Yes.

16 Q It doesn't include any one-time fee payments?

17 A It doesn't.

18 Q And it doesn't include any one-time fee deferrals, right?

19 A No. Those are in a different column.

20 Q So even though that's what this exhibit says, it's wrong?

21 A Yes. It's says the one-time plus interest. It's
22 actually --

23 Q One-time plus interest, that is not in this first column
24 here. Is that right?

25 A Yes. I think that's right. It's a type-o error.

1 MR. ERICKSON: Your Honor, could we go
2 off the record for just a minute?

3 JUDGE FELDMAN: All right. Let's go off
4 the record.

5 (Brief discussion was held off the record.)

6 JUDGE FELDMAN: Back on the record. Mr.
7 Robinson, you may proceed when you're ready.

8 Q (By Mr. Robinson): Mr. Callen, I think where we were
9 was, you had just said that, we're on the second page of
10 your Exhibit 4, we're talking about the numbers in the
11 column headed Payments, and is it your understanding that
12 that column does not include any one-time fee payments?

13 A Yes. Let me clarify. Just underneath payments it says
14 one mill per kilowatt hour, and just below that it says
15 one-time plus interest? Cross that out. That was meant
16 to be elsewhere.

17 Q Elsewhere on this page of the exhibit?

18 A Yes. It should have been under debt.

19 Q So that the column headed debt is all one-time fees?

20 A Plus interest.

21 Q Plus interest?

22 A Accumulated interest, yes.

23 Q It's not deferred one-time fees but a hundred percent of
24 all one-time fees; is that right?

25 A Yes. One hundred percent of all the one-time fees plus

1 interest accumulations to date.

2 Q So where this footnote says, with respect to the numbers
3 in the column headed Debt, the footnote says funds owed
4 for the fuel burned before 1983 but not yet paid by
5 utilities as allowed by DOE contract --

6 A Is correct.

7 Q Is correct?

8 A But it doesn't note that that includes interest.

9 Q And it also doesn't note that it includes one-time fees
10 that were not deferred but were already paid. Is that
11 right?

12 A They would be under payments.

13 Q So the -- O.K. So now the one-time fees that were
14 already paid are in the payments column?

15 A Right.

16 Q Are you sure about any of this, Mr. Callen, or are you
17 just kind of guessing at this point?

18 A I'm not guessing.

19 Q Are you sure about it?

20 A I spent a considerable time with this.

21 Q I appreciate that. Are you sure of what you're telling
22 me about these numbers?

23 A I am.

24 Q The column headed Return on Investments, is that again
25 some kind of interest calculation?

1 A Yes. That's the accumulated interest.

2 Q Is that the same kind of interest calculation that is
3 shown on the preceding exhibits or is this an interest
4 calculation that the MPSC Staff does independently?

5 A These are numbers done, reported by the Department of
6 Energy. If you look back on my Exhibit MCAAA 2.

7 Q Yes?

8 A These are consolidated accounting and investment system
9 reports on Nuclear Waste Fund, and these are produced by
10 the U.S. Department of Energy from actual accumulations,
11 with financial parts done by the U.S. Treasury
12 Department. And what you are seeing on these other
13 tabulations are various accumulations of these numbers.
14 These pages come out utility by utility and occasionally
15 from multiple unit operators. They come out on two or
16 three sheets.

17 Q Staying with the second page of your Exhibit No. 4, for
18 the figures shown in the Michigan row, can you tell me
19 what portion of those amounts relate to Consumers Energy
20 Company?

21 A Not offhand.

22 Q Mr. Callen, was the payment of the on-going fee by
23 Consumers Energy unlawful?

24 MR. KESKEY: Well, I guess I could object
25 because if he's asking for a legal conclusion. He

1 objected to legal conclusions before. So to be
2 consistent, if he's asking for a legal opinion, we
3 object.

4 JUDGE FELDMAN: Well, let's make it clear
5 that he's only asking for this witness's understanding.

6 Q (By Mr. Robinson): Mr. Callen, is it your understanding
7 that the payment by Consumers Energy of the on-going fee
8 was unlawful?

9 A I believe it wasn't.

10 Q I'm sorry, it was not?

11 A I believe it was not unlawful.

12 Q Was the payment of the on-going fee by Consumers Energy
13 in fact required by the Nuclear Waste Policy Act, based
14 again on your understanding?

15 A Yes.

16 Q And is it your understanding that payment of that
17 on-going fee was in fact required by the Standard
18 Contract?

19 A Yes.

20 Q Do you believe that Consumers Energy would have incurred
21 any legal consequence if it had failed to make payment of
22 the on-going fee?

23 A Can I have that repeated?

24 JUDGE FELDMAN: Certainly. Can you read
25 it back?

1 (The record was read aloud as follows: "Q Do you
2 believe that Consumers Energy would have incurred
3 any legal consequence if it had failed to make
4 payment of the on-going fee?")

5 MR. KESKEY: I object again on the basis
6 he's asking for a legal conclusion, but also on the basis
7 that legal consequences is extremely vague.

8 JUDGE FELDMAN: Mr. Robinson?

9 MR. ROBINSON: Let me just try it
10 differently.

11 Q (By Mr. Robinson): Is it your understanding that if
12 Consumers Energy had refused to make payment of the
13 on-going fee to the federal government, that there could
14 have been consequences to its operating license?

15 A I'm not sure of that. I have looked into that section of
16 Nuclear Waste Policy Act. I'm not convinced.

17 Q Could there have been consequences with respect to the
18 licensing for the ISFSI?

19 A I'm not sure of the hypothetical you're talking about.
20 Consumers was required, and the other utilities, to make
21 those payments upon the beginning of receipt of spent
22 fuel by the Department of Energy.

23 Q Sir, we're talking now about the on-going fees that you
24 discuss in your testimony. We're not talking about
25 one-time fee, we're talk about on-going fees.

1 My question is: Could there have been
2 some consequences to Consumers Energy's licenses to both
3 operate the nuclear plant and continue to operate the
4 spent nuclear fuel disposal facilities if it had failed
5 to make those payments?

