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CASE 94-E-0099 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric Street Lighting Service.

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OPINION AND ORDER CONCERNING
REVENUE REQUIREMENT AND RATE DESIGN

Issued and Effective: December 29, 1995
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Lisa Rosenblum
William D. Cotter
Raymond J. O’Connor
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CASE 94-E-0098 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric Service.

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CASE 94-G-0100 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Gas Service.

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OPINION NO. 95-21

OPINION AND ORDER CONCERNING REVENUE REQUIREMENT AND RATE DESIGN

(Issued and Effective December 29, 1995)

BY THE COMMISSION:

INTRODUCTION

On April 21, 1995, we issued an abbreviated order setting electric, electric street lighting, and gas rates for rate year 1995.³ In it, Niagara Mohawk Power Corporation (Niagara Mohawk or the company) was authorized to increase its rates to generate a $36.1 million (1.1%) increase in total

¹ Harold A. Jerry, Jr. served as Chairman of the Commission until December 6, 1995.

² See Appendix 1 for a list of these proceedings.

³ Cases 94-E-0098 et al., Order Setting Electric, Electric Street Lighting, and Gas Rates (issued April 21, 1995), (the 1995 Rate Order).
electric and street lighting revenues\(^1\) and to generate an increase in annual gas revenue of $4.95 million (.8\%).\(^2\) The active parties in these cases were also provided with guidance for their further negotiations concerning electric rates beyond 1995. Among other things, the 1995 Rate Order directed the company and other parties to address methods to improve the company’s competitive position, without anticompetitive effects; uneconomic utility generation (including further investigation of the IPPNY/Sithe ratemaking proposal); the high price of many IPP contracts; the effects of the Fuel Adjustment Clause (FAC) and other make-wholes and true-ups; local property tax issues; and ways to improve operational efficiency.

This opinion and order explains the bases for the determinations and conclusions in the 1995 Rate Order and, thus, completes our decision in these cases. The procedural background and public comments are summarized first, followed by a discussion of the issues presented.

**BACKGROUND SUMMARY**\(^3\)

These cases were initiated by Niagara Mohawk’s February 4, 1994 tariff filing and multi-year electric rate proposals. With the company’s consent, the filed tariffs were suspended through April 26, 1995, 16 weeks later than the normal suspension date of January 4, 1995. On January 26, 1995, a recommended decision by then-Deputy Chief Administrative Law Judge Gerald L. Lynch and Administrative Law Judge Eleanor Stein (the Judges) was issued, supporting an electric base rate revenue increase of $253.810 million (7.3\%), a disallowance of

1. This is the effect of a $181.7 million base rate revenue increase, non-base rate changes, and forecast discount changes.

2. The increase in rates of $36.1 million reflects an increase in anticipated 1995 revenues over those actually received in 1994.

3. The full procedural history is set forth in the recommended decision, pp. 4-16.
CASES 94-E-0098, 94-E-0099, 94-G-0100, and 29327 et al.

approximately $58 million of electric system costs the company proposed to recover through its fuel adjustment clause, and a gas base rate revenue increase of $10.336 million (1.7%). The recommended electric base rate revenue increase included $108 million of Independent Power Producer (IPP) capacity costs heretofore recovered in fuel adjustment charges, whose transfer to base rates would not increase customers’ bills. Taking into account all base and other forecast rate changes in 1995, the recommended decision projected a total annualized electric revenue increase of 1.7% over 1994 total annualized electric revenues.¹

More than 120 exceptions were taken to the recommended decision by Niagara Mohawk, staff, the Consumer Protection Board (CPB), the Department of Law (DOL), the New York Power Authority (NYPA), Multiple Intervenors (MI, an organization of the company’s largest commercial and industrial customers), the Commercial Building Association (CBA or the Association, an organization of commercial property owners doing business in the Buffalo area), United Tenants of Albany, Inc. (United Tenants, representing the interests of low-income residential customers), the Independent Power Producers of New York, Inc. and Sithe Energies, Inc. (IPPNY/Sithe), the Pace Energy Project and the Natural Resources Defense Council (Pace/NRDC), Native Textiles (Native, a manufacturer which will receive NYPA economic development power delivered by Niagara Mohawk),² and Adirondack Hydro Development Corporation (an individual IPP).

In its exceptions, staff recommends that Niagara Mohawk be denied any base rate relief and that there be a disallowance,

¹ The percentage increases for various service classifications and various rates and charges within service classifications would vary widely from this overall percentage, however, with total electric residential class revenues increasing by about 6.2%, for example, and most other classes experiencing smaller percentage increases or percentage decreases.

² This opinion and order reflects the facts and circumstances at the time of our deliberations.
greater than the Judges recommend, of the revenues Niagara Mohawk may recover through its fuel adjustment clause. CPB recommends a base rate decrease or a rate freeze. Niagara Mohawk’s updated request is for an increase in electric base rate revenues of approximately $286.5 million (8.3%) and an increase in gas revenues of approximately $17.1 million (2.8%).¹ Niagara Mohawk opposes any disallowance of costs it proposes to recover through its fuel adjustment clause.²

**SUMMARY OF PUBLIC COMMENTS³**

These cases are being decided under circumstances in which many of the company’s customers are finding it difficult to pay their utility bills at existing rates. More than 1,100 customers wrote and many hundreds of others signed petitions or spoke at eight public statement hearings in Buffalo, Williamsville, Utica, Albany, Syracuse, Cicero, Watertown, and Port Henry.

A substantial majority of those commenting are elderly and on fixed incomes, and they generally paint a desperate

¹ These figures are based on the income statements attached to the company’s brief opposing exceptions. The company’s figures reflect an estimate of more than $55 million of savings projected from the company’s Voluntary Employee Reduction Program (VERP) which were not reflected in the recommended decision. Excluding the effects of VERP, Niagara Mohawk is seeking a total of approximately $359 million in additional gas and electric base rate revenues, while the recommended decision is recommending a total gas and electric base rate revenue increase of $264 million.

² Procedural milestones subsequent to the 1995 Rate Order include Multiple Intervenors’ comments opposing Niagara Mohawk’s compliance filing, the May 11, 1995 filing of a final Settlement Report on fuel targets and buyback rates, the May 22, 1995 filing by Niagara Mohawk concerning its management of mandated electric power purchase obligations, and the May 22, 1995 petition for rehearing and/or clarification filed prematurely by Niagara Mohawk.

³ A more detailed summary of the public comments is set forth in the recommended decision, pp. 16-19.
picture, giving a variety of reasons why they are unable to maintain an acceptable standard of living, and contending that any further rate increase would make their lives even more difficult. These customers complain of utility rates increasing faster than inflation over the past few years, ask that past increases be rolled back, and object strongly to any further increases. Many of those commenting also express strong objection to specific cost elements: executive compensation, operating and decommissioning nuclear power plants, advertising, charitable contributions, and taxes. Others express concern as well about general inefficiency in the company’s operations and the need for improved management oversight of company employees. Some of the strongest objections come from customers angered by increases in their bills despite their successful efforts to decrease usage.

These public comments have all been considered in the decisions explained in this opinion and order.

LEGAL AND PROCEDURAL ISSUES

The Burden of Proof Adjustment

From the beginning of these cases, staff and the company disagreed about the quality of the company’s rate case presentation. Staff complained that the company’s presentation was poorly explained, riddled with errors and inconsistencies, updated constantly, and, for many issues, lacked sufficient supporting information. Niagara Mohawk responded to staff’s complaints about its initial filing, initially agreeing to provide more information. Niagara Mohawk also committed itself to providing more time for other parties to review the new information, offering to extend the suspension date by 12 weeks subject to a non-cash make-whole of 50% of any electric revenues forgone by reason of the extension. The company otherwise disputed staff’s criticisms. In trial briefs, staff renewed its broad criticisms of the company’s rate case presentation and argued the presentation was so deficient that Niagara Mohawk
should be denied a rate increase. Niagara Mohawk vehemently opposed staff’s argument.

The recommended decision considered and resolved each substantive issue, taking into account the evidence and arguments presented. However, the Judges also considered staff’s criticisms of the company’s rate case presentation in the context of whether Niagara Mohawk had sustained its overall burden of proof. The Judges saw some validity in staff’s criticisms, particularly with regard to the company’s numerous failures to comply with applicable rules, such as 16 NYCRR §61.4;1 Niagara Mohawk’s reluctance to identify expense updates that would tend to reduce revenue requirement or offset the need for rate relief; and the reliability of the company’s filing overall.2 Because of these deficiencies, the Judges recommended a disallowance based on 1% of the company’s forecast margin or profit, representing $17.532 million (electric) and $2.644 million (gas).

