S T A T E O F M I C H I G A N

MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, regarding the regulatory reviews, revisions, determinations, and/or approvals necessary for Indiana Michigan Power Company to fully comply with Public Act 295 of 2008, as amended by Public Act 342 of 2016.	)	Case No. U-20367

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on June 25, 2020.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 7109 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before July 16, 2020, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before July 30, 2020.

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L. Feldman

Digitally signed by: Sharon L. Feldman
DN: CN = Sharon L. Feldman email = feldmans@michigan.gov C = US O = MOAHR OU = MOAHR - PSC
Date: 2020.06.25 15:25:13 -04'00'

Sharon L. Feldman
Administrative Law Judge

June 25, 2020
Lansing, Michigan

S T A T E O F M I C H I G A N

MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, regarding the regulatory reviews, revisions, determinations, and/or approvals necessary for Indiana Michigan Power Company to fully comply with Public Act 295 of 2008, as amended by Public Act 342 of 2016.	)	Case No. U-20367

PROPOSAL FOR DECISION

I.

PROCEDURAL HISTORY

Following the Commission's February 7, 2019 order creating this docket, Indiana Michigan Power Company (I&M) filed its application to reconcile its 2018 Energy Waste Reduction (EWR) costs and revenues on May 1, 2019. The application was accompanied by the testimony and exhibits of three witnesses. At the July 9, 2019 prehearing conference, I&M and Staff appeared and the parties agreed to set a second prehearing conference date to facilitate settlement. Prior to that prehearing, the parties agreed to set a full schedule. Following that schedule, on September 10, 2019, Staff filed the testimony and exhibits of two witnesses, and on October 10, 2019, I&M filed the rebuttal testimony and exhibits of one witness. At the November 18, 2019 hearing, the testimony of all witnesses was bound into the record and the prefiled exhibits were

admitted into evidence by agreement of the parties, without the need for the witnesses to appear. Briefs were filed on December 18, 2019 and reply briefs were filed on January 17, 2020.

II.

OVERVIEW OF THE RECORD

The record in this case is contained in 83 transcribed pages and 13 exhibits. This section contains an overview of the testimony and exhibits.[1] The arguments of the parties and related portions of the record are discussed in more detail in the discussion section that follows.

A. I&M

I&M presented the testimony of three witnesses, with one of these witnesses also presenting rebuttal testimony.

Jon C. Walter is Manager of Consumer Programs for I&M.[2] He testified to support the company's 2018 reconciliation of EWR revenues and costs and its application for financial incentive earnings for 2018, to provide an overview of its implementation of its EWR plan in 2018 and its 2018 EWR annual report, to support the verified and certified results of its plan and its Electric Energy Consumption Optimization (EECO) program, and to support its 2018 plan cost-effectiveness. He presented a summary of the 2018 plan performance in Exhibit IM-1, with the 2018 annual report in Exhibit IM-4; he presented an analysis to support the company's requested 2018 financial incentive in Exhibit IM-2; and he presented plan benefit-cost scores in Exhibit

[1] All transcript citations in this PFD are to the second of two transcript volumes; the first volume is a transcript of the prehearing conference.
[2] Mr. Walter's testimony is transcribed at Tr 15-35; his qualifications are set forth at Tr 16-18.

IM-3 based on EWR and EECO (volt/VAR optimization and conservation voltage reduction) program savings detail in Exhibits IM-5 and IM-6.

Mr. Walter explained that an independent contractor, ADM & Associates, performed the benefit-cost scoring and verification underlying Exhibits IM-3, IM-5, and IM-6. He also testified that I&M did not seek to adjust its plan to recognize the statutory changes adopted in 2016 PA 342. He described the goals of the plan, adopted in Case No. U-18263, including customer engagement, partnerships with vendors, streamlining rebate processing, and offering new efficient technologies, which are also described in the annual report.

Mr. Walter specifically discussed the Home Energy Management Program, the Home Energy Product Program, and the IQ Weatherproofing program for residential customers, as well as programs for commercial and industrial customers. He also outlined all programs included in the implemented plan, identifying modifications made during the plan year.[3] Citing Exhibit IM-1, Mr. Walter testified that I&M achieved verified savings of 32,037,744 kWh from all EWR programs, which equates to 115% of the 1% Act 295 target or 109% once an adjustment is made to reflect the inclusion of load management programs.[4] He testified that lifetime savings also increased to 418,869,149 kWh. Mr. Walter explained that savings were calculated using the Michigan Energy Measures Database, and verified by ADM & Associates.[5] He testified that I&M spent $2,091,599 for residential customer programs, and $2,414,049 for commercial and industrial customer programs, which he characterized as well below the

[3] See Tr 25-28.
[4] See Tr 30.
[5] See Tr 24.

Act 295 program caps, and reasonable and prudent.[6] Mr. Walter also specifically discussed the savings associated with its EECO program, detailed in Exhibit IM-6, explaining the method ADM & Associates used to evaluate the savings.[7]

Mr. Walter then discussed I&M's application of cost-effectiveness tests to compare program expenses to benefits, as detailed in Exhibit IM-3. He testified that I&M is requesting a financial incentive of $432,012 for 2018 as shown in Exhibit IM-2.[8]

Bryan S. Owens is Regulatory Analysis and Case Manager in the Regulatory Services Department of I&M.[9] He presented I&M's calculation of its EWR revenues and costs for 2018 and its calculation of a cumulative overrecovery including interest and the requested financial incentive. He also testified in support of I&M's accounting for the amounts collected under its discontinued net lost revenue tracker (also referred to as the NLRT) as required by the Commission's September 13, 2018 order in Case No. U-18333, and its contention that no refund should be made.