6 A I can't make that judgment.

7 Q Do you think the failure to make those on-going fee
8 payments could have been considered a default under the
9 Standard Contract? Is that your understanding or do you
10 have an understanding about that?

11 A Well, I know that the Nuclear Waste Policy Act requires
12 those payments, as I mentioned, upon first receipt of
13 spent fuel.

14 Q Well, let's -- Suppose Consumers had failed to make those
15 payments, suppose the government had declared it in
16 default under the terms of the Standard Contract because
17 of its failure to make those payments, do you think that
18 could have had some impact on Consumers ability to
19 prosecute its claim for damages against the federal
20 government for its failure to pick up the spent nuclear
21 fuel?

22 A I'm still troubled by the timeframe in which you are
23 postulating this. Consumers, by not paying anytime
24 between now and when the spent fuel starts to be
25 transferred to the DOE, is not in compliance with not

1 paying.

2 Q But you --

3 JUDGE FELDMAN: Mr. Robinson, you're
4 still talking about the on-going fee, the one mill per
5 kWh?

6 MR. ROBINSON: That's correct, your
7 Honor. I am talking about that.

8 JUDGE FELDMAN: Only, right, Mr.
9 Robinson?

10 MR. ROBINSON: For purposes of these
11 questions. It's just the on-going fee, right.

12 Q (By Mr. Robinson): I understand your position with
13 respect to the one-time fee. I'm trying to figure out
14 your position with respect to the on-going.

15 A Oh. If Consumers or another utility did not make
16 quarterly payments, there would be consequences.

17 Q What might those be?

18 A I'm not sure of the scenario in this case.

19 Q But they could include some impact on operating license?

20 MR. KESKEY: I object to the question
21 because the -- again it's intruding into a legal area.
22 But the presumption that Mr. Robinson has is that
23 somebody in this case is suggesting that Consumers should
24 not have collected the one mill from the ratepayers and
25 that Consumers did not have remedies to protect the fees.

1 If they were going to pay the fee to the federal
2 government, they had remedies to condition the payments
3 of fees, escrow the fees, get a court order to protect
4 the fees, getting a court order finding that the payment
5 of fees into an escrow complies with the Nuclear Waste
6 Policy Act and the Standard Contract.

7 JUDGE FELDMAN: O.K., Mr. Keskey. I hate
8 to cut you off, but I believe Mr. Robinson's question
9 really only had to do with what the consequences to the
10 Company could have been under this witness's
11 understanding had those fees not been paid when they were
12 paid.

13 MR. KESKEY: But the question is: Should
14 they have been paid without condition or protection or
15 safeguards. That's important.

16 JUDGE FELDMAN: O.K. That may be
17 important, it's something that you can argue about
18 throughout the case. But in terms of what the question
19 is pending before this witness, I think that question is,
20 as I stated it, is that objectionable and so if so why.

21 MR. KESKEY: Well, it is objectionable
22 because the Nuclear Waste Policy Act, the section he is
23 referring to, requires the utility to sign the Standard
24 Contract of 1983 in order to get its licenses. Well,
25 there's nobody questioning the fact that Consumers Energy

1 signed the Standard Contract.

2 JUDGE FELDMAN: Oh. So you're saying
3 that questions are not relevant to something to be
4 decided in this case?

5 MR. KESKEY: What I'm saying is that his
6 question is overbroad, vague, and doesn't refer to a
7 specific section or, you know, he's asking --

8 JUDGE FELDMAN: O.K. It did refer to his
9 prior question. At this point I think we may have gotten
10 further from the original question that he asked. So
11 that phrase, if I had it re-read, would not make sense
12 without going back to the prior question.

13 So Mr. Robinson, while I will allow this
14 line of inquiry, could you please restate the question?

15 MR. ROBINSON: Sure.

16 Q (By Mr. Robinson): Mr. Callen, you said earlier, I
17 believe, that you agree that there would be consequences
18 had Consumers Energy not made these quarterly payments of
19 the on-going fee? Is that what you said?

20 A Yes.

21 Q My question to you was: Might those consequence include
22 impacts on the Company's operating license for either the
23 nuclear plant itself or for the ISFSI?

24 A My answer was I don't know.

25 Q What consequences then were you referring to?

1 A Well, I'm troubled with the hypothetical. None of this
2 has played out, and I have no crystal ball to figure out
3 how it might come forward.

4 Q Well, I understand that, Mr. Callen. But you're the one
5 who has got testimony here saying that my client should
6 cough up \$260 million in on-going fees and accumulated
7 interest back to customers, that you're saying that
8 apparently should not have been paid to the federal
9 government.

10 My question to you is: Do you believe
11 there might have been some severe adverse consequences to
12 Consumers Energy, its ability to continue to operate
13 those nuclear facilities, and its customers, had the
14 Company actually done what your testimony suggests it
15 should have done?

16 A I didn't suggest that Consumers not pay. I --

17 Q So your testimony is that --

18 MR. KESKEY: Can you let him finish?

19 JUDGE FELDMAN: Mr. Robinson, let him
20 finish his sentence. Mr. Callen, you didn't suggest
21 that?

22 A The Company not pay.

23 Q (By Mr. Robinson): So it's your testimony that the
24 Company should both pay this amount to the federal
25 government as well as pay that amount back to customers.

1 Is that your testimony?

2 A In this regard where there is, my words, no federal
3 program, that I think the optimal way to protect
4 ratepayers is for Consumers to put money into escrow, and
5 then one option is to sue the federal government for
6 noncompliance of the contract.

7 Q So it is your testimony then that notwithstanding the
8 fact that Consumers Energy made these on-going fee
9 payments to the federal government, that it should now
10 put that amount plus your interest calculation either
11 into escrow or trust or refund it to customers, that's
12 your testimony. Is that right?

13 A Into trust. I didn't suggest return.

14 Q Mr. Callen, I think if you look at your testimony, you've
15 got a proposal there to return the \$260 million to
16 customers. That represents your calculation of on-going
17 fee, principal, plus interest. Are you -- Do you
18 disagree with that? Because I do.