On exceptions, the Commercial Building Association suggests the burden of proof adjustment might not survive a judicial challenge and argues it would have been better to deny any rate increase, as staff proposed. CPB, meanwhile, characterizes the recommended adjustment as "trivial" and contends a rate freeze would be preferable. Staff maintains the company did not sustain its burden of proof even in part and that the contrary conclusion in the recommended decision cannot withstand scrutiny. But staff suggests, alternatively, that the recommended burden of proof adjustment "probably suffices."3

In response, Niagara Mohawk emphasizes that a rate freeze would be unreasonable because the recommended decision

1 That rule requires utilities to present competent testimony to support estimates of changes in revenues, expenses, or income. The rule states that speculative or conjectural data are not acceptable and that all estimates must be explained in detail and their bases definitely established.

2 R.D., pp. 36-39.

3 Staff’s Brief on Exceptions, p. 7.
correctly cited a Commission rule that there cannot be a presumption that existing rates are reasonable.\(^1\) The company also disagrees with the idea that a specific burden of proof adjustment for it should be adopted as a general warning to other utilities that deficiencies in rate case presentations will not be tolerated.

Niagara Mohawk also excepts to the recommended burden of proof adjustment. While agreeing with much of the Judges’ analysis in support of the recommended adjustment, Niagara Mohawk views the burden of proof adjustment as an unfair undifferentiated "penalty," which lacks any specific record basis, and is unsupported by agency precedent or rules. The company also suggests the proposed disallowance double counts deficiencies for which specific expense disallowances were elsewhere supported in the recommended decision. Finally, Niagara Mohawk maintains a burden of proof adjustment would be unreasonable and unfair given its willingness to "absorb" by choice what it estimates to be $142 million of legitimate business costs.

Staff and the Commercial Building Association reply. Staff argues the recommended disallowance is not a penalty, but represents, instead, a value assigned to the Judges’ doubts about the company’s proof in support of a rate increase. It maintains the adjustment would be fair if we are unwilling to adopt its primary recommendation to deny the company any rate increase. Staff and the Commercial Building Association both criticize Niagara Mohawk’s suggestion that we should relax the burden of proof standard because of various challenges the company faces, especially if a 1995 revenue decision will serve as a base for any multi-year rate arrangement in 1996 and beyond. Staff sees more than enough record evidence to support the recommended adjustment or even a greater one. Finally, staff objects to Niagara Mohawk’s arguments about the $142 million of revenue

\(^{1}\) 16 NYCRR §61.2.
requirement the company claims to have agreed to forgo, asserting that figure is untested on the record.

The Judges properly criticized the company’s rate case presentation, its failure to comply with our rules of procedure, and its demonstrably unsatisfactory approach to meeting its burden of proof in this rate filing. As the Judges concluded, for example, in numerous instances Niagara Mohawk failed to comply with the requirements of 16 NYCRR §61.4 that it explain in detail in competent testimony the bases for its expense, revenue, and income forecasts and that the bases for such estimates be definitely established.¹ We find that the company’s evidence was deficient primarily in the areas of departmental expenses, independent power purchase projections, sales for resale, and transmission revenues. The company also departed from the commonly followed method of meeting its burden of proof, described in the Statement of Policy on Test Periods in Major Rate Proceedings, in that it did not always provide actual information for a single historical test year, normalizing adjustments, and the forecast expense level for the rate year.² While a company could seek to modify the commonly accepted approach, it could do so only in favor of some equally comprehensive method; Niagara Mohawk did not do so.

Rather than persuade us that the Judges’ adjustment on account of the company’s failure of proof is excessive, arguments on exceptions demonstrate that the recommended adjustment is too

¹ R.D., pp. 36 and 23.
small. Thus, were we relying heavily on the company’s evidentiary presentation, an adjustment greater than the Judges’ recommended adjustment would be proper.

As discussed below, however, we are determining the overall departmental expense allowance using a macro approach that does not rely on the company’s evidentiary presentation of individual departmental expenses. Because of the deficiency noted in the forecast of IPP purchases and sales for resale and transmission revenues, we are also ordering the continuation of 100% true-up of forecasted against actual independent power purchase costs; we are not adjusting the macro sales for resale and transmission revenue targets set by the Judges; and we are retaining the company’s fuel adjustment clause (FAC). Given our use of the macro approach to departmental expenses and concomitant true-ups, the burden of proof adjustment need not be adopted at this time. Should our true-up provision or the macro approaches to departmental expenses and sales for resale and transmission revenue targets need to be revisited, so too will the issue of the burden of proof adjustment.

1 Another example of this kind of failure of proof, in addition to those cited in the recommended decision, involves Niagara Mohawk’s initial decision to ignore CPB’s criticisms of its demonstration, selling, and advertising expense allowance request. It was not until after the record was closed and the Judges recommended a $28.5 million (50%) disallowance for this expense category that the company attempted, for the first time, to explain the reasonableness of its request. It did so, apparently, by initially advising some parties informally that the cost of DSM programs are included in the expense category, and by subsequently attempting, as staff and CPB complain, to augment the evidentiary record in a procedurally defective manner. From strictly a procedural point of view, this single failure of proof alone suggests the Judges’ quantification of a fair burden of proof adjustment is way too low.

2 Case 26583, Western Union Telegraph Company - Teletypewriter Exchange Service, Order Denying Rate Increase (issued January 23, 1975); Order Denying Rehearing (issued March 19, 1975).
Staff’s Motion to Strike

Near the close of the record, Niagara Mohawk moved to introduce into evidence voluminous rebuttal testimony and exhibits. Staff objected to much of the rebuttal, asserting it should have been introduced earlier in the cases, and moved to strike it. Staff’s motion was denied. Staff renewed its procedural argument in its trial briefs and the recommended decision concluded that while staff had raised some valid arguments, the ruling denying staff’s motion was reasonable.1

Staff excepts, pointing out that if its motion were granted, $6 million of expense disallowances could be adopted for rents, computer software, data processing, American Gas Association dues, and consulting expenses. Staff, supported by CPB, asserts utilities should not withhold important, relevant evidence until the end of rate cases. Niagara Mohawk replies that staff was offered a reasonable opportunity to prepare for cross-examination prior to the rebuttal’s introduction into evidence.

Staff’s exception is largely moot given the macro approach we have employed. To the extent it is not moot, the Judges provided ample justification to deny staff’s motion to strike.

Rates for Delivery of NYPA Economic Development Power

At the time trial briefs were submitted, a petition to intervene, a brief, and some prefiled direct testimony were submitted by Native Textiles, which had not participated previously in these cases. During 1995, Native will receive NYPA economic development power delivered by Niagara Mohawk, and in its brief, Native offered an argument opposing the company’s proposal to increase by 31% the demand charge for the delivery of NYPA power. The prefiled testimony suggested Niagara Mohawk’s

1 R.D., pp. 31-33.
rate proposal was not justified and would interfere with important state policy.

The Judges granted the petition to intervene to the extent of considering Native’s brief, but they declined to entertain assertions of fact offered by Native on brief because the evidentiary hearings had already been closed and there was no suggestion the public notice of these cases had been inadequate. They nevertheless endorsed Native’s substantive position, agreeing in the recommended decision with MI’s argument that Niagara Mohawk had not proven the reasonableness of its proposed 31% demand charge increase.

Native excepts to what it calls the "denial" of its motion to intervene, claiming it was making an argument in its trial brief, not offering facts outside the record. Staff replies that Native should be able to argue based on facts in evidence, but asserts Native is actually seeking unfairly to augment the record.

Pursuant to 16 NYCRR §4.7(a), a party denied permission to intervene has a right to our review of that decision. Upon review, we agree with the Judges: Native was properly allowed to intervene only to the extent of offering arguments based on the existing record; and the Judges properly held the record should not fairly be reopened on questions of fact. We also agree Niagara Mohawk’s rate proposal should be rejected for the reasons offered by Multiple Intervenors, rendering Native’s claims moot. To the extent it is inconsistent with these conclusions, Native’s exception is denied.

Niagara Mohawk also excepts, claiming that the proposed rate for delivery of NYPA power was developed in accordance with a method employed in a previous Commission order, as set forth in its exhibits and work papers, and is based on an embedded cost

1 R.D., p. 44.
study otherwise supported in the recommended decision. In its brief on exceptions, Niagara Mohawk traces the evidence in the record from the cost study to the proposed rate. The company explains that it did not submit direct testimony to support the proposed rate increase because no one contested its rate proposal in the hearings.