Exhibits IM-7 and IM-8 show the calculations of the EWR plan revenue requirement and cost reconciliation. Mr. Owens explained that the cumulative overrecovery of $69,967 shown in Exhibit IM-7 reflects a starting overrecovery balance of $336,272, 2018 revenues of $5,499,139, 2018 costs of $4,589,784, cumulative interest or "carrying costs" of $7,936 on the net overrecovery calculated on a monthly basis, and a cumulative financial incentive of $1,183,597, which includes a 2018 financial incentive of $432,012, as shown in Exhibit IM-8. He also explained that the cumulative net carrying cost of $7,936 includes a true-up amount equal to a net credit of

[6] See Tr 29, 35.
[7] See Tr 31-32.
[8] See Tr 33-34.
[9] Mr. Owens's testimony, including both direct and rebuttal, is transcribed at Tr 36-57; his qualifications are set forth at Tr 37-39.

$12,165, attributable to an error in the calculation of 2016 carrying costs, as also shown in Exhibit IM-8.[10]

Exhibit IM-9 contains a summary of the revenue collected under the net lost revenue tracker. He testified that I&M is not proposing to refund any of the surcharge revenues collected under this tracker, as shown in Exhibit IM-9. He testified that I&M collected the revenue pursuant to a surcharge authorized by the Commission's December 20, 2012 order in Case No. U-16739, and that I&M's collection of revenue through that surcharge ceased in September 2014 based on the Commission's September 26, 2014 order in Case No. U-17283. Mr. Owens provided tariff citations in support of this testimony. He also cited advice of counsel as supporting the company's position.[11]

Stephen Hornyak is Regulatory Consultant Principal, in the Regulated Pricing and Analysis group of American Electric Power Service Corp.[12] He testified in support of the reconciliation component of the proposed surcharges presented in his Exhibit IM-10, explaining the method underlying the calculations. Mr. Hornyak confirmed Mr. Owens's testimony that no net lost revenue tracker surcharge revenues were included in the company's reconciliation or surcharge calculations. He presented a chart at Tr 64 showing negative surcharges by customer class for rates to be effective January 1, 2020.

[10] See Tr 43.
[11] See Tr 49-51.
[12] Mr. Hornyak's testimony is transcribed at Tr 58-64; his qualifications are set forth at Tr 59-60.

B. Staff

Fawzon B. Tiwana is an Economic Analyst in the Energy Waste Reduction section of the MPSC's Energy Resources Division.[13] He addressed I&M's accounting for net lost revenue tracker surcharge revenues, explaining that Staff disputes I&M's position that it has no surcharge revenues to refund. Citing the Commission's final order in Case No. U-18333, he testified that the revenues collected under the surcharge should be refunded to customers as an offset to EWR surcharges.[14]

Mr. Tiwana also addressed I&M's Home Energy Report program. He testified that I&M should have calculated the 15% cap after excluding Home Energy Management Program savings from the total, citing the settlement agreement in Case No. U-18263. He identified a 15,729 kWh difference between the cap I&M calculated and Staff's calculation, and characterized this difference as "relatively minor."[15] He recommended no adjustment to the reconciliation, but instead that Staff's calculation method be adopted in future cases.

Karen M. Gould is Manager of the Energy Waste Reduction section of the MPSC's Energy Resources division.[16] She addressed I&M's 2018 program expenditures as reported in its reconciliation, and testified that load management program costs should not have been included in total EWR program costs. She specifically identified $238,161 in expenditures for the Home Energy Management program, along with administrative costs of $14,545, and recommended that the total $252,706 be excluded. She explained that although I&M was authorized under its plan

[13] Mr. Tiwana's testimony is transcribed at Tr 67-72; his qualifications are set forth at Tr 68-69.
[14] See Tr 70-71.
[15] See Tr 72.
[16] Ms. Gould's testimony is transcribed at Tr 73-81; her qualifications are set forth at Tr 74-76.

to implement the Home Energy Management program, it was assumed the associated costs would be recovered in the company's subsequent rate case. Ms. Gould recommended that I&M's costs for the Home Energy Management program be considered as part of the three-phase framework the Commission adopted for demand response (DR) costs.

In a chart included in her testimony at Tr 81, Ms. Gould presented a calculation of the total amount Staff believes should be refunded, $2,060,478. This amount reflects Staff's 2018 cumulative EWR overrecovery balance of $1,506,270, carrying costs as calculated by I&M, the cumulative financial incentive requested by the company of $1,183,597, and the refund of net lost revenue tracker surcharge revenues of $1,729,869.

C. Rebuttal

In his rebuttal testimony, Mr. Owens presented revised versions of Exhibits IM-7, IM-8, and IM-10 as Exhibits IM-11 through IM-13, to reflect Staff's recommendation to remove load management costs from the EWR reconciliation. He testified that in order to remove $252,706 in load management costs, the carrying cost calculation needs to be adjusted, resulting in a net reduction of $250,636 as incorporated in Exhibit IM-12.[17]

Mr. Owens also addressed Staff's recommendation that the net lost revenue tracker surcharges be returned to customers through reductions in future surcharges, reiterating I&M's position that revenues collected prior to the Commission's order in Case No. U-17283 are not subject to refund.[18]

[17] See Tr 54-55.
[18] See Tr 55-56.

As the final subject of his rebuttal testimony, Mr. Owens addressed Staff witness Mr. Tiwana's discussion of the savings cap calculation. He agreed that no adjustment should be necessary.[19]

Mr. Owens explained that I&M's revised reconciliation calculations result in an overrecovery balance of $320,630 for 2018 as shown in Exhibit IM-11, while Exhibit IM-13 presents revised surcharge calculations.

III.