19 A Well,--

20 JUDGE FELDMAN: O.K. Mr. Robinson, I'm
21 going to ask you to please leave out the editorializing
22 in your questions.

23 MR. ROBINSON: I will try to do that,
24 your Honor.

25 JUDGE FELDMAN: Thank you.

1 A My focus was on concern for lest the federal program
2 never succeed in disposing of spent nuclear fuel, leaving
3 the responsibility scattered around the country at
4 perhaps utilities and with the financial responsibilities
5 in other than the federal treasury.

6 Q (By Mr. Robinson): Mr. Callen, my guess is that many
7 people probably agree with you and your evaluation of the
8 federal government's conduct of its spent nuclear fuel
9 disposal program. Where I'm focussing you, though, is on
10 your proposed remedies that you talk about in your
11 testimony. Just if you would please turn to page 27 of
12 your testimony. Starting on line 11 where you say "CECo
13 should be required to either refund the entirety of the
14 1983-2007 fees collected in rates, plus interest
15 (estimated at nearly \$260 million), or at minimum," the
16 same amounts should be amortized by rate reduction over
17 ten years.

18 Now my question to you is. Is that your
19 proposal? Do you believe that Consumers Energy should be
20 now required to refund to customers the amounts that it
21 paid to the federal government in on-going fees?

22 A Well, it looks like I said that.

23 Q Do you agree with that?

24 A No.

25 Q Now that you've had a chance to think about it?

1 A No, I don't.

2 Q Is it -- this is going to be a safe statement, I think,
3 Mr. Callen. Do you agree that the federal government has
4 pretty seriously messed up the National Spent Nuclear
5 Spent Fuel disposal policy?

6 A Yes, and for decades and decades.

7 Q And so in light of that you think it was, it's just a
8 mistake for utilities to be required to continue to send
9 money to the federal government to support that badly
10 executed policy, right?

11 A No, I don't.

12 Q You think it's a good idea to keep sending money to the
13 federal government to support that policy?

14 A What Consumers would do I left open. For example, I
15 didn't recommend, although it would be a possibility, to
16 put these monies in escrow and sue the federal government
17 for noncompliance.

18 Q I'm taking sort of a broader picture perspective than
19 these questions, Mr. Callen. And I'm just focussing on
20 the federal government's execution of the SNF program.
21 And I let me try it this way. Would you agree that
22 there's a lot of people out who think that the federal
23 government has badly messed up the Medicare program?
24 Whether you personally agree with that or not, you would
25 agree there's people out who there who believe that

1 right?

2 A Yes.

3 MR. KESKEY: Well, I object as being
4 irrelevant and also subject --

5 MR. ROBINSON: Well, it'll become very
6 relevant very quickly, your Honor.

7 JUDGE FELDMAN: Must we proceed --

8 MR. ERICKSON: Your Honor, I would object
9 to that line of questioning.

10 JUDGE FELDMAN: -- to the Medicare
11 program? I really doubt there's a strong analogy that --

12 MR. ROBINSON: Well, I disagree.

13 JUDGE FELDMAN: -- would be useful to the
14 Commission in resolving issues in this case.

15 MR. ROBINSON: Your Honor, I strongly
16 disagree. The point is, and maybe it's more of an
17 argument than it is anything else, but the federal
18 government has messed up a lot of programs. And a
19 solution to that is that people can't just violate the
20 law and not pay their taxes. And I think that's a valid
21 analogy that we could draw here.

22 JUDGE FELDMAN: Well, to the extent that
23 you're saying perhaps it's more of an argument than
24 anything else, I think that's where I have an issue. And
25 this witness has not offered any kind of expertise in

1 health care or the Medicare program. I understand you're
2 trying to draw an analogy, but I think that in light of
3 the lateness of the hour we should not pursue that
4 analogy.

5 Q (By Mr. Robinson): Just two more areas then, Mr. Callen.
6 Consumers Energy had deferred payment of the one-time fee
7 back in 1983, right? That's when it first made the
8 election to defer payment of that one-time fee?

9 A Yes.

10 Q So that's whatever, some 27 years, right, 29 years.

11 A O.K.

12 Q And other utilities had also elected that deferral
13 option, right?

14 A Some of them.

15 Q Some. Over the course of that 29 years did the fact that
16 the federal government was waiting on receipt of payment
17 of that one-time fee have some positive impact on the
18 federal government's willingness to carry out the SNF
19 disposal program? Did that make them more eager to get
20 their job done?

21 A I guess the results show that it's not the case.

22 Q Do you think that if Consumers Energy had not made the
23 one-time fee payment of \$163 million in the context of
24 the DOE settlement, that that would have had some
25 positive impact on the federal government and they would

1 have seen the light and decided to get their act straight
2 with respect to the SNF program?

3 A Well, let me just cut the answer short: No.

4 Q There is still a couple places in your testimony, Mr.
5 Callen, where you say that Consumers Energy has
6 effectively waived its ability to file future lawsuits
7 and waived its ability to seek recovery of any of these
8 fees that have been paid. I'd like you to tell me what
9 the basis for that opinion is.

10 A Can you give me a reference?

11 Q Well, one place is on page 19, lines 17 and 18. Another
12 place is on page 25, at the bottom of the page. There's
13 probably others.

14 A Page 25, at the bottom of the page.

15 Q Right where you say "ensure a refund of said fees and in
16 waiving this important remedy." I'd like to know what
17 the basis is for your conclusion that Consumers Energy
18 has waived that, waived anything?

19 A I base that on my understanding of the fact that in
20 Consumers testimony it was stated that it had resolved
21 all its -- the Company had resolved all its nuclear
22 issues.

23 Q And that's the basis for this testimony?

24 A Yes. I know that the arrangement with the Department of
25 Justice are that around 2015 utilities may apply for

1 recovery of all their fee payments.