Native and Multiple Intervenors respond. Multiple Intervenors explains the method employed in Case 91-E-0403 was evaluated as part of a settlement agreement and, in any event, that the method used to develop the rate here is not the same as the one used in the earlier case. Both responding parties maintain Niagara Mohawk did not sustain its burden of proof, and Native criticizes the company’s attempt to explain on brief what should have been provided through direct testimony and exhibits. Native also criticizes Niagara Mohawk’s failure to justify its proposed 31% rate increase in the context of the business expansion and revitalization intended to be encouraged by the low-priced NYPA power being delivered to it by Niagara Mohawk.

Niagara Mohawk’s exception is denied. Native properly points out that a rate increase of this magnitude should have been fully explained by Niagara Mohawk as part of its direct evidence, especially in light of the business expansion and revitalization to be encouraged by low-cost NYPA power. The company has failed to sustain its burden of proof, and we reject the proposed increase in the rate for delivery of NYPA power.

Voluntary Employee Reduction Program Update

The Voluntary Employee Reduction Program (VERP) enabled Niagara Mohawk to reduce significantly its employee count. While the company initially forecast 10,452 employees in 1995, when it took account of VERP it later forecast only 8,757 employees by year-end 1995. The change poses the procedural issue of how to deal fairly with a substantial, complex modification in forecast rate-year expense that was estimated for the first time after the close of the evidentiary record and after the cases were briefed.
The company, staff, and CPB differed about how the new information should be handled and how any savings should be reflected in the 1995 revenue requirement. Niagara Mohawk proposed to hold prompt hearings on the update, between the time of the recommended decision and our deliberations, and to reflect the resulting estimate of savings in rates immediately. Staff, however, wanted more time to prepare for hearings and proposed to reflect any savings from VERP in rates after 1995; it complained that deciding these cases on the basis of the VERP update would entail disregarding numerous staff adjustments supported on the record before the company’s update. CPB agreed more time was needed to prepare for hearings, but wanted to reflect in 1995, subject to a true-up, rate-year savings premised on 2,000 employees retiring or separating from Niagara Mohawk under VERP.

Because of the procedural concerns raised, the recommended decision did not reflect any savings from VERP, but suggested that it would be reasonable for the company’s estimate of savings to be reflected in rates on a temporary basis.1

On exceptions, staff, Niagara Mohawk, and CPB all continue to advocate their earlier positions. CPB maintains it is reasonable to assume 2,000 positions will be eliminated and that, in the absence of a better company forecast, departmental expenses will fall by 10% because of VERP. Staff maintains the company’s proposed schedule of VERP hearings would not be reasonable and that it still makes sense to defer all the revenue requirement effects of VERP to 1996. Niagara Mohawk complains of a double count if the Judges’ recommended disallowances for payroll, fringe benefits, and other expenses are combined with its projected savings from VERP. The company also suggests that if its proposal for handling VERP is not adopted, it might seek recovery in rates of the $195 million of one-time costs of the

1 R.D., pp. 50-54.
VERP program it had written off in 1994.¹

We are reflecting in 1995 rates savings from the Voluntary Employee Reduction Program, equal to $53.6 million (electric) and $4.8 million (gas). This amount is $5.5 million less than the company’s estimate, in order to ensure that savings from employee reductions are not double counted. The VERP savings reflected are based on the company’s estimate. The savings reflected will not be the subject of reconciliation or true-up, because we are satisfied the overall level of revenues will be reasonable given other adjustments to revenue requirement contained in this determination. While the actual 1995 VERP savings may be somewhat greater than forecast by Niagara Mohawk or reflected in this opinion, this is reasonable, as a matter of discretion, in the context of Niagara Mohawk having written off the electric portion of nearly $195 million of one-time VERP costs in 1994.

CPB’s exception is denied because we are not willing to project VERP savings on the premise 2,000 employees will leave Niagara Mohawk. Nor will staff’s approach be employed, for it would require ratepayers to wait until 1996 to see the benefits of VERP in their bills.

Management Audit Recommendations

The Judges reported that staff and Niagara Mohawk agree that 51 of 52 recommendations from the company’s three 1990 management audits have been implemented and that the remaining recommendation is moot because of the sale of HYDRA-CO, a former non-utility generation subsidiary of Niagara Mohawk. These findings are not contested on exceptions. Accordingly, consistent with Public Service Law (PSL) §66(19), we find that Niagara Mohawk has reasonably implemented its most recent management audit recommendations.

¹ Niagara Mohawk’s Brief on Exceptions, p. 21.
COMMON REVENUE REQUIREMENT ISSUES

Total Departmental Expenses

The record includes evidence and arguments on more than 25 separate categories of costs described by Niagara Mohawk as "departmental expenses." These include operation and maintenance expense categories for labor, fringe benefits, rents, computer software, legal services, consultants, data processing, training, and similar costs. Most of the evidence and arguments presented concerned individual departmental expenses, and were offered by Niagara Mohawk, staff, and CPB. Much of the evidence offered on these issues was the subject of evidentiary disputes which influenced the Judges’ recommended burden of proof adjustment. Staff and the company also presented evidence and arguments in support of "macro" analyses of total departmental expenses, which could be used either to set an overall allowance for departmental expense in the first instance, or as a check on the reasonableness of the results of a "micro" or issue-by-issue analysis.

Employing an exhaustive micro, or issue-by-issue, analysis of the evidence and arguments, the Judges concluded the company should be allowed departmental expenses of approximately $818 million, exclusive of the nuclear refueling outage costs, the unrecognized pension gain authorization, effects of the VERP, and of their recommended burden-of-proof adjustment. Because it took so much time to evaluate the evidence and arguments on these individual departmental expenses, the Judges did not perform a macro analysis to project total departmental expense.

On exceptions, the parties continue to focus on the

1 The Judges considered these issues at R.D., pp. 60-106.

2 See, for example, Exhibit 66 (Niagara Mohawk), and Tr. 6556-6560 (staff). Staff’s approach started with the company’s updated and corrected forecast of departmental expenses and adjusted it for recent actual variances from budgets, AGA dues for lobbying, excessive nuclear refueling costs, and 1995 pre-VERP labor reductions.
individual departmental expenses. The Judges reported all the exceptions to us and advised us as well of the replies and their latest recommendations. We have also been advised of the "macro" approaches employed by Niagara Mohawk and staff and their criticisms of each other’s approach.

In our view, continued micro evaluation of individual departmental expenses distracts Niagara Mohawk from the appropriate focus on controlling and cutting costs and increasing productivity so service quality will not deteriorate in an increasingly competitive market and inserts the parties and this Commission too much into the function of micro managing Niagara Mohawk. In this case, as a practical matter, it is also inefficient for this Commission to attempt to decide precisely all the individual departmental expense allowances. For these reasons, and given the facts and circumstances facing Niagara Mohawk generally, we are setting Niagara Mohawk’s departmental expense allowance on a macro basis in these cases.¹

We start from the proposition that the Judges carefully scrutinized the evidence and arguments and fairly concluded an approximately $818 million expense allowance would be reasonable.² The Judges, as noted, have also analyzed all the exceptions and replies in detail. While they recommend that many exceptions be denied and a few be granted, the overall expense allowance would not change materially because granting some exceptions would increase revenue requirement and granting others would lower revenue requirement. Moreover, our macro approach for determining a reasonable overall level of departmental expense (exclusive of VERP, mandate relief and amortization of

¹ Therefore, Niagara Mohawk’s concern that the recommended decision’s micro adjustment related to the Addis and Dey’s buildings rehabilitation credit violated the Internal Revenue Code is moot. Niagara Mohawk’s Brief on Exceptions, pp. 26-27.

² The Judges’ recommended departmental expense allowance adjusted for the $8.378 million amortization of unrecognized pension gain and $39.9 million of Nine Mile outage costs.
unrecognized pension gain) produces a result very similar to the Judges’ recommended allowance.