DISCUSSION

I&M proposes to refund $320,603 through a negative surcharge, including interest through January 2020. Consistent with Mr. Owens's testimony, this amount excludes the refund of any net lost revenue tracker surcharge revenue. This reconciliation amount also excludes $252,706 in load management costs as proposed by Staff, with a $2,070 offsetting adjustment for carrying costs as explained by Mr. Owens in his rebuttal testimony. Staff contends that the amount to be refunded is $2,060,478, which includes $1,729,869 in net lost revenue tracker surcharges and does not incorporate the carrying cost adjustment Mr. Owens made in conjunction with the exclusion of load management costs.

As discussed in section A, although I&M and Staff use different values for the 2018 reconciliation balance, there is no dispute regarding 2018 EWR costs or revenues. As discussed in section B, there is a minor dispute between the parties regarding I&M's adjustment to its carrying cost calculations to reflect the exclusion of load management costs from the reconciliation.[20] Based on the testimony and the briefs of the parties, the

[19] See Tr 56.
[20] See Staff brief, page 6.

primary issue in dispute in this case involves I&M's accounting for net lost revenue tracker surcharge revenues as required by the Commission's September 13, 2018 order in Case No. U-18333. This issue is discussed in section C below.

A. 2018 EWR Costs and Revenues

Staff and the company agree the reconciliation should reflect 2018 energy waste reduction costs that are $252,706 less than reported in Exhibit IM-8, to exclude load management costs that I&M originally included in its reconciliation. There also appears to be no dispute that the reconciliation should reflect 2018 energy waste reduction revenues of $5,449,139. Staff did not take issue with the company's statement of revenues in either its testimony or brief. In its rebuttal exhibits, Exhibits IM-11 and IM-12, I&M recalculated the total 2018 EWR over/under balance as an overrecovery of $1,498,334, not including carrying costs, which is the difference between 2018 EWR costs of $4,337,078 and revenues of $5,449,139. In a chart included in her testimony, Ms. Gould presented an overrecovery balance of $1,506,270, not including carrying costs.[21] Although Ms. Gould separately added carrying costs of $7,936, because the difference between the overrecovery balances stated in I&M's rebuttal exhibits and Staff's testimony is $7,963, the ALJ concludes that Staff's overrecovery balance of $1,506,270 already includes carrying costs of $7,963. Thus, this PFD finds no actual dispute that the 2018 overrecovery balance, not including carrying costs, is $1,498,334.

B. Carrying Costs (Interest) on Monthly Balances

As noted above, I&M agreed to Staff's exclusion of load management costs from the 2018 reconciliation on the basis that those costs were properly recoverable through base rates, as demand response costs, rather than as EWR costs. In his rebuttal, Mr.

[21] See Tr 81.

Owens reduced Staff's proposed $252,706 adjustment by $2,070 to reflect a revision to the carry cost calculation. Mr. Owens presented this calculation in Exhibit IM-12, which is a revised version of Exhibit IM-8. In its brief, Staff relies on Ms. Gould's testimony and disputes that the carrying cost adjustment is appropriate, without additional analysis. Although the amount at issue is small, and the parties devote no meaningful effort to analysis of the issue in their briefs, after reviewing the record evidence, the ALJ is convinced that I&M's calculation is unsupported and that time to address this issue is merited to avoid future errors in similar calculations. In making this determination, the ALJ notes that I&M's reconciliation in this case corrects a prior error in the calculation of carrying costs.

Putting aside the true-up adjustment of $12,165, which is identical in both Exhibit IM-8 and Exhibit IM-12, I&M calculates total interest on revenues of $10,945 in each exhibit, but calculates carrying charges on expenses as $14,773 in Exhibit IM-12, compared to $12,703 in Exhibit IM-8. While the $2,070 difference is a minor amount, it does seem counterintuitive that a reduction in recoverable expenses, with no reduction in offsetting revenues, should result in a reduction in the interest to be returned to ratepayers. A review of Exhibit IM-12 in comparison to Exhibit IM-8 shows that "2018 Program Costs" are reduced each month from February 2018 through December 2018 to exclude the load management costs. In the line labeled "Carrying Costs Costs," in which carrying costs attributable to these program costs are calculated,[22] the carrying costs associated with the reduced costs are shown as greater in Exhibit IM-12 for the months of March through December 2018, even though expenses but not revenues

[22] Confusingly, these values are shown in parenthesis, i.e. as a negative number or "over" collection, although the carrying cost associated with expenses are treated as an offset to the overrecovery rather than a contribution to the overrecovery.

have been reduced. It is also worth noting that while a monthly interest rate of 0.2% is applied to revenues, the rates applied to costs vary from approximately 0.15% to approximately 0.94%.

Mr. Owens testified that he applied the monthly daily average cost of short-term debt to the over/under recovery balances.[23] He cited the settlement agreement in Case No. U-16673, approved by the Commission in its January 12, 2012 order in that docket. That settlement agreement only states that the reconciliation shall include "interest at the Company's short-term borrowing rate on any over-recoveries and under-recoveries."[24]

A review of Exhibits IM-8 and IM-12 shows that I&M's carrying cost calculations are not consistent with his explanation of the derivation or from one exhibit to the next. Because it is a minor amount, and Staff did not press the point, this PFD does not recommend that the calculations be redone. Instead, this PFD recommends that the Commission reject I&M's $2,070 reduction to the interest credited to ratepayers as a result of the reduction in 2018 EWR costs. Nonetheless, if I&M is more careful with its carrying cost calculations and its presentation of those calculations, this confusion could be avoided in a future case.