2 Q What exactly are you referring to? Are you referring to
3 a law, a rule, or what?

4 A I can't answer that question. It was reported that that
5 would be worked out by the Department of Justice.

6 Q You're repeating something you heard from who?

7 A I'm sorry, I can't remember. I believe I saw it written.

8 Q Do you remember where you saw it written?

9 A I don't.

10 MR. ROBINSON: Your Honor, that's all the
11 questions I have. Thank you.

12 JUDGE FELDMAN: Thank you, Mr. Robinson.
13 Ms. Uitvlugt, do you have any questions?

14 MS. UITVLUGT: No, your Honor.

15 JUDGE FELDMAN: Mr. Keskey, any redirect?

16 MR. KESKEY: If I could just have a
17 couple minutes?

18 JUDGE FELDMAN: Yes, let's take a five-
19 minute recess.

20 (At 4:18 p.m. a brief recess was taken.)

21 JUDGE FELDMAN: Back on the record. Mr.
22 Keskey, whenever you're ready.

23 REDIRECT EXAMINATION

24 BY MR. KESKEY:

25 Q Mr. Callen, you were asked a question about a rate

1 reduction recommendation on your page 27, lines 11
2 through 17. Let me refer you to your final conclusionary
3 recommendation on page 30, lines 14 to 22. Is there a
4 relationship between your reference to a rate reduction
5 amortization and the trust remedy?

6 A Yes, indeed. My thoughts were that there would be a rate
7 reduction and a buildup of the trust for concern over
8 nuclear waste disposal.

9 MR. KESKEY: I have no other questions,
10 your Honor.

11 JUDGE FELDMAN: All right. Mr. Robinson,
12 anything further?

13 MR. ROBINSON: Reluctantly, yes, I think
14 there is, your Honor, just to get some clarity here.

15 RE-CROSS-EXAMINATION

16 BY MR. ROBINSON:

17 Q I wrote your words down, Mr. Callen. You said your
18 proposal is a rate reduction and a buildup of a trust.
19 Now, does the rate reduction have something to do with
20 current electric rates of Consumers Energy?

21 A Well, I see the point of your question. I guess it
22 wouldn't.

23 Q So we're not reducing current rates to take out any costs
24 that are currently being recovered, right?

25 A Presumably what Consumers has paid through its on-going

1 fees, et cetera, would take care of the disposal, but
2 this refers to the 163 million that would be accumulated
3 since that -- that would be part of the funding for
4 actual disposal.

5 Q So the remedy that you're now proposing is to somehow
6 through rate reductions accumulate a pot of \$163 million
7 and put that in a trust?

8 A Yes.

9 Q You're no longer proposing to, proposing any specific
10 remedy with respect to the on-going fee?

11 A Well, there isn't any by Consumers.

12 Q There isn't any currently. There were collections from
13 customers of on-going fees and then payment of those
14 amounts to the federal government. My question is: Are
15 you proposing any remedy in your testimony with respect
16 to that?

17 A To the former -- I mean the on-going fees?

18 Q The on-going fees.

19 A No longer being paid?

20 Q Correct.

21 A My recommendation is not to the on-going fees.

22 Q All right. Then I think I understand your testimony.

23 MR. ROBINSON: Thank you. That's all I
24 have, your Honor.

25 JUDGE FELDMAN: All right. Thank you,

1 Mr. Robinson.

2 Thank you for your testimony this
3 afternoon, Mr. Callen. Are there any objections to the
4 admission into evidence of Exhibits MCA-1 through 4?
5 Hearing none, those exhibits are admitted.

6 (The witness was excused.)

7 JUDGE FELDMAN: All right. What's next,
8 Mr. Keskey?

9 MR. KESKEY: The next would be, MCAAA
10 would like to call to the stand Mr. William Peloquin.

11 JUDGE FELDMAN: Thank you. Mr. Peloquin,
12 come along. The court reporter will swear you in.

13 W I L L I A M A. P E L O Q U I N

14 was called as a witness on behalf of Michigan Community
15 Action Agency Association and, having been duly sworn to
16 testify the truth, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. KESKEY:

19 Q Mr. Peloquin, could you please state your name?

20 A My name is William A. Peloquin.

21 Q And did you cause to be prepared in this case direct
22 testimony of William Peloquin which consists of a cover
23 page and then the first page of question and answer
24 starts with page 2, and then it goes on for, up to page
25 12. Did you prepare or respond to those questions and

1 prepare those answers?

2 A Yes, I did.

3 Q Did you also prepare for purposes of this proceeding
4 Exhibit MCAAA 5 and Exhibit MCAAA 6?

5 A Yes.

6 Q And do you have any revisions or modifications to your
7 testimony?

8 A To the testimony, no.

9 Q Any changes to the exhibits?

10 A One minor one. I noted on MCAAA 6, on the exhibit
11 itself, line 7, the "ISFSI" was typed incorrectly. It
12 should be ISFSI. Other than that, there are no other
13 changes that I am aware of.

14 Q And do you adopt the testimony and exhibits as your
15 testimony and evidentiary presentation in this case?

16 A Yes.

17 MR. KESKEY: Your Honor, with that we
18 would move that the testimony be bound into the record
19 and that the exhibits be entered into evidence.

20 JUDGE FELDMAN: Thank you. Are there any
21 objections to Mr. Keskey's request? Hearing none, the
22 prefiled direct testimony of William A. Peloquin will be
23 bound into the record.

24 - - -

25

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the application of
CONSUMERS ENERGY COMPANY
for approval of refunds to retail electric
customers and for related relief.

Case No. **U-16861**

DIRECT TESTIMONY
OF
WILLIAM A. PELOQUIN

On Behalf of

Michigan Community Action Agency Association

February 14, 2012

I. QUALIFICATIONS

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Q. Please state your name and business address for the record.

A. My name is William A. Peloquin. My business address is 11533 Monroe, Portland, MI 48875.

Q. Briefly describe your professional qualifications.

A. I graduated from Michigan State University with a Bachelors Degree in Economics. In 1985 I graduated from Michigan State University’s Master of Business Administration program, with a major in Finance. I am a Certified Public Accountant registered by the State of Michigan.

I have over thirty (30) years of experience devoted exclusively to regulatory matters. I was formerly employed by the Michigan Public Service Commission for the period September 1971 through November 1979. I was employed by the Attorney General of the State of Michigan from November 1979 through October 2002 when I retired.