Our macro starts with the company’s latest pre-VERP estimate of departmental expense and builds upon and improves staff’s four-part macro approach, which we find reasonable with some modifications. We are adopting parts two and four of staff’s macro approach—the adjustments for AGA dues for lobbying and a smaller pre-VERP payroll in 1995—along with the estimates as calculated by staff. Staff’s direct testimony explains and its work papers in evidence indicate that these adjustments were conservative in nature. The company did not take specific exception to these staff estimates and we have no reason to doubt their reasonableness. However, we find staff’s reliance on the company’s 1993 budget as compared to the actual departmental expense variance of 4.93% partially duplicative.\(^1\) Taking the Judges’ conclusions and recommendations, including their analysis of micro exceptions, and employing the macro analysis described above,\(^2\) we are convinced the recommended departmental expense allowance of approximately $818 million is reasonable exclusive of the effects of VERP, the nuclear refueling outage costs, the unrecognized pension gain authorization, and mandate relief we required in the 1995 Rate Order.\(^3\)

\(^1\) Part one of staff’s macro related to departmental expenses exclusive of nuclear refueling outage costs. However, the 4.9% overall departmental expense budget variance in 1993 inherently included the budget versus actual variance of the 1993 Nine Mile 1 outage. By basing the first part of staff’s macro on the actual year-to-date October 1994 budget variance of only 4.4% as indicated in Appendix C of staff’s Initial Brief, we have eliminated any possible doublecounting related to Nine Mile 1 outage costs since there was no Nine Mile 1 refueling outage in 1994.

\(^2\) Part three of staff’s macro approach related to nuclear refueling outage costs. We are addressing these costs separately (see p. 32).

\(^3\) Indeed, while our macro analysis alone produces a forecast of $816 million, the $818 million figure remains reasonable.
There is also no question that government must do its part to lower the cost of doing business in New York. For this reason, we will relieve the company of specific regulatory requirements which heretofore applied and further decrease the departmental expense allowance (and other cost categories as well) by $4.9 million for DSM, $1.2 million for uncollectibles, and $1.25 million for the PSC assessment. We remain committed to further similar reductions as needed to help Niagara Mohawk lower its costs and prices in its transition to competition. Included among these is also a decrease to $4.3 million for research and development (R&D).

Finally, as noted in the 1995 Rate Order, the total departmental expense allowance (and other cost categories as well) should be reduced on a net basis for the projected savings from VERP. Our reasons for adopting this course are explained above.

Taking the Judges’ $818 million starting point discussed above, the portion of mandate relief savings attributable to departmental expenses (approximately $4 million) and the departmental expense portion of the projected net VERP savings (approximately $53 million of the $57 million total reflected), we conclude a departmental expense allowance of approximately $761 million (exclusive of nuclear refueling outage costs and the unrecognized pension gain) would result in just and reasonable rates in 1995. That figure is adopted for ratemaking purposes in these cases.

Return on Common Equity

The Judges recommended that Niagara Mohawk be allowed 11% on common equity and suggested the allowance should be updated based on the recommended method in the Generic Finance Case (if it has been adopted by that time) or based on an update of the single-utility Discounted Cash Flow (DCF) analysis.
Niagara Mohawk excepts, pointing out that while it previously agreed to constrain its allowed return on equity for its electric business to 11.0%, the Judges erred in suggesting the company’s gas return on equity should be lowered to 11.0%. In reply, CPB suggests the exception should be denied as Niagara Mohawk’s trial briefs clearly indicate the company’s commitment to accept an 11% return on equity for electric and gas service. Staff, meanwhile, suggests the return on equity need not be constrained for gas operations as the company’s gas prices are competitive.

CPB accepts the 11% equity return recommendation for electric operations and use of the Generic Finance Case approach. But if the utility-specific DCF analysis from the last case is to be updated, CPB proposes that we employ only one-half of the SV factor (calculated at 0.055%) and that an adjustment of 0.4%, made to reflect discrepancies between the DCF determination and other equity return allowances set in other cases at around the time of the last Niagara Mohawk rate decision, not be readopted in these cases.

Niagara Mohawk’s argument regarding the gas ROE has merit and its exception is granted. The 11.0% return on equity for electric operations is not at issue among the parties and will be used for setting the electric revenue requirement.

The Generic Finance Case has not yet been decided, and we will continue to place primary reliance on the DCF method, but give some credit to the CAPM. An 11.4% ROE for gas operations is within a range of reasonableness and is supported by the record as a whole. Accordingly, the gas revenue requirement will be calculated based on the 11.4% cost of common equity estimated as of the time of our deliberations and the electric revenue requirement will be calculated using the 11.0% cost of common equity estimated as of the time of our deliberations.

1 R.D., p. 131.

2 See, for example, Staff’s Reply Brief, Appendix D.
Niagara Mohawk’s Revised Financing Plan

As an Appendix to its brief on exceptions, Niagara Mohawk provides a summary of its new financing plan, under which it will issue no equity, and increase substantially over prior forecasts in these cases the level of debt outstanding in 1995 and beyond. Indeed, the company now proposes to issue $400 million of debt in 1995 and $100 million in 1996, but it would issue no common equity. These changes and the reasons for them are not discussed in the company’s briefs.

Staff replies that the company’s new financing plan is unreasonable as it will result in inadequate interest coverages and debt ratios, possibly resulting in a downgrading. Staff criticizes the company’s past failure to issue more common equity, when prices exceeded book value, and suggests a common stock issuance now at a price below book value would be more reasonable than the company’s proposed debt offerings. Staff feels the company is disingenuous to argue the Commission’s actions in this case might push it over the financial brink, because, according to staff, the company’s own financing plan is a major threat to Niagara Mohawk’s long-term financial viability. Staff goes on to say that while we have historically been inclined to increase the company’s prices to preserve its bond rating, such action may no longer be warranted as it would not correct the underlying cause of the company’s financial weakness.

The effect of the new financing plan is a reduction in revenue requirement of approximately $8.6 million (electric) and an increase of approximately $.7 million (gas), with the latter adjustment taking into account the higher 11.4% cost of equity for gas service. It appears that forecast interest coverage should be adequate to retain existing ratings so long as a comprehensive long-range plan is developed that ensures the company’s financial stability. Such a plan is the subject of Phase II of these proceedings.
The Use of Deferral Accounting and True-Ups

The parties agreed to the use of deferral accounting or true-ups for many cost categories in these cases, particularly where the rate year expense level is difficult to forecast. But there clearly was increased interest expressed by some parties in minimizing or reducing the number of instances where these approaches are employed. Niagara Mohawk proposed elimination of deferrals for NERAM, property taxes and refunds, variable rate preferred stock and NYSERDA bonds, pensions and other post-employment benefits (OPEBs), HIECA, and R&D. Staff proposed elimination of Site Investigation and Remediation (SIR) and FAC true-ups as well.

The Judges recommended that some categories of costs—for example, historic Dunkirk property taxes, projected Dunkirk property taxes, SIR costs, nuclear decommissioning costs, the effects of accounting, legislative, regulatory and tax developments, pensions, OPEBs, and low-level radioactive waste disposal costs—should be allowed subject to reconciliation. They also recommended adopting CPB’s proposal to require Niagara Mohawk to defer gains on the sale of non-utility property which was previously included in rate base.

Staff excepts to the recommendations to allow true-ups for the historic Dunkirk property taxes and the costs of low-level radioactive waste disposal, asserting generally that true-ups will impede Niagara Mohawk’s transition to a competitive environment where firms do not have a chance to true-up revenues and actual expenditures. The company does not reply.

We agree with the Judges’ reasons for restoring the pension, OPEBs, and Dunkirk property tax deferrals and, as

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1 Staff had proposed that Niagara Mohawk be allowed to request rate recovery of the historic amount at the time the actual amount becomes known. Under staff’s proposal this would also be a true-up mechanism. (The amount for the past period is uncertain because of pending litigation between Niagara Mohawk and Dunkirk.)
discussed below, accept the Judges’ recommendation that the fuel adjustment clause continue for the time being and we will also require that SIR costs be partially trued up. With these exceptions, the proposed deferral eliminations are approved.

Site Investigation and Remediation Expense

The Judges recommended the company’s forecast of SIR costs subject to true-up with the exception that staff’s proposed $416,000 disallowance for unfair number rounding and to avoid double collection of historic in-house SIR costs would not be subject to true-up. Niagara Mohawk seeks clarification that it will not be barred from recovering actual SIR costs incurred in-house in the future so long as it can prove there is no double collection (as an SIR cost and payroll expense). Staff opposes the company’s request, contending it is impossible for Niagara Mohawk to show there is no double collection in a situation where Niagara Mohawk’s payroll expenses are excessive generally.

Niagara Mohawk’s request for clarification is granted because its proposal is consistent with the recommended decision. Staff should renew its argument, if at all, at the time the company tries to prove there is no double collection and attempts to recover in-house SIR costs.