C. Net Lost Revenue Tracker (RDM) surcharges

The history of the company's net lost revenue tracker was summarized in the Commission's September 13, 2018 order in Case No. U-18333 (September 13 order), beginning with the Commission's October 14, 2010 order approving a settlement agreement in Case No. U-16180, and continuing through the Court of Appeals decision

[23] See Tr 44-45.
[24] See Settlement Agreement, paragraph 5, page 3, attached to the January 12,2012 order in Case No. U-16673.

in *In re Application of Indiana Michigan to Reconcile Costs,* unpublished per curiam opinion of the Court of Appeals, issued November 29, 2016 (Docket Nos. 326405 and 327716) (*Indiana Michigan*).[25] In that September 13, 2018 order in Case No. U-18333, the Commission held:

> The net lost revenue tracker at issue in this proceeding is an unlawful revenue decoupling mechanism and is void ab initio pursuant to the Court of Appeals' holding in *Enbridge Energy Ltd Partnership v Upper Peninsula Power Co*, 313 Mich App 669; 884 NW2d 581 (2015), lv den 500 Mich 997 (2017).[26]

The Commission directed I&M to "reflect the surcharges to be refunded to the appropriate customer classes in its revised tariff sheet submitted in its 2018 energy waste reduction reconciliation proceeding."[27]

As noted above, Mr. Owens presented an accounting of the surcharge revenues I&M collected, but did not provide tariff sheets to refund those revenues to the customer classes, disputing that any refunds are appropriate. In its brief, I&M cites the substantial evidence standard applicable to judicial review of Commission decisions and argues the substantial evidence standard is applicable in this case "for purposes of determining whether the company's proposals and recommendations are reasonable and prudent."[28] I&M also cites *Michigan Bell Telephone v PSC*, 315 Mich 533 (1946) (*Michigan Bell*) and *Detroit Edison Co v PSC*, 416 Mich 510 (1982) for the standards on retroactive ratemaking.

---

[25] See September 13 order, pages 1-4.
[26] See September 13 order, page 18, ordering paragraph A.
[27] See September 13 order, page 18, ordering paragraph B.
[28] See I&M brief, page 7. As the Commission explained in its January 31, 2017 order in Case No. U-18014, pages 5-8, this standard of judicial review is clearly the wrong standard for the ALJ and the Commission to use in making findings of fact in this matter; instead, findings of fact are based on the preponderance of the evidence standard.

I&M argues the Commission should not require refunds of the net lost revenue tracker revenues:

> The Commission should not engage in impermissible retroactive ratemaking by adopting Staff's suggestion to force the Company to refund previously approved amounts.[29]

I&M provides a review of the history of Commission orders addressing the net lost revenue tracker. Addressing the Court of Appeals remand order in *Indiana Michigan* and the Commission's subsequent September 13 order in Case No. U-18333, the company argues the Commission did not limit its determination in that order "to the issue on remand," but "the Commission also determined *sua sponte*, that the NLRT was void ab initio."[30] I&M then reviews the history of surcharges under the mechanism, arguing it was first adopted in January 2013 and terminated in October 2014. I&M cites tariff pages in Exhibit IM-9, arguing it had no choice but to collect the surcharges according to the approved tariffs:

> All of the revenues I&M collected during that period became I&M's property, and I&M used the revenue for its business commitments.[31]

I&M argues the order authorizing the surcharges was never challenged or subject to appeal, and argues as justification for the revenue decoupling mechanism (RDM) that it was necessary to provide the utility with a reasonable opportunity to recover its costs and earn a reasonable return:

> The NLRT Surcharge was established to address the problem created when general rates are set based on forecasted sales levels and revenues when at the same time energy optimization requirements direct a utility to take efforts to not achieve those sales levels. This means rates are designed on a sales forecast the utility must try not to achieve.

[29] See I&M brief, page 12.
[30] See I&M brief, page 12.
[31] See I&M brief, page 15.

> When fixed costs are spread across the sales forecast used to set rates, a utility is denied a reasonable opportunity to recover its reasonable costs absent something like the NLRT Surcharge.[32]

In support of its claim that the Commission's September 13 order constitutes retroactive ratemaking, I&M argues the situation presented in *Michigan Bell* is similar to the situation here. It also cites *McDonald v Watt*, 653 F2d 1035 (CA 5 1981), which involved applications for oil and gas leases approved by the federal Bureau of Land Management. Citing MCL 462.25, I&M argues the Commission's order authorizing the collection of surcharge revenues in Case No. U-16749, which was not appealed, is "deemed prima facie lawful and reasonable."[33] It further disputes that MCL 462.24 is applicable, arguing that the Commission does not have the power to determine whether its own orders are unlawful or void ab initio.

Staff argues that $1,729,896 in surcharge revenues collected under the net lost revenue tracker should be returned to ratepayers based on the Commission's prior orders. Staff argues that I&M's arguments have already been addressed and rejected by the Commission, citing both the September 13 order and the subsequent December 20, 2018 order denying rehearing. Staff argues that the Commission followed the Court of Appeals instructions in *Indiana Michigan* and its holding in *Enbridge Energy Ltd P'ship v Upper Peninsula Power Co*, 313 Mich App 669 (2015). Staff argues that its December 20 order, the Commission expressly rejected I&M's argument that its September 13, 2018 order constituted retroactive ratemaking. Staff argues that I&M is attempting to relitigate an issue that has been fully decided. In its reply brief, Staff addresses I&M's reliance on MCL 462.25, arguing that section provides

[32] See I&M brief, page 16.
[33] See I&M brief, page 17.

that charges are prima facie lawful only "until finally found otherwise." Staff argues that the Commission's order on remand found that the net lost revenue tracker was an unlawful revenue decoupling mechanism. Staff disputes that the company's collection of revenue under the prior Commission orders in Case Nos. U-16180, U-16311, and U-16379 is sufficient to entitle the company to retain the illegal surcharge revenues, disputing its claim that the money became I&M's property:

> The NLRT was never legal. Thus, the amounts collected pursuant to the NLRT surcharge were never properly the property of I&M. Simply put, the money isn't I&M's, it's the ratepayers, and I&M should give it back. The Michigan Court of Appeals held that 'a plain reading of MCL 460.1097(4) does not empower the PSC to approve or direct the use of an RDM for electric providers.' . . . Thus, electric RDMs, such as the NLRT, are not authorized by statute and are unlawful. Further, the Court in *Enbridge* determined that despite the strong public policy favoring settlement, the Commission still could not approve a settlement agreement that established an otherwise lawful RDM.[34]

Staff argues that I&M wrongly contends the Commission is impugning its own legislative acts, and wrongly relies on *Michigan Bell*, because orders approving revenue decoupling mechanisms were determined to be *ultra vires* acts. Staff also disputes I&M's reliance on *McDonald v Watt*, supra, arguing that the Bureau of Land Management approval of leases were not predicated on illegality in the first instance.[35]

In its reply brief, I&M argues that the net lost revenue tracker was never found to be unlawful, and that the Court of Appeals remand to the Commission was only "for purposes of providing guidance for future cases."[36] In support of this argument, I&M quotes the following language from *Indiana Michigan*:

> The issue whether the NLRT is factually distinct from RDMs approved by the PSC in other cases requires analysis of the specific structure of the

[34] See Staff reply, pages 3-4, citation omitted.
[35] See Staff reply, pages 5-6.
[36] See I&M reply, pages 4-5.

> NLRT and comparison of that structure to RDMs approved by the PSC. The performance of such an analysis is more suited to the PSC in the first instance. We defer to the administrative expertise of the PSC. Attorney General, 237 Mich App at 99. Moreover, it is apparent that the PSC approves a number of RDMs and similar mechanisms. To have the PSC rule on the validity of the NLRT in light of *Enbridge Energy* would provide guidance for future cases.[37]

I&M disputes Staff's contention that it is attempting to relitigate the Commission's orders in Case No. U-18333, arguing that the dispute in this case is whether the Commission may grant a refund, while the Court of Appeals "did not address that issue and did not establish the law of the case." It argues that the question regarding the appropriateness of refunds was not previously litigated.

Additionally, I&M argues that even if the issue was fully decided in the earlier proceeding, it is appropriate for I&M to relitigate that issue in this case "given the unreasonableness of the Commission's designation of the NLRT as being void *ab initio* from inception."[38] I&M cites *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 7-9 (1988), *Consumers Energy Co v Pub Serv Comm*, 268 Mich App 177 (2005), and *In re Consumers Energy Application for Rate Increase*, 291 Mich App 122, 584 (2010) in support of its contention that issues decided in earlier Commission proceedings may be relitigated by establishing new evidence or a showing the earlier result in unreasonable.[39] I&M argues that only the courts may decide that a Commission order is void ab initio.[40] In support of this argument, I&M cites MCL 462.25, and contends that Staff's position is equivalent to concluding that the Court improperly delegated its duty

[37] See *Indiana Michigan*, 18-19, as quoted in I&M reply, page 4.
[38] See I&M reply, page 5.
[39] See I&M reply, page 5.
[40] See I&M reply, page 6.

to determine what the law is.[41] To I&M, the Commission's authority under MCL 462.24 must be prospective because "ratemaking actions under that section clearly are legislative in nature and, therefore, prospective."[42] I&M further addresses MCL 462.24 by arguing that the Commission cannot rescind its own order on its own motion, but only "upon application of a person or common carrier."[43] I&M cites *In re Detroit Edison*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2008 (Docket No. 273961), *Pennwalt Corp v Pub Serv Comm*, 157 Mich App 273 (1987), and *Building Homeowners Managers Ass'n of Metro Detroit v Pub Service Comm*, 424 Mich 494 (1986) in arguing that the Commission can only modify rates prospectively:

> Past expenses and costs are not recoverable under a future rate. If a rate structure is wrong and causes a utility to lose $1,000,000, the utility cannot recover that in its new rate. *Attorney General v Pub Serv Comm*, 291 Mich App 106, 113; 804 NW2d 574 (2010). If the rate structure is wrong so the utility gains $1,000,000 more profit than is reasonable and just, the commission cannot order a refund. It can certainly lower the rate so there will be no excess profit in the succeeding years. *Detroit Edison Co v Pub Serv Comm*, 82 Mich App 59, 68; 266 NW2d 665 (1978).[44]

I&M also reiterates its reliance on *Michigan Bell*. Finally, I&M argues that ordering a retroactive refund "as Commission Staff argues," would "constitute an unconstitutional taking."[45]

The analysis of this issue begins with the recognition that MCL 462.25 provides:

> All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until

[41] See I&M reply, pages 6-7.
[42] See I&M reply, page 6.
[43] See I&M reply, page 7.
[44] See I&M reply, page 8.
[45] See I&M brief, pages 10-12.

> changed or modified by the commission as provided in section 24 of this act.

This statutory provision, which I&M relies on to support the validity of earlier Commission orders, affirms the *prima facie* validity of the Commission's September 13 and December 20 orders in Case No. U-18333. In its September 13 order, the Commission addressed the Court of Appeals remand, first summarizing the underlying procedural history:

> In its October 14, 2010 order in Case No. U-16180 (October 14 order), the Commission approved a settlement agreement that included approval of a net lost revenue recovery surcharge mechanism associated with a net lost revenue recovery tracker (NLRT) that Indiana Michigan Power Company (I&M) had requested as part of its application in its 2010 electric rate case. In the utility's next electric rate case, Case No. U-16801, I&M failed to request or even reference an NLRT. Further, neither the settlement agreement, nor the Commission's February 15, 2012 order (February 15 order) in Case No. U-16801 approving the agreement, referenced the NLRT.
>
> Each April, from 2011 through 2013, I&M filed applications seeking authority to reconcile its energy optimization (EO) plan costs and revenues and to recover net lost revenues in accordance with the net lost revenue recovery surcharge mechanism and NLRT approved in the October 14 order. See, Case Nos. U-16311, U-16739, and U-17283 respectively. Although I&M submitted a settlement agreement to the Commission for its approval regarding both 2011 and 2012 EO reconciliation cases (Case Nos. U-16311 and U-16739), and achieved a partial settlement agreement regarding its 2013 EO reconciliation case (Case No. U-17283), issues regarding I&M's proposals for recovery of its net lost revenue remained to be determined. Accordingly, in his May 23, 2014 PFD in Case No. U-17283, Administrative Law Judge Peter L. Plummer (ALJ Plummer) concluded that the NLRT was linked to the approved rates in the 2010 electric rate case and further agreed with the Commission Staff (Staff) that the NLRT does not apply to revenues collected under rates determined by the February 15 order in the utility's subsequent electric rate case (Case No. U-16801). He also rejected the utility's claims that this conclusion was a collateral attack on the settlement agreements approved in Case Nos. U-16180, U-16311, U-16739, and U-16801. ALJ Plummer further determined that the NLRT did not exist independently from the rates the Commission approved in its October 14 order in Case No. U-16180. ALJ Plummer declined to decide whether the NLRT was a revenue decoupling

mechanism (RDM) and therefore unlawful pursuant to Michigan Court of Appeals precedent. On September 26, 2014, the Commission issued an order in Case No. U-17283 that adopted ALJ Plummer's May 23, 2014 PFD on these issues (September 26 order). It then issued an order denying I&M's request for rehearing on February 12, 2015 (February 12 order).

I&M filed yet another annual application for EO reconciliation in April 2014 in Case No. U-17603. Administrative Law Judge Sharon L. Feldman (ALJ Feldman) issued a March 12, 2015 PFD recommending that the Commission deny I&M's request for a surcharge to cover lost revenues for 2013 and part of 2014 under the NLRT adopted in Case No. U-16180 and finding that I&M had not presented new arguments in the case that were not already presented to the Commission in its rehearing request in Case No. U-17283, which the Commission denied in its February 12 order.

On May 14, 2015, the Commission issued an order in Case No. U-17603 (May 14 order) adopting the PFD and finding that I&M's failure to request authority to continue the NLRT in the subsequent rate case was fatal to its claims in both Case Nos. U-17283 and U-17603. The Commission further found that I&M reduced its sales projection to reflect past lost sales in its subsequent rate case without providing any party an opportunity to verify that the adjustment was correct and ensure that previous lost sales were not double counted. Finally, the Commission differentiated between past EO reconciliation cases that involved the reconciliation of the NLRT approved in Case No. U-16180 from Case No. U-17283, which the Commission stated was the first opportunity the Staff and the Commission had to address the continuation of the NLRT after I&M failed to request the tracker in Case No. U-16801.

In Court of Appeals Docket No. 326405, I&M appealed the Commission's September 26 order in Case No. U-17283 in which the Commission denied I&M's request to reconcile certified net lost revenues for the 12-month period ending December 31, 2012, ended the surcharge for net lost revenues approved in the order entered on December 20, 2012, in Case No. U-16739, and ordered I&M to file a reconciliation of revenues collected under the surcharge established in Case No. U-16739. In Court of Appeals Docket No. 327716, the utility simultaneously appealed the Commission's May 14 order in Case No. U-17603. The Court consolidated these two appeals for purposes of oral argument and decision.

In *Indiana Michigan*, the Court of Appeals remanded Case Nos. U-17283 and U-17603 back to the Commission for reconsideration in light of the Court's decision invalidating an RDM in *Enbridge Energy Ltd Partnership v Upper Peninsula Power Co*, 313 Mich App 669; 884 NW2d 581 (2015), lv den 500 Mich 997 (2017). In light of this remand, the Commission directed

> the parties in this docket, I&M's currently pending EO reconciliation case, to address, in addition to EO reconciliation issues, the Court of Appeals' remand in Case Nos. U-17283 and U-17603. See, September 28, 2017 order, p. 7. [46]

A review of the September 13 order shows that I&M argued that a determination whether refunds should be required was not properly part of the case, and also that a refund requirement would be prohibited retroactive ratemaking.[47] Notwithstanding I&M's arguments, the Commission concluded that the NLRT was an unlawful revenue decoupling mechanism, and ordered surcharge revenues collected under the unlawful mechanism to be refunded.

The Commission quoted the Court of Appeals opinion in *Indiana Michigan* for the principle that if the NLRT was an unlawful revenue decoupling mechanism, the Commission order approving it would have been an *ultra vires* act.[48] After explaining its conclusion that the NLRT is an unlawful revenue decoupling mechanism under the statutory definition in MCL 460.1089, the Commission further concluded, consistent with the Court of Appeals opinion in *Indiana Michigan*:

> Further, because the Commission's understanding of an RDM is sufficiently expansive to include the NLRT approved in Case No. U-16180, it follows that under the holdings of *Detroit Edison* and *Enbridge Energy*, the NLRT is unlawful *ab initio* as ALJ Wallace determined.[49]

The Commission rejected I&M's argument that consideration of the validity of its prior orders constituted an impermissible collateral attack on those orders:

> The Commission finds the Court of Appeals' holding in [*Clohset v No Name Corporation,* 302 Mich App 550 (2013)] inapplicable to this remand proceeding because the Court specifically asked the Commission to take another look at the NLRT to determine whether it is an unlawful RDM

[46] See September 13 order, pages 1-4.
[47] See September 13 order, pages 12-13, 17-18.
[48] See September 13 order, pages 13-14.
[49] See September 13 order, page 16.