I have testified in numerous rate cases, including the following electric rate cases:

- U-4570 The Detroit Edison Company
- U-4704 Indiana & Michigan Electric Company
- U-4807 The Detroit Edison Company
- U-5108 The Detroit Edison Company
- U-5331 Consumers Power Company
- U-5608 Indiana & Michigan Electric Company
- U-6006 The Detroit Edison Company
- U-6322 Michigan Power Company
- U-6923 Consumers Power Company
- U-7660-R The Detroit Edison Company (remand)
- U-7830 Consumers Power Company
- U-9346 Consumers Power Company
- U-10102 The Detroit Edison Company
- U-10335 Consumers Power Company
- U-10685 Consumers Power Company
- U-11495 Detroit Edison Company
- U-11560 Consumers Energy Company
- U-15244 Detroit Edison Company

1 U-15245 Consumers Energy Company
 2 U-15645 Consumers Energy Company
 3 U-16191 Consumers Energy Company
 4 U-16472 Detroit Edison Company
 5 U-16794 Consumers Energy Company
 6

7 I have testified in numerous small electric rate cases, including those of the following
 8 electric cooperatives: Cherryland, Ontonagon, Presque Isle, Southeastern Michigan,
 9 Thumb, Tri-County and Wolverine. I testified in the Wolverine and Northern Michigan
 10 Cooperative securities cases involving Fermi 2, Case Nos. U-5407 and U-5408 and the
 11 storage battery plant (SBEED), Case Nos. U-6636 and U-6643.

12 I testified in Wolverine Power Supply Cooperative, Inc.'s Case U-7521 (Power Supply
 13 Cost Recovery Clause).

14 I have testified in steam heating rate cases U-4522 (Consumers Power) and U-6103
 15 (Detroit Edison). I testified in the telephone cases of Baraga Telephone and Shiawassee
 16 Telephone.

17 I have developed PSCR factors and presented testimony in the following Power Supply
 18 Cost Recovery and Gas Cost Recovery plan cases:

19 U-7512 Consumers Power Company (PSCR)
 20 U-7522 Wolverine Power Supply Cooperative, Inc. (PSCR)
 21 U-7550 The Detroit Edison Company (PSCR)
 22 U-7775 The Detroit Edison Company (PSCR)
 23 U-7785 Consumers Power Company (PSCR)
 24 U-8020 The Detroit Edison Company (PSCR)
 25 U-8578 The Detroit Edison Company (PSCR)
 26 U-8880 The Detroit Edison Company (PSCR)
 27 U-9174 Michigan Consolidated Gas Company (PSCR)
 28 U-9432 Consumers Power Company (PSCR)
 29 U-9732 Consumer Power Company (PSCR)
 30 U-9960 Consumers Power Company (PSCR)
 31 U-10702 Detroit Edison Company (PSCR)
 32 U-10710 Consumers Power Company (PSCR)
 33 U-10965 Detroit Edison Company (PSCR)
 34 U-11528 Detroit Edison Company (PSCR)

1 U-15001 Consumers Energy Company (PSCR)
 2 U-15415 Consumers Energy Company (PSCR)
 3 U-15451 Michigan Consolidated Gas Company (GCR)
 4 U-16146 Michigan Consolidated Gas Company (GCR)
 5 U-16434 Detroit Edison Company (PSCR)
 6

7 I testified in the following reconciliation cases:
 8

9 U-6488-R 1982 FCAC & PIPAC – DECo
 10 U-6871-R DECo – Insulation Outreach Reconciliation
 11 U-7512-R 1982 PSCR – CPCo
 12 U-7484-R 1983 GCR – MGU
 13 U-7785-R 1984 PSCR – CPCo Reconciliation
 14 U-7775-R 1984 PSCR – DECo Reconciliation
 15 U-8020-R 1985 PSCR – DECo Reconciliation
 16 U-8855-R 1988 PSCR – CPCo Reconciliation
 17 U-9432-R 1990 PSCR – CPCo Reconciliation
 18 U-9433-R 1990 GCR – CPCo Reconciliation
 19 U-10702-R 1995 GCR – DECo Reconciliation
 20 U-10710-R 1995 PSCR – CPCo Reconciliation
 21 U-10973-R 1996 PSCR – CECo Reconciliation
 22 U-10965-R 1996 PSCR – DECo Reconciliation
 23 U-11175-R 1997 PSCR – DECo Reconciliation
 24 U-14701-R 2006 PSCR – CECo Reconciliation
 25 U-15701-R 2009-10 GCR - DECo Reconciliation
 26 U-15704-R 2009-10 GCR - CECo Reconciliation
 27 U-16047-R 2010 PSCR - DECo Reconciliation
 28

29 I have presented testimony in various gas rate cases and special topic cases before the

30 Commission, including the following cases:

31 U-5129 Deferred Income Taxes – DECo
 32 U-5583 Deferred Income Taxes – CPCo
 33 U-6041 Depreciation Rates – CPCo
 34 U-6163 Storm Damages – DECo
 35 U-6381 Decker Coal Penalties – DECo
 36 U-6490 Automatic Adjustment Clauses
 37 U-6569 Storm Damages – DECo
 38 U-6589 Deferred Taxes – Michigan Consolidated Gas Co.
 39 U-6590 Lifeline Rates – CPCo
 40 U-7065 Fermi Test Generation – DECo
 41 U-7232 Sale of Capacity to GPU – DECo
 42 U-7236 Rail Charge Refunds – DECo
 43 U-7633 Incentive Discount Rate – MGU
 44 U-7757 Gas Cost Recovery Accounting – CPCo