The Judges also recommended that the estimated $13.5 million of SIR costs be fully recovered in the rate year in the absence of any showing of imprudence—finding no basis to distinguish SIR costs from other prudently incurred costs. CPB excepts, arguing there is no evidence SIR costs are prudently incurred, offering reasons why utility sharing of SIR costs would be reasonable, and pointing to precedent favoring its proposed approach. Niagara Mohawk replies that it has shown all its SIR costs were prudently incurred, points out CPB has offered no evidence of the imprudent incurrence of SIR costs, and criticizes CPB’s extensive reliance on orders approving settlement agreements in other jurisdictions as precedent to support utility
sharing of SIR costs.

We have agreed with full recovery in most other cases, though we have indicated a willingness to reconsider these earlier decisions.\footnote{Case 92-G-0256, \textit{National Fuel Gas Distribution Corporation – Rates}, Opinion No. 94-16 (issued July 14, 1994), mimeo p. 141.} Based on the facts and circumstances presented here, however, including Niagara Mohawk’s financial exposure and the need to contain rates, we are requiring 20% utility sharing of rate year 1995 SIR costs. In the absence of price caps, sharing of SIR costs provides an additional incentive for Niagara Mohawk to contain SIR costs and for it to aggressively seek partial recovery of such expenditures from other responsible parties and/or insurance companies. Because of the possible financial consequence of a decision to require SIR sharing as a matter of policy, our decision in this case is on a one-time, short-term basis only, pending our further evaluation of the issue in future proceedings.

\subsection*{Dunkirk Property Taxes}

The company projected a substantial increase in 1995 Dunkirk property taxes based on information it received from that taxing authority. The Judges recommended the $11.9 million projected increase be allowed subject to a true-up.\footnote{The Judges also incorrectly referred to a $17.060 million historic Dunkirk property tax expense in the text of the recommended decision. The technical appendices to the recommended decision reflect the correct historic figure of $12.142 million.}

Staff excepts, arguing the company is partly at fault for the big 1995 increase because of its failure to file for certain tax exemptions. Staff also asks the company to clarify the incremental Dunkirk tax expense, because of a concern the recommended allowance is too high. The company opposes staff’s exception and declines to provide what it sees as the kind of selective, unfair update of one expense forecast that staff has
strongly opposed throughout these cases.

We expect Niagara Mohawk’s tax dispute with Dunkirk will be resolved reasonably without the dramatic tax expense increase the company forecasts. Accordingly, $10 million of the Judges’ recommended allowance for 1995 property taxes will be reversed. As the Judges recommend, this allowance is subject to a final true-up.

ELECTRIC SUPPLY

The Recommended Imprudence Review and Adjustments

Niagara Mohawk forecast $1.05 billion in rate year capacity and energy purchases from IPPs, and sought an additional allowance of $22.5 million for deferred contract buy-out expenses. Staff challenged the prudence or efficacy of the company’s management of IPP purchases and contract management, seeking a $77 million adjustment. The Judges recommended approximately $21 million in imprudence adjustments as well as various adjustments for forecast errors and failures of proof related to IPP expenses. They found, despite Niagara Mohawk’s protestations that federal and state law and government policies forced overpayments to IPPs, that the company had considerable discretion in managing contract costs. More specifically, they found the utility had imprudently failed, in several instances, to contain costs by enforcing policies concerning such matters as financing and construction milestones, site certainty, and QF status. In addition to recommending specific adjustments, the Judges found a prudence investigation warranted in the absence of a multi-year agreement.

Niagara Mohawk excepts, arguing the recommendation for prudence review goes against the record evidence that it aggressively and successfully manages IPP costs, having bought out 31 and renegotiated 36 contracts since 1991, and warning
against a "fishing expedition." It offers instead to prepare a report for the Commission on its IPP practices over the past 15 years, addressing whatever issues the Commission directs. It contends that adoption of the recommended decision would require it to write off nearly $100 million in 1995.

Staff replies that Niagara Mohawk’s prudent record with respect to some projects does not establish prudence as to others; and it notes the company offered no proof the bought-out projects would have been viable.

In addition to the dispute about overall review of the prudence of the utility’s IPP contract management, some parties excepted to several of the Judges’ specific disallowance recommendations. Those issues are presented next, and a general discussion of all these matters follows.

Specific Buy-Out Issues

1. Imputed Buy-Outs

Staff recommended a $68.9 million disallowance for Niagara Mohawk’s failure to buy out three projects: Ag-Energy, Kamine Beaver Falls, and Onondaga Cogen. The Judges rejected all three disallowances holding, as a matter of law, that because staff, by its own admission, had not charged imprudence as to these projects during the hearings, it could not, in fairness, assert an imprudence adjustment on brief. They also held the disallowances unwarranted on the facts. With respect to Ag-Energy, they found that although Niagara Mohawk did not aggressively pursue a buy-out, there had been no showing that Sithe, Ag-Energy’s owner, would have agreed to a reasonable price. With regard to Beaver Falls, they regarded a finding of imprudence as precluded by the company’s evidence that staff was intimately involved in the renegotiation. Finally, they were unpersuaded by staff’s claim that the company allowed Onondaga Cogen’s developer to miss milestones; they held that because the

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1 Niagara Mohawk’s Brief on Exceptions, p. 66.
CASES 94-E-0098, 94-E-0099, 94-G-0100, and 29327 et al.

developer met its financing milestone, the company’s misjudgment may have had no effect.

Staff excepts, arguing it was not required to identify a legal theory on the record and that its testimony supports a finding of imprudence. The company replies that staff expressly stated it was not charging imprudence.1 Staff further contends, as to Beaver Falls, that negotiations involving staff did not commence until December 1992 and the company should have begun much earlier; and it denies staff’s effort to assist negotiations precludes a subsequent imprudence charge. In reply, the company insists its buy-out efforts were timely.

2. Recovery of Consummated Buy-Out Costs

Niagara Mohawk sought $20.8 million in deferred expenses incurred in buying out IPP projects; staff charged buy-out policies were dilatory and specific projects were bought out that would not in any case have come on line. The recommended decision concluded Niagara Mohawk was on notice of prudence review of actual buy-outs. The Judges found the L&J buy-out imprudent on the ground the project would not have met milestones; and 25 unspecified buy-outs imprudent because Niagara Mohawk failed to show it had ascertained they would have come on line. An adjustment of approximately $3 million was suggested.

Niagara Mohawk excepts to the recommended L&J adjustment on the ground the project was entitled, under Commission policy, to an additional 12 months to meet its milestone. Staff replies that the L&J contract was approved

1 Staff’s witness stated:

We have purposefully not used the term "imprudent" in our testimony. We are raising questions with regard to the company’s activities in administering its contracts, and we have not done the kind of analysis that would, in my opinion, be required in order to establish firmly the prudence of a particular act.

Tr. 8299-8300.
prior to the Commission’s milestone decision and is governed by its contractual deadlines, without benefit of any extension, and that the utility itself extended the deadline one year, forgoing cancellation and making a buy-out necessary.

Niagara Mohawk also excepts to the adjustment for 25 unspecified buy-outs, arguing it was not required to show these projects would have come on-line and that the buy-out price factored in likely viability. Staff replies the utility failed to justify cost recovery.

Staff, meanwhile, excepts to recovery of Northeast project costs on the ground Niagara Mohawk failed to document an investigation of the project’s likelihood of entering service and its compliance with financing preconditions. Niagara Mohawk replies its evidence established its thorough evaluation of viability, a factor reflected in the assertedly low buy-out prices.

3. Accounting for Future Buy-Outs/Restructuring

Noting that the Commission was considering raising the minimum expense that might be subject to deferral as material, staff proposed that Niagara Mohawk no longer have the opportunity to defer specific buy-out expenses falling below that new materiality standard. The recommended decision rejected the proposal, concluding the utility could petition to defer buy-out expenses as they were incurred.

Niagara Mohawk protests that the recommended decision would unreasonably require it to petition for these deferrals, whereas now it is allowed to defer buy-out expenses automatically without having to petition.\(^1\) Staff responds Niagara Mohawk is the state’s only electric utility afforded this treatment; it made deferral expenditures carelessly; and its position runs

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counter to the Commission’s inclination to restrict deferrals.

4. The Long Lake Settlement

The recommended decision found Niagara Mohawk had entered into the Long Lake settlement substantially to avoid antitrust liability for treble damages. Under the settlement, Niagara Mohawk entered into contracts with Adirondack Hydro Development Corporation (AHDC) for at least four hydroelectric sites. AHDC thereupon terminated its outstanding federal antitrust suit against Niagara Mohawk and withdrew FERC license applications which were in competition with the company’s. The Judges considered the settlement imprudent because any antitrust penalty would injure shareholders, not ratepayers; and because they considered the contracts overpriced. On the ground the contracts are front-loaded, with 40-year terms, at outdated LRAC prices, the recommended decision suggested disallowance of $5.8 million in 1995 overpayments.