> pursuant to its holdings in Enbridge Energy and its predecessor Detroit Edison. Because the Court has directed the Commission to make this determination, it cannot be deemed an improper "collateral attack" on a previously Commission-approved settlement agreement.[50]

The Commission rejected I&M's argument that there was nothing to refund since surcharges under the NLRT had ceased October 2014, concluding that "the Commission's approval of the surcharge on December 20, 2012 in Case No. U-16739 authorized the implementation of a surcharge that unlawfully collected revenues associated with the NLRT, which the Commission now determines to be an unlawful RDM."[51] The Commission also rejected I&M's argument that requiring a refund would constitute unlawful retroactive ratemaking:

> The prohibition against retroactive ratemaking does not apply to a situation where a Commission order incorrectly approves of an unlawful rate or charge. See, December 4, 2000 order in Case Nos. U-10138 and U-11743, pp. 4- 5; *Attorney General v Pub Serv Comm*, 206 Mich App 290, 297; 520 NW2d 636 (1994); *Michigan Bell Tel Co v Pub Serv Comm*, 315 Mich 533, 544; 24 NW2d 200 (1946). As the Commission has concluded, the NLRT is an unlawful RDM and the corresponding surcharge that the Commission approved in Case No. U-16739 is likewise unlawful. Further, the Commission directs that an adequate accounting of the amounts unlawfully collected be determined in I&M's 2018 annual energy waste reduction reconciliation proceeding in order to ascertain the amount of the refund.[52]

The Commission again considered and again rejected I&M's arguments in its December 20 order in Case No. U-18333. It described I&M's arguments as follows, showing striking similarity to the arguments I&M presents in this case:

> I&M relies on MCL 462.25 in support of its position that the December 20 order is lawful and is not subject to the Commission finding it "void ab initio" almost six years later. Id., p. 5. The utility explains that MCL 462.25 provides that the rates charged under the December 20 order are lawful and reasonable unless they are: (1) found otherwise by a Court under

[50] See September 13, order, page 17.
[51] See September 13 order, pages 17-18.
[52] See September 13 order, page 18.

MCL 462.26; or (2) changed or modified by the Commission under MCL 462.24. According to I&M, nothing in MCL 462.25 gives the Commission the authority to nullify a prior order retroactively. Id. Further, I&M states that no court found the rates approved in Case No. U-16739 to be unlawful and unreasonable pursuant to MCL 462.26, and the 30-day appeal period for the December 20 order has passed rendering the order final. I&M continues, claiming that the Commission never followed the process that exists to rescind, alter, or amend rates under MCL 462.24, but instead determined that the December 20 order was "void ab initio" on its own motion (as opposed to doing so upon application of any person or any common carrier). Id., p. 6.

I&M further asserts that at common law, "application of the void ab initio doctrine is viewed as 'an equitable remedy which is granted only in the sound discretion of the court.'" Id., quoting *Bazzi v Sentinel Ins Co*, 502 Mich 390, 409-410; 919 NW2d 20 (2018). I&M posits that, in acting outside its statutory powers, the Commission has attempted to exercise non-existent common law powers reserved for the Courts. I&M notes that "this equitable remedy of declaring something void ab initio" is something courts do when declaring a contract void from the outset due to factors such as fraud or misrepresentation, and as a general rule of statutory interpretation when holding that an unconstitutional statute is void ab initio. Id., pp. 6-7. The company goes on to point out that in the instances that the "doctrine" has arisen in Commission-related proceedings it relates to arguments that originated at the appellate court level and was a determination made by the Court and not the Commission. Id., p. 7.

I&M also states that the Commission failed to give the utility at least 10 days' notice or an opportunity to be heard with regard to the Commission's decision to rescind the December 20 order as MCL 462.24 requires. It reiterates that the Commission has never had the common law equitable power to make the legal determination that something it did is void ab initio including the NLRT, as this is an impermissible exercise of power reserved to the courts. Id.

I&M further asserts that, even if the Commission could rescind rates it previously approved, it can only do so on a going-forward basis, because the Commission's rate orders operate only prospectively. It explains that statutes generally apply prospectively unless the statute provides otherwise and asserts that the Commission lacks the statutory authority to issue retroactive orders. Id., p. 8.

In addition to these arguments alleging a lack of statutory authority, I&M suggests that the Commission's September 13 order exceeds the scope of the Court's instructions on remand, which directed the Commission to determine "'whether the NLRT is factually distinct from RDMs approved by

the PSC.'" Id., p. 9, citing Indiana Michigan, p. 9. According to the utility, this directive does not allow the Commission to decide whether its prior NLRT decisions were unlawful and does not allow the Commission to decide its decisions are "void ab initio." I&M also suggests that the December 20 order was never an issue in this proceeding, not before the Court of Appeals, and not part of the consolidated docket in this case. According to the utility, the ALJ raised the issue on her own at the conclusion of the PFD in this case. Because this issue was not a part of the Court's remand instructions to the Commission, I&M argues that the Commission had no authority to decide it. Id.

I&M further points out that the only dockets it appealed were Case Nos. U-17283 and U-17603, neither of which involved an authorized NLRT surcharge, unlike Case No. U-16739. I&M argues that, even if the refund question were properly before the Commission in this proceeding, there is nothing to refund because the legislature has not granted the Commission authority to order refunds from a rate decision that is final and has not been appealed. I&M further contends that if the December 20 order were found to be unlawful the remedy is not to declare the increase "void ab initio" and order a refund. Id., p. 12. Rather, the proper remedy is to remand the matter to the Commission for another hearing, leaving intact the rate increase previously granted unless found to be unreasonable upon rehearing. Id. According to I&M, such a refund would further leave open the question of how the Commission decides the level of reasonable rates.