1	U-7930	Restructured Residential Rates – DECo
2	U-7930-R	Restructured Residential Rates (Reopened) – DECo
3	U-7940	Restructured Residential Rates – CPCo
4	U-8110	DECo/CPCo (Estimated Billings)
5	U-8145	CPCo (Deferred Tax Accounting)
6	U-8562	Tondu Energy Systems, Inc. (Cogen)
7	U-8630	Midland Salvage
8	U-8680	CPCo (Gas – '86 Tax Reform Act)
9	U-8683	DECo (Electric – '86 Tax Reform Act)
10	U-8713	Midland Salvage
11	U-8812	Michigan Consolidated (Gas Rates)
12	U-8871	Midland Cogeneration Venture
13	U-9040	CPCo (1987 Midland Compliance Filing – 3A)
14	U-9266	Michigan Bell – New Service Offering
15	U-9322	CPCo (1988 Midland Compliance 3A)
16	U-9350	CPCo (Deferred Tax Accounting)
17	U-9493	CPCo (Depreciation)
18	U-9586	CPCo (Competitive Bidding)
19	U-9595	CPCo (Compliance 1989 – 1990)
20	U-9598	CPCo (Deferred Tax Accounting)
21	U-9611	CPCo (Midland Proceeds)
22	U-9798	DECo (Future Capacity Solicitations)
23	U-9819	CPCo (Accounting/MCV Capacity Charges)
24	U-9852	CMS Gas Transmission (South Chester Pipeline – Act 69)
25	U-9869	CPCo (Deferred Tax Accounting)
26	U-10040	Generic (Post Retirement Benefits)
27	U-10066	DECo (1989 PA 2)
28	U-10127	CPCo (MCV Contested Settlement)
29	U-10143	CPCo Retail Wheeling
30	U-10176	DECo Retail Wheeling
31	U-10297	DECo Biennial Energy Conservation
32	U-10320	CMS Gas Transmission (Albert-Vienna Pipeline – Act 69)
33	U-10321	CMS Gas Transmission (East Antrim)
34	U-10562	CPCo (Electric Line Extension – Act 69)
35	U-10554	CPCo (DSM Reconciliation)
36	U-10754	CPCo (Depreciation)
37	U-10755	CPCo (Gas Rate Case)
38	U-10787	CPCo (Special Competitive Services)
39	U-11222	Michigan Consolidated Gas Company (Depreciation)
40	U-11283	CPCo (Transmission Facilities Classifications)
41	U-11337	DECo (Transmission Facilities Classifications)
42	U-11509	CECo (Depreciation)
43	U-11662	CECo (Nuclear Decommissioning)
44	U-11726	DECo (Fermi 2 Depreciation)
45	U-11724	CECo/DECo (Ludington Pumped Storage Depreciation)
46	U-11722	DECo (Depreciation)

1	U-12033	Great Lakes Cooperative (Beaver Island Cable and Generation)
2	U-12133	Electric Deregulation: Educational Surcharges
3	U-12478	DECo (Securitization)
4	U-12505	CECo (Securitization)
5	U-12639	Commission's Own Motion (Netting of Stranded Costs)
6	U-13000	CECo (Gas Rate Case)
7	U-14992	CECo (Sale of Palisades)
8	U-15506	CECo (Gas Rate Case)
9	U-15611	CECo Nuclear Legacy Case (Big Rock)
10	U-15985	Mich Con (Gas Rate Case)
11	U-15986	CECo (Gas Rate Case)
12	U-16418	CECo (Gas Rate Case)
13	U-16535	MichCon (Manufactured Gas Plan accounting)
14	U-16855	CECo (Gas Rate Case)

15

16

I have also been directly involved in or participated in the successful settlement of the

17

following cases:

18	U-6150-R	Nuclear Plant Decommissioning Funds (Reopened)
19	U-8638	Generic Accounting for TRA '86
20	U-8675	Revenue Reduction – TRA '86 – Michigan Bell
21	U-8684	Revenue Reduction – TRA '86 – Michigan Consolidated Gas Co.
22	U-8676	Revenue Reduction – TRA '86 – General Telephone
23	U-8686	Revenue Reduction – TRA '86 – Michigan Power (Electric)
24	U-8687	Revenue Reduction – TRA '86 – Michigan Power (Gas)
25	U-8691	Revenue Reduction – TRA '86 – Alpena Power
26	U-8692	Revenue Reduction – TRA '86 – Edison Sault
27	U-8789	DECo (Fermi 2 – Electric Rates)
28	U-9096	CPCo (Deferred Tax Accounting)
29	U-9097	CPCo (Deferred Tax Accounting)
30	U-9099	Michigan Consolidated Gas Co. (Deferred Tax Accounting)
31	U-9475	Michigan Consolidated Gas Co. (Gas Rates)
32	U-9498	DECo (Construction Lines)
33	U-9600-01	Michigan Power/I&M (Tax Normalization Accounting)
34	U-9866	DECo (Deferred Tax Accounting)
35	U-12033	Great Lakes Cooperative (Beaver Island Cable and Generation)
36	U-15320	In Re Application of Midland Cogeneration Venture
37	U-15451	Michigan Consolidated Gas Company GCR (Partial Settlement)
38	U-15628	Michigan Consolidated Gas Company (Sale of Storage Gas)

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Q. Are you a member of any professional associations?

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A. Yes. I am a member of the Institute of Certified Public Accountants.

II. DIRECT TESTIMONY1
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Q. What is the purpose of your testimony in this proceeding?

A. I am addressing the amount of refunds due ratepayers from the DOE settlement. I will also address the issue of placing the \$163 million pre '83 DOE Liability in a trust fund, or alternatively, to refund it.

A. Settlement Refunds Due Ratepayers.

Q. Consumers witness Mr. Torrey proposed to refund \$23.3 million to the ratepayers applicable to the Department of Energy (DOE) Settlement. Are you opposing his adjustments totaling \$23.3 million?

A. No. I am advocating an additional adjustment that was not (but should be) included in the pre-filed Exhibit A-3.

Q. Please explain your additional adjustment.

A. CECO's proposed refund to ratepayers is understated by \$33.7 million. An adjustment that should be made relates to the post securitization Palisades ISFSI investment that amounted to \$39.3 million, and which increases the refund that should be assigned ratepayers.

Q. Please describe and calculate your adjustment relating to the post securitization Palisades ISFSI investment?

A. Mr. Torrey's workpapers MAT-1 and MAT-6 show that Consumers invested \$39.3 million in Palisades ISFSI (Independent Spent Fuel Storage Installation) during the period 2001 through April of 2007. Securitization involved assets booked prior to 2001.