Niagara Mohawk excepts to the $5.8 million disallowance; it charges the recommended decision erred in concluding the contracts’ price term reflects a premium for the antitrust settlement and that the record has no evidence for this view. The company argues the settlement was predicated upon the use of sites that had to be developed, the withdrawal of competing applications before FERC, and environmental benefits, not the antitrust settlement.

Staff responds the Commission already determined the AHDC contracts reflect consideration for ending the antitrust litigation. Staff also replies that overpayments it estimates at $20 million for the first year of two plants’ operation must reflect some bargained-for exchange. Staff rejects the company’s view that the withdrawal of competing FERC applications benefits ratepayers, and adds that AHDC received favorable treatment from

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Niagara Mohawk, while the company rejected a proposal of Fourth Branch Associates to redevelop two sites at a price 20% lower than the AHDC contracts.

AHDC requests party status and files a brief on exceptions, arguing the motivation behind the settlement has been misjudged. It contends renewables development was mandated by the State Energy Plan and justifies the settlement; and Niagara Mohawk should be encouraged to enter into settlements with independents, not penalized for doing so. It argues the settlement with the litigious Long Lake Corporation benefitted ratepayers. It proposes to add facts missing from the record in this case, consisting of accounts of its meetings with Commissioners and staff about these projects. Staff responds that AHDC’s brief is tantamount to a concession that the record does not set forth the settlement’s advantages, and it objects to AHDC’s late intervention.

Niagara Mohawk also excepts on the ground we lack jurisdiction to review for prudence purchases at FERC-approved wholesale rates, citing Mississippi Power & Light v. Miss. ex rel. Moore, 108 S. Ct. 2428 (1988). Staff replies Niagara Mohawk errs because PURPA only requires it to purchase electricity from AHDC under a five-year energy-only format. Staff contends the FERC approval did not constitute a prudence review, noting FERC was advised any imprudence would be borne by the utility’s shareholders. Staff also replies that the preemption doctrines of Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) and Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) do not apply in circumstances such as these, in which a utility is choosing to incur costs in light of available alternatives: the Pike County exception.¹

5. Discussion

Taking the procedural issue first, AHDC is granted party status, but only the argument portions of its brief on exceptions will be considered. The remaining, purportedly factual, portions will be disregarded because the evidentiary record in this phase of these proceedings is closed.

As for the substantive questions, staff’s presentation raises troublesome issues about Niagara Mohawk’s management of IPP costs. But those issues cannot be decided in isolation and must be viewed in the context of a thorough evaluation of the factors driving excessive electric generation costs. That evaluation has not been (and could not have been) conducted in this proceeding, and we therefore grant the company’s exceptions to the recommended power-purchase related disallowances. In so doing, we do not rule on the legal or policy analyses of the Judges or the parties; judgment on those issues is reserved.

Nor are we persuaded that the general prudence investigation recommended by the Judges should be instituted now. Instead, we direct the company to review and improve its management of power purchase contracts, paying particular regard to the provision of adequate, well-informed personnel, the conduct of targeted negotiations and programs specific to individual contracts, and the maintenance of records of all discussions and offers.

Overgeneration

Niagara Mohawk forecast generation in excess of the contractual maximum for several IPP projects, and sought to enforce a policy of paying IPPs at energy-only tariff rates, instead of contract rates. It nevertheless projected payment at contract rates, and staff sought a $20.3 million adjustment, representing the difference between contract and marginal energy cost. The Judges recommended a $15 million adjustment, based on the company’s own estimate of these overpayments, rather than staff’s.
No party has excepted; but in its reply brief on exceptions, Niagara Mohawk cites a January 19, 1995 Appellate Division decision1 as suggesting that some overgeneration costs may be incurred by the company. On that basis, it requests that any overgeneration expenses be permitted to flow through the FAC.

The decision cited by Niagara Mohawk granted the company summary judgment as to the principle that IPPs may not increase their output beyond the parties’ reasonable expectations as shown in the contract estimates. That principle rests on considerations of fairness to the utility and reasonable power supply planning; but it provides no basis for revising the adjustment, which is adopted.

Nuclear Generation – Nine Mile 1

1. Outage Costs

Niagara Mohawk forecast $25.6 million in expenses for the spring 1995 refueling outage. Staff claimed the company had consistently overstated nuclear expenses since 1991 and proposed a rate year adjustment of $2.03 million. The Judges found the outage forecasts reasonable except for $.3 million in the rate year associated with motor operated valve testing; they therefore recommended all but that much of staff’s proposed adjustment.

Staff excepts on the ground the recommended decision gave too much weight to the company’s plans and not enough to Niagara Mohawk’s record of overforecasting nuclear expenses. Recent company publications offered by staff spell out how the company must cut nuclear costs and plan to reduce outage costs. Staff urges this adjustment to reflect the company’s studies, and Niagara Mohawk does not reply.

Staff’s exception is granted. Although the company’s plans were detailed, the pattern of historic overforecasting and the utility’s apparent current cost reduction plans warrant

modifying the Judges’ recommendation.¹

2. Torus Wall Study

The recommended decision found reasonable Niagara Mohawk’s request for $6.09 million for plant design studies mandated by the Nuclear Regulatory Commission, rejecting CPB’s requested adjustment with respect to Nine Mile 1. CPB’s position was that the studies were required only because of poor design and operation of this plant.

CPB excepts, arguing the company failed to carry the burden of refuting its testimony regarding poor plant design and operation. The exception is denied; Niagara Mohawk was not required to demonstrate the efficacy of the plant’s design in order to recover costs associated with conducting an NRC-mandated study for an operating nuclear power plant.

Proposed Ratemaking Treatment for Nine Mile 1 and the Huntley Units

The Judges analyzed but did not recommend at this time IPPNY/Sithe’s innovative ratemaking proposal for Niagara Mohawk’s Nine Mile 1 and Huntley Units 63-66, which IPPNY/Sithe viewed as the utility’s least economic. The IPPNY/Sithe proposal was designed to provide incentives for the company to meet supply requirements objectively, not favoring its own sources. The proposal would allow the company a return of reasonable sunk Nine Mile 1 costs as of December 31, 1994, and payments for its generation at buyback tariff rates, but with no additional ratepayer contribution. IPPNY/Sithe would allow traditional recovery for the Huntley units were Nine Mile 1 retired and

¹ Inadvertently, this adjustment was omitted in the base rate relief calculation prepared for the 1995 Rate Order. The difference for 1995 revenues, inasmuch as the adjustment is spread over the two-year refueling cycle, is $1.7 million. Because this omission, in the ratepayers’ favor, is offset by the correction of the Fitzpatrick 1994 disallowance overestimation, the errors have no net impact on revenue requirement.
Fitzpatrick costs (discussed below) disallowed; otherwise, Huntley generation also would be subject to the buyback tariff rate. The Judges concluded that IPPNY/Sithe’s proposal one-sidedly burdened utility generation plant without a concomitant concession from the independent power industry; and that the uncertainty of the financial consequences for Niagara Mohawk precluded its adoption now.

On exceptions, IPPNY/Sithe reiterates its view that Niagara Mohawk’s Nine Mile 1, Huntley Units 63-66 and amended Fitzpatrick contract constitute uneconomic generation saddled with excessive embedded costs and that this case offers the opportunity to replace cost-plus treatment with a competitive pricing mechanism. IPPNY rejects the Judges’ conclusion that there was insufficient information about the consequences of its proposal, pointing to its evidence and company studies as well as to the parties’ opportunity for discovery, cross-examination, and rebuttal; and it chastises the Judges for viewing the proposal as one-sided, pointing to asserted ratepayer benefits from its immediate adoption. Niagara Mohawk replies that IPPNY/Sithe’s proposal could only be considered as part of a comprehensive industry transition plan, and it asserts the proposal is designed to pressure the utility to retire its plant. The company challenges IPPNY’s calculations as far too simplistic and misleading.

The Commercial Building Association also excepts, arguing the recommended decision rejected the proposal because it was sponsored by IPPNY/Sithe. It contends this proposal favors ratepayers and offers a sound basis for dealing with investments Niagara Mohawk concedes are not currently economic.