I&M also asserts that Michigan law does not require a mandatory refund. Citing an opinion by the Missouri Supreme Court, I&M argues that refunds of rates collected pursuant to fuel adjustment clauses were not required where such clauses were ruled unlawful on appeal as the Court ruled the refunds would be confiscatory. Id., p. 13, citing *Missouri ex rel Utility Consumers Council v Missouri Pub Serv Comm*, 585 SW2d 41; 33 PUR4th 273 (Mo, 1979). I&M points out that no party challenged the rates resulting from the December 20 order and that MCL 462.25 makes them lawful. Id. The utility further posits that, if the rates approved in Case No. U-16739 are invalid, then the settlement agreements that underlie those rates are also invalid. Id., p. 14. The company cites language in the settlement agreement that the Commission approved in the December 20 order to the effect that the Commission's failure to accept the agreement without modification results in its withdrawal. Thus, I&M suggests that the entire rate order may be infirm. According to I&M, "[t]he equities weigh in favor of no automatic refund because a refund would create confiscatory rates." Id. The utility goes on to argue that required refunds would violate its due process rights.[53]

[53] See December 20 order, pages 2-5.

The Commission found that I&M did not demonstrate adequate grounds for rehearing. After quoting from *Indiana Michigan* at length, the Commission explained its determination that no error occurred in its September 13 order:

> [T]he Court of Appeals asked the Commission to considered various published opinions in which the Court concluded that the Commission lacked the statutory authority to approve an RDM for use by an electric utility, either outright or through approval of a settlement agreement that permits such an RDM. By referencing this line of case law and asking the Commission to consider it, the Court placed the question of the NLRT's lawfulness squarely before the Commission. It is clear, both from the Court's remand instructions and its failure to retain jurisdiction in this matter, that the Court wanted the Commission to do more than just determine whether the NLRT is factually distinct from RDMs the Commission approved in the past. By not retaining jurisdiction, the Court effectively washed its hands of the whole matter and delegated the case to the Commission to resolve *in its entirety*.
>
> The Commission also disagrees with I&M's attempt to paint the Latin phrase "*ab initio*" as some kind of equitable remedy at law. The Commission has carefully reviewed *Bazzi, supra,* and has concluded that the Michigan Supreme Court did not hold the Latin words "*ab initio*" to be an equitable remedy. Rather, *Bazzi* involved rescinding a contract or transaction. Here, the Commission's September 13 order does not rescind a contract or transaction. Instead, it complies with the Court of Appeals' instructions on remand, finding the NLRT to be an unlawful RDM and resolving the matter by requesting a determination of the proper amounts to be refunded to customers in the utility's upcoming EWR reconciliation proceeding. Were the Commission to fail to determine the effective date of the NLRT"s unlawfulness, the Commission would both: (1) ignore the Court's instructions to determine the NLRT's lawfulness, and (2) ignore the Court's failure to retain jurisdiction, a failure that implies it is the Commission (and not the Court) that must resolve all remaining issues necessary to dispose of the case.[54]

Based on the Commission's orders in Case No. U-18333, which are *prima facie* lawful and reasonable, this PFD finds that I&M must be directed to refund the surcharge revenues collected under its unlawful RDM. While I&M essentially seeks to relitigate the Commission's determinations in that case, the company had ample opportunity to

[54] See December 20 order, pages 8-9.

appeal the Commission's decision to the Court of Appeals and chose not to. MCL 462.26(1) provides in pertinent part:

> Except as otherwise provided in [MCL 460.117, MCL 460.205, MCL 483.162, MCL 486.570 and this section], any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals.

The Commission's September 13 and December 20 orders clearly stated the availability of an appeal.

Contrary to I&M's argument that this case calls for an evaluation of the reasonableness of a refund order, the Commission has already determined that a refund is required, and the only question presented in this case is the correct accounting for those revenues. The ordering paragraph in the September 13 order stated: "Indiana Michigan Power Company shall reflect the surcharges to be refunded to the appropriate customer classes in its revised tariff sheet submitted in its 2018 energy waste reduction reconciliation proceeding."[55]

It is somewhat ironic that in seeking to retain the surcharge revenues received under the unlawful RDM, I&M relies on a line of cases prohibiting retroactive ratemaking, which is itself a hallmark of the revenue decoupling mechanism. That is, under the unlawful RDM, the utility is compensated after rates are put into effect for the post-rate-order reduction in sales attributable to energy efficiency activities.

[55] See September 13 order, page 18.

IV.

CONCLUSION

For the reasons explained above, this PFD recommends that the Commission adopt the findings and conclusions presented above, including the following findings and recommendations:

1. I&M's 2018 EWR costs were $4,337,078, and its 2018 EWR revenues were $5,499,139, as shown in Exhibit IM-12, for a net overrecovery of $1,498,334, not including interest or carrying costs, and not accounting for net lost revenue tracker surcharge revenues;

2. I&M should be authorized to recover an earned financial incentive of $432,012 for 2018, with a cumulative financial incentive of $1,183,597 as of year-end 2018, as shown in Exhibits IM-11 and IM-12.

3. The carrying cost or interest on the net overrecovery that I&M initially calculated as $7,936, which also reflects a credit to ratepayers from a prior error in the carrying cost calculation, should not be further reduced as presented in Exhibits IM-11 and IM-12. Thus, the net overrecovery resulting from the 2018 reconciliation is $322,673, prior to consideration of the net lost revenue tracker surcharge revenue.

4. Staff has properly interpreted the Commission's September 13 order to require I&M to refund an additional $1,729,869 to customers.

5. I&M should be directed to file tariffs to refund a total of $2,052,542 to customers. It should be further directed to work with Staff to develop a method for

determining carrying costs consistent with the settlement agreement in Case No. U-16673 that is transparent and easily reproducible.

MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L. Feldman

Digitally signed by: Sharon L. Feldman
DN: CN = Sharon L. Feldman email = feldmans@michigan.gov C = US O = MOAHR OU = MOAHR - PSC
Date: 2020.06.25 15:25:36 -04'00'

Sharon L. Feldman
Administrative Law Judge

Issued and Served:
June 25, 2020