1 The \$39.3 million of Palisades ISFSI investments are post-securitization DOE “But For”
2 costs, as so labeled on workpaper MAT-6.

3 Workpaper MAT-6 also indicated that the \$39.3 post securitization Palisades
4 ISFSI ‘But For’ Costs were off-set by \$6.6 million of accumulated depreciation. This
5 resulted in a net book value of \$33.7 million. I have attached lines 1 through 16 of Mr.
6 Torrey’s workpaper MAT-6 as page 3 of my Exhibit MCAAA-5.

7 On January 23, 2008, Consumers filed its “Case No. U-14992 - Palisades
8 Transaction Proceeds - Final Report.” This filing included “Attachment B” titled
9 “Palisades Plant Final Gain.” I have attached Attachment “B” as page 2 of my Exhibit
10 MCAAA-5.

11 Referencing Attachment “B,” Consumers retained \$305.7 million of the proceeds,
12 the book value of Palisades assets. Consumers then refunded the \$67.5 gain on the sale
13 to the ratepayers.

14 Based upon workpaper MAT-6, we know that the \$305.7 of Palisades proceeds
15 that Consumers retained included the \$33.7 million of net post securitization Palisades
16 “But For” DOE costs. Consumers was therefore reimbursed by Entergy for \$33.7 million
17 of the post securitization “But For” DOE costs of the Palisades ISFSI.

18 Mr. Torrey’s workpaper MAT-10 details Consumers’ \$150 million DOE claim. I
19 have attached workpaper MAT-10 as page 4 of my **Exhibit MCAAA-5**.

20 Workpaper MAT-10 also includes \$39.3 million of Palisades ISFSI investment
21 for the period 2001 through April of 2007.

1 Workpaper MAT-10 illustrates that Consumers was reimbursed for \$39.3 of post-
2 securitization “But For” DOE costs of the Palisades ISFSI by the DOE. Attachment “B”
3 and workpaper MAT-10 demonstrate that Consumers was reimbursed twice for the post-
4 securitization “But For” DOE costs of Palisades’ ISFSI.

5 Page 1 of my Exhibit MCAAA-5 presents my DOE Settlement Adjustment.
6 Column “a” reiterates Consumers “Final Gain” from Attachment “B,” page 2 of
7 MCAAA-5. Column “b” contains the \$33.7 million of post 2000 Palisades ISFSI “But
8 For” DOE costs. Lines 2 and 3 of column “c” excludes the DOE “But For” costs.
9 Column “c” illustrates that the effect of Consumers’ inclusion of the post 2000 DOE “But
10 For” costs of Palisades ISFSI was to reduce the U-14992 refund by \$33.7 million.

11 The ratepayers U-14992 refund should not have been reduced by the post 2000
12 Palisades ISFSI investment that was required only by the DOE contractual breach.
13 Additionally, Consumers is not entitled to collect twice for the post 2000 Palisades ISFSI
14 investment.

15 **Q. What amount are you recommending should be refunded to the ratepayers?**

16 A. \$57 million. The \$57 million ratepayer refund is detailed in my **Exhibit MCAAA-6**.

17 **Q. Do you oppose any of the amounts found on Mr. Torrey’s Exhibit A-3?**

18 A. Yes. Mr. Torrey requests \$12.1 million for “litigation and miscellaneous” on line 13 of
19 his Exhibit. This amount is supported by workpapers MAT-15 and MAT-16.

20 Workpaper MAT-16 details \$4.9 million of “DOE Liability Letter of Credit”
21 costs. The Commission has previously ruled that the DOE Letter of Credit costs are not
22 recoverable from the ratepayers. Referencing workpaper MAT-10 (attached to my

1 Exhibit MCAA-5), Consumers did not even request DOE reimbursement for the DOE
2 Liability Letter of Credit costs. Since these costs are not recoverable from either the
3 DOE or ratepayers, Consumers cannot recover them.

4 **B. The DOE Liability Trust or Refund Remedy.**

5 **Q. Please address the issues applicable to the \$163 million pre '83 DOE Liability.**

6 A. The pre '83 DOE Liability was previously fully funded by the ratepayers. Indeed, it was
7 over-funded. From the May 7, 1991 date of the Commission's Order in Case No. U-9346
8 through the November 2, 2009 date of the Commission's Order in Case No. U-15645, the
9 book balance of the DOE Liability was improperly included in Consumers' jurisdictional
10 electric ratebase.

11 Consumers' Standard Contract with the DOE for the disposal of spent nuclear fuel
12 required the DOE to begin accepting spent nuclear fuel by January 31, 1998. The DOE
13 has been found to be in partial breach of its contracts by the federal courts. The DOE
14 nuclear fuel disposal program was in disarray. DOE nuclear fuel disposal was decades
15 behind in accepting spent fuel. But the DOE at least was preparing its licensing
16 application to the Nuclear Regulatory Commission for the Yucca Mountain repository. It
17 was in that scenario that the Commission found in Case No. U-15645 and in U-16191
18 that Consumers should place the \$163 million of ratepayer monies in a trust fund.

19 Consumers represented in U-16191 that it would prefer to pay the DOE the \$163
20 million rather than put the money into a trust fund. The Commission rejected Consumers
21 proposal. The Commission found that paying the \$163 million to the DOE currently

1 would be imprudent. The Commission again stated that paying the pre '83 DOE Liability
2 would be imprudent in its March 2011 rehearing order in U-16191.

3 Since the close of the record in Case No. U-16191 in late 2009, the DOE spent
4 nuclear fuel disposal program has imploded. MCAA Witness Ronald Callen discusses
5 the failures of the DOE spent fuel disposal program in his testimony filed in this case.

6 If, as the Commission found in U-16191 that it would be imprudent to pay the
7 DOE for the pre '83 DOE Liability based upon the evidentiary record in that case, it
8 became even more imprudent for CECo to pay the DOE Liability in 2011. Nonetheless,
9 Consumers paid the DOE \$163 million in July 2011 to settle its damage case against the
10 DOE.