The IPPNY/Sithe proposal may have merit in the context of restructuring the company’s power purchases. But without a more developed record about its consequences for the utility’s financial stability, including the effects of implicit costs such as decommissioning, the proposal is premature and the exceptions are denied.
The Fitzpatrick Purchases

Since 1975, Niagara Mohawk has purchased electricity from NYPA’s Fitzpatrick nuclear power station. In February 1994, the company entered into a letter agreement to purchase additional Fitzpatrick power at a reduced unit price. On the ground that Niagara Mohawk needed no additional capacity and therefore entered into the purchase agreement for anti-competitive purposes, staff claimed the utility’s action was imprudent and excess costs should be disallowed.

The Judges, citing PSL §66-i, found the prudence of Niagara Mohawk’s February 1994 extension and expansion of its Fitzpatrick power purchase agreement unsupported by the company’s evidence. The Judges saw no showing that the company had weighed the impact of this contract on its overabundance of capacity and dump energy costs, and they recommended disallowing excess costs associated with the Fitzpatrick contract.

Niagara Mohawk excepts, claiming PSL §66-i was inapplicable and, in any event, had been complied with; that the Fitzpatrick purchase was at a price below long run avoided cost (LRAC) estimates in effect at the time; and that there was a 25% chance the power it contracted for would otherwise have been sold to Niagara Mohawk’s industrial customers, leading to load loss.

NYPA also excepts, charging the recommended decision is inconsistent with the long-term task of restructuring the wholesale energy market. It argues the amended contract is less

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1 Public Service Law §66-i specifies, among other things, factors to be considered by an electric utility before entering into a contract for the purchase of electric capacity.

2 Dump energy refers to excess energy a utility has on its system when generation exceeds load. It typically occurs in periods of low load, when utilities are generating as little as reasonably possible, and unneeded IPP deliveries are still taking place. Within certain limits, the extra energy is "dumped" into the systems of adjoining utilities or power pools. Dump energy has economic and, if there is enough of it, system reliability consequences.
expensive than 99.9% of Niagara Mohawk’s more than 11.6 million MWh of purchases under other long-term firm contracts. Objecting to a comparison of short-run marginal cost with costs of long-term contracts it suggests, instead, evaluating the contract as a change in the long-term array of generation alternatives, using long-run marginal cost.

Staff, MI, and IPPNY/Sithe reply the comparison to LRACs is an inappropriate measure of the Fitzpatrick costs. Staff reiterates its view that the Fitzpatrick purchases exacerbate the utility’s dump energy problem. MI sees no basis in the record for Niagara Mohawk assuming 25% of Fitzpatrick power would otherwise have been sold to Niagara Mohawk’s traditional customers; and MI points out that unlike the IPP contracts, the Fitzpatrick contract was not one Niagara Mohawk was obligated to sign. IPPNY/Sithe insists the record overwhelmingly shows that entering into the renewal contract made no economic sense.

The evidence suggests the company renewed the contract and overpaid for power for anticompetitive reasons, in order to prevent its customers from possibly taking advantage of competitive alternatives.¹ This cannot be countenanced. Moreover, neither Niagara Mohawk’s arguments nor NYPA’s adequately take account of the utility’s capacity glut and associated costs. Niagara Mohawk failed to demonstrate it weighed this factor prudently at the time it renewed the contract.

Accordingly, the exceptions are denied and all excess costs associated with Niagara Mohawk’s amendment to the Fitzpatrick power purchase contract are disallowed. The disallowance is based on the difference between the contract price on the one hand, and, on the other, the sum of forecast marginal generation capacity costs ($1.50/MWh based on $13.00 per kW per year) and marginal energy costs ($20.50/MWh). For 1995, this comes to a disallowance of approximately

¹ Tr. pp. 8412-13.
$2.6 million, net of revenue taxes. Moreover, similar excess costs were partially recovered by Niagara Mohawk through its fuel adjustment clause in 1994, and we will recapture those improper payments, resulting in a further disallowance of $.54 million net of revenue taxes for the period April 1, 1994 through December 31, 1994.¹

FACTOR OF ADJUSTMENT

A utility must include in its prices electrical losses, theft-of-service, company use of electricity, and similar items. The factor of adjustment is the ratio used to convert the cost of producing and delivering electricity into unit prices reflecting a slightly higher charge per kWh. During the hearings, staff supported a factor of 1.087—the factor currently in use—while the company supported a factor of 1.100. Using the company’s higher factor would have increased annual electric revenues by about $11 million in 1995.

The recommended decision adopted the company’s proposal because it was based on a three-year rolling average of historic actual factors, a method employed by staff and in past decisions; because staff’s ratio was lower than what the company actually had experienced 90% of the time since 1977; and because staff’s proposal was based only on engineering studies of the losses, which do not account for losses caused by theft of service and company usage.

Staff excepts, arguing the company’s approach has not always been used and that the engineering studies are reliable; the most recent study shows actual losses lower than the company forecasts for 1995. Staff also asserts it is inconsistent to reject the use of engineering studies to set retail rates, but to

¹ In the order issued April 21, 1995, the 1994-related disallowance was set at $2.17 million. However, this total inadvertently included Fitzpatrick purchases attributable to economic development power contracts for power wheeled to NYPA customers, which are not at issue in this proceeding. The corrected disallowance is $.54 million for 1994.
employ those same studies to adjust (i.e., decrease) the per-kWh rates paid by utilities to IPPs.

In view of that inconsistency argument, IPPNY/Sithe replies that it supports staff’s proposal. Alternatively, it suggests that the adjustment of per kWh charges paid to IPPs should not be based solely on engineering studies, and that this should be considered further in Phase II.

Niagara Mohawk responds that the current factor of adjustment of 1.087 has been below its actual experience for the last four years, and it contends that staff’s arguments about payments to IPPs are unsupported by any evidence and have no bearing on whether the factor of adjustment has been determined using a reasonable method in these cases.

Staff’s exception is granted. The company’s loss experience appears out of line with the results of its own engineering measurements, and the company has offered no good explanation for the discrepancy. Nor has it justified the inconsistency in its treatment of losses as they affect retail rates and IPP payments.¹

GAS REVENUE ALLOCATION AND RATE DESIGN

In General

Given their recommended gas revenue increase of $10.336 million (1.7%), the Judges suggested that the residential class revenue requirement be increased by 1.3 times the overall percentage increase, net of gas costs. They also recommended that the increased residential revenue requirement be generated through a $1.50 per month increase in the minimum charge, as proposed by staff.

On exceptions, CPB presses for assigning all classes an equal percentage increase, net of gas costs. It would leave the residential minimum charge unchanged or increase it by no more

¹ The company’s proposed ratio of 1.1 was not reflected in the recommended decision’s proposed rates, and granting staff’s exception does not affect the 1995 rate calculation insofar as it is based on the recommended decision.
than the average increase. Multiple Intervenors, in contrast, would allocate more of the revenue requirement to the residential class. If the overall revenue increase turns out to be less than recommended by the Judges, Multiple Intervenors would increase the residential class revenue requirement proportionately more than the average increase. Niagara Mohawk and staff do not except on the allocation issues, though Niagara Mohawk argues for a larger increase in the residential monthly minimum charge--of $2.50 instead of $1.50--and asks as well that its recommended increase in the commercial monthly minimum charge--$10.00 per month--be adopted over staff’s $5.00 per month proposal supported in the recommended decision.

As so often happens in rate design matters, we are required here to balance the interests in moving prices closer to cost and in avoiding the harsh impacts on customers that can be caused by too precipitous a change. In this case, the residential class (S.C. 1) is the only one providing a below-average return, and the gas base revenue increase we are allowing--$4.95 million, well below the Judges’ recommendation--is small enough to be recovered solely from that class without unduly affecting customers in it. The increase should be recovered by increasing the S.C. 1 monthly minimum charge by $1.50, as staff and the Judges recommend; the resulting minimum charge will still be well below cost. The S.C. 1 tailblock rate should be reduced by the amount needed to constrain the overall revenue increase to $4.95 million.

The S.C. 2 (small commercial) monthly minimum charge also should be increased by $1.50, equal to the S.C. 1 increase and resulting, again, in a charge still below cost. In addition, the company’s proposed reduction in the S.C. 2 tailblock rate is adopted. Because the S.C. 2 class return is slightly above average, class revenues should not be allowed to rise as a result of the increased minimum charge; to the extent that result is not achieved by the reduced tailblock rate, the rate for the
penultimate block should also be reduced as well.¹

Low-Income Proposal

United Tenants proposed a plan under which eligible low-income customers would pay $5.00 a month and $.47 a therm. The Judges recommended rejection of the proposal, and we agree with them. United Tenants’ proposal was not well developed on the record, specifying neither the likely number of beneficiaries nor the customers who would be called upon to bear the cost of the discount. Assuming all other customers picked up a share, the effect of this proposal would be a 1% bill increase and the percentage bill increase would be even larger if only residential customers picked up the lost revenues. Such additional increases are not acceptable at this time.