11 The \$163 million of ratepayer funds was not Consumers property. I believe that
12 Consumers had a fiduciary responsibility to the ratepayers. Paying \$163 million to the
13 DOE for services not provided and that probably will never be provided, was not fiscally
14 responsible, and was imprudent. This is doubly so since Consumers paid the federal
15 government the \$163 million of the DOE Liability after the Commission found in its
16 orders that paying the DOE pre '83 Liability would be imprudent.

17 Consumers' imprudent payment of \$163 million to the DOE should not be an
18 impediment to placing the ratepayers \$163 million into a trust fund. Consumers had no
19 right to use the ratepayers funds to pay the DOE. However, Consumers is free to risk
20 shareholder funds.

21 It is my recommendation that the Commission again order Consumers to place the
22 \$163 million of DOE Liability ratepayer monies into a trust fund. Given the DOE's

1 dereliction of its contractual responsibility to perform, some future entity will of
2 necessity replace the DOE as the spent nuclear fuel repository. The \$163 million trust
3 fund investment will be needed.

4 **Q. Do you have an alternative recommendation?**

5 A. Yes. If the ratepayer's monies (comprising the \$163 million of the DOE Liability) are
6 not placed in a trust fund, then these should be refunded forthwith to the ratepayers..

7 **Q. Does this complete your testimony at this time?**

8 A. Yes.

1 JUDGE FELDMAN: Does Staff have any cross
2 for Mr. Peloquin?

3 MS. UITVLUGT: No, your Honor.

4 JUDGE FELDMAN: Mr. Erickson?

5 MR. ERICKSON: No, your Honor.

6 JUDGE FELDMAN: Mr. Robinson, anytime
7 you're ready.

8 MR. ROBINSON: Thank you, your Honor.

9 CROSS-EXAMINATION

10 BY MR. ROBINSON:

11 Q Mr. Peloquin, you have reviewed Mr. Torrey's Exhibit A-3,
12 correct?

13 A Yes.

14 Q And your testimony doesn't indicate any disagreement with
15 the calculation of the amounts shown on that exhibit,
16 correct?

17 A That's correct. I made no attempt to verify his numbers.

18 Q So even though you think that the amount that should be
19 distributed to customers is more than the 23.3 million
20 that he shows on that exhibit, you don't -- you haven't
21 expressed any disagreement with the calculation of that
22 amount, right?

23 A That is correct. And in fact, like I say I made no
24 attempt to examine his numbers in any depth.

25 Q O.K. So if you accept that Mr. Torrey accurately

1 calculated the amounts that were, that have been paid by
2 customers for these costs that were at issue in the DOE
3 litigation, then a refund of \$23.3 million would return a
4 hundred percent of the amounts that customers paid,
5 right?

6 A I'm not certain I can agree with that.

7 Q Is that because you just haven't done the analysis of
8 those amounts to agree or disagree?

9 A I think the Palisades plant and ISFSI are an issue. It's
10 both an issue in the settlement and it's also an issue in
11 14992 and the things that follow from it. So I'm not
12 sure that we can say that that's a hundred percent
13 recovery.

14 Q Well, but when you make that, when you gave me that
15 answer, you're referring then to your other discussion in
16 your direct testimony about this alleged double recovery
17 of some costs and how that affected the above book amount
18 that was distributed to customers as a result of the
19 Palisades sale, right? That's what you're talking about
20 there?

21 A Well, it -- basically I would go the opposite direction
22 with the -- I believe that the recovery of all or most of
23 the Palisades II ISFSI raises an issue with the amount of
24 gain on the sale of Palisades. And I simply note that
25 that's all a double recovery.

1 Q That's the subject of your direct testimony, right?

2 A Yes.

3 Q So I mean that's a single issue we're talking about,
4 right?

5 A It's a single issue. I'm only mentioning that I
6 approached it from the point of view that we needed to
7 recalculate the gain on Palisades because of the ISFSI
8 recovery. I happen to note that it's also a double
9 recovery, but that isn't really the reason why I think we
10 should include the additional gain on Palisades.

11 Q O.K. I think I understand what you're saying.

12 MR. ROBINSON: And I don't have any more
13 questions, your Honor.

14 JUDGE FELDMAN: Thank you very much, Mr.
15 Robinson.

16 Any redirect, Mr. Keskey?

17 We have an in-place recess. Off the
18 record.

19 (Brief in-place recess.)

20 JUDGE FELDMAN: Back on the record. Now
21 please say that again.

22 MR. KESKEY: We have no other questions,
23 your Honor.

24 JUDGE FELDMAN: All right. Thank you.
25 Mr. Peloquin, thank you very much for your testimony this

1 afternoon and your patience. You may step down at your
2 leisure.

3 (The witness was excused.)

4 JUDGE FELDMAN: Are there any objections
5 to the admission of MCAAA 5 or MCAAA 6? Hearing none,
6 those exhibits are admitted.

7 Anything further that we should take up
8 before we adjourn today? We have briefing dates. Let's
9 go off the record a moment.

10 (Brief discussion was held off the record.)

11 JUDGE FELDMAN: Back on the record.
12 Pursuant to our off-the-record discussion, by my
13 understanding by agreement of the parties, briefs will
14 now be due May 9, 2012, and reply briefs will now be due
15 May 23, 2012. Is that acceptable to everyone?

16 MR. ROBINSON: Yes, your Honor.

17 MR. ERICKSON: No objection, your Honor.

18 JUDGE FELDMAN: I will adjust the
19 scheduling memo and I will adjust the PFD target date
20 accordingly.

21 Does anybody else have anything at all
22 before we close the record on this? Thank you all very
23 much for your patience today, and we are adjourned.

24 (At 4:40 p.m., the record was closed.)

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C E R T I F I C A T E

I, Marie T. Schroeder (CSR-2183), do hereby certify that I reported in stenotype the proceedings had in the within-entitled matter, that being Case No. U-16861, before Sharon Feldman, Administrative Law Judge with MAHS, at the Michigan Public Service Commission, Lansing, Michigan, on Tuesday, April 10, 2012; and do further certify that the foregoing transcript, consisting of Volume 2, Pages 9-290, is a true and correct transcript of my stenotype notes.

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