Miscellaneous

For S.C. 5 and 8, we decline to adopt the Judges’ recommended increases in administrative charges.² The approved revenue increase will be recovered entirely from the increase in the S.C. 1 minimum charge, making it unnecessary and impractical to adopt the recommended administrative charge changes.

The proposed decrease in S.C. 8 throughput rates is adopted so that the throughput rate for transportation of customer-owned gas under S.C. 8 will be the same as the rate under S.C. 5F. As the Judges state, the two rates fell out of balance inadvertently and this should be corrected.

Finally, Niagara Mohawk should bill industrial interruptible transportation customers for FERC Order 636 transition costs at one-half the unit rate charged to firm

¹ On a related matter, we are approving the company’s unopposed proposal to eliminate the 3-40 therm usage block and to create a new, combined 4-280 therm usage block in recognition of this improved recovery of customer-related costs in the S.C. 2 minimum charge, Tr. 359.

² R.D., pp. 194-195. The Judges’ recommendation against increasing the S.C. 5I administrative charge is adopted.
FUEL ADJUSTMENT CLAUSE

The Administrative Law Judges recommended deferring to Phase II a decision on proposals to eliminate or modify Niagara Mohawk’s fuel adjustment clause (FAC). The FAC was modified a few years ago to create a greater incentive for the company to control its fuel costs.

On exceptions, Multiple Intervenors urges that a decision on this issue be made now, and that the FAC be eliminated in 1995 as it provides little incentive for Niagara Mohawk to control fuel costs and it makes it harder for customers to understand and budget their energy costs. If the FAC is maintained, MI wants it modified so that Niagara Mohawk would absorb the first $20 million of fuel or purchased power costs in excess of the rate-year forecast. At present, the company’s exposure is limited to $15 million; MI believes the change would increase Niagara Mohawk’s incentive to control fuel costs.

Staff also excepts, suggesting Phase II may not be decided this year or ever and arguing that the record warrants elimination of the FAC now, that only 4% of forecast electric revenues are fuel costs, and that fuel price volatility should not present a problem for Niagara Mohawk. In any event, staff concludes, Niagara Mohawk’s current FAC should be modified to begin to reflect IPP costs in the FAC sharing mechanism, consistent with Commission policy.2

Niagara Mohawk replies that it does not understand the reasons for staff’s insistence that a decision be made now and noting that all other New York utilities have FACs. The company adds that staff’s proposal to eliminate the FAC was part of its

1 Multiple Intervenors’ petition for rehearing on this point was denied, Cases 93-G-0932 et al., Gas Restructuring Case, Order on Reconsideration (issued August 11, 1995).

2 Case 90-E-0954 - Fuel Adjustment Clause Proceeding, Opinion No. 91-19 (issued September 18, 1991); mimeo pp. 18, n. 1 and 27, ordering ¶6.
multi-year rate proposal that is to be considered in Phase II.

The record shows no urgent need to eliminate the FAC immediately, and doing so would entail a one-time revenue requirement increase of about $18 million for deferred fuel charges. Accordingly, we will allow the company to continue its FAC until the matter, including Multiple Intervenors’ proposal, is revisited in Phase II. Although staff’s sharing proposal has merit and is consistent with our policy, we will not apply our policy to Niagara Mohawk at this time because of the weaknesses in the company’s proof with regard to independent power purchase projections. Ratepayers are thus best protected by requiring the company to continue to reconcile 100% of variances between these forecast and actual 1995 costs.

FUEL TARGET AND BUYBACK RATE
SETTLEMENT AND RELATED ISSUES

Niagara Mohawk, staff, and IPPNY/Sithe agreed on all fuel target and generation target projections, with one exception discussed next, and agree as well to a systemwide, annualized marginal energy cost of $20.50/MWh, exclusive of any adders. This figure would apply in 1995 and in 1996, until a new figure is approved in its place. As noted in the 1995 Rate Order, the parties’ settlement agreement is approved.

The parties were not able to reach agreement on a reasonable capacity factor and generation level for Nine Mile 1 in 1995. We are adopting a forecast of 4.18 million MWh, between Niagara Mohawk’s forecast of 3.56 million MWh, and staff’s estimate of 4.35 million MWh. The company’s forecast is based on an assumed capacity factor of only 70% for ratemaking purposes at a time when it is employing an 80% factor to evaluate the economics of Nine Mile 1 and a 75.5% factor for this plant as part of its 1995-1998 business plan. Moreover, in 1993, when the company conducted a refueling outage similar to the one completed this year, the company achieved a capacity factor of 82% and

1 Exhibit 435.
generated 4.381 million MWh. This level was exceptional and may not recur in 1995. For this reason, we are adjusting staff’s forecast slightly, down to 4.18 million MWh.¹

DEMAND SIDE MANAGEMENT

1995 DSM Program

Niagara Mohawk proposed a 1995 DSM program substantially reduced from previous programs in scope and energy savings goals. Moving away from the rebates and financial incentives offered in the past, the proposed program relies heavily on the brokering of financing for DSM measures and the provision of information to customers. The company’s proposed 1995 DSM budget was $25 million, which may be compared with actual 1993 expenditures of $39 million. The energy savings goal for 1995 was 178.23 gWh.

The Judges accepted the proposed budget and goal, which was supported by staff on the basis of its evaluation of past programs. They recognized that rebates and incentives had been at the core of Niagara Mohawk’s historically successful DSM program, but they believed current circumstances called for new solutions and moderated effects on rates. Acknowledging the experimental nature of the proposed program, they suggested that approval be conditioned on close monitoring of its results.

Pace/NRDC excepts, contending the proposal abandons the company’s highly successful program in favor of an uncertain and unproven approach. In particular, it warns, the proposal will cause Niagara Mohawk to lose energy savings opportunities associated with new construction and equipment replacement. It argues as well that the proposal conflicts with the State Energy Plan (Plan) goals of energy efficiency savings of 8% to 10% by 2000, as it provides for only 60% of the company’s energy savings responsibility under the Plan and violates the Energy Law’s requirement of reasonable consistency with the Plan. Asserting

¹ The plant generated 4.91 million MWh in 1994, but there was no scheduled outage that year.
that the company’s DSM spending has had only a negligible effect on rates, Pace/NRDC suggests a DSM budget of $32 million, equivalent to 85% of the 1994 spending level.

Staff replies that Niagara Mohawk’s proposed budget is adequate to meet its goals and that both reflect an evaluation of past programs and the current market. Conceding the company will not meet the Plan’s goals, staff believes circumstances warrant deviation from those goals and views the reductions as a temporary scaling-back to test new programs and reflect current conditions. Staff also believes the company’s financing and market transformation program could accrue greater savings in future years and notes that declining avoided costs diminish the financial benefits of investments in energy efficiency.

Niagara Mohawk, meanwhile, insists its proposed 1995 goals comply with the Plan, which does not mandate the level of savings each year and contains flexible guidelines. It sees no support for Pace/NRDC’s budget increase, asserting that additional DSM spending may not be cost justified as per-measure energy savings decline.

MI denies the State Energy Plan establishes utility-specific energy reduction goals. It believes the new approach to DSM to be timely, given the company’s excess capacity, the changing marketplace, and the lessons of Niagara Mohawk’s past DSM practices.

The CBA opposes DSM and excepts on the ground that usage is already too low while rates are too high. CBA argues if rates approach marginal cost, demand side options can compete on equal footing with supply options. Pace/NRDC replies that the CBA’s focus on short-term cost reductions obscures DSM’s long-term benefits.

Although demand side management programs continue to have value, we have reduced the company’s proposed DSM budget, in recognition of its present excess capacity and the growing pressure of high electricity prices on business growth and residential customers alike. We have done so as part of our effort to identify Commission-mandated programs for which costs
can be reduced or eliminated in the rate year without jeopardizing the provision of safe and adequate service. Specifically, DSM costs have been reduced by approximately $4.9 million from the Judges’ recommendation, comprising reductions of $.5 million for HIECA, $3.2 million of DSM incentives, $.6 million for DSM evaluation costs, and $.95 million for DSM program costs from a 5% across-the-board program cut.\(^1\) The exceptions of Pace/NRDC accordingly are denied, and the CBA’s exception is granted to the extent spending is reduced and otherwise denied.

The Demand Side Management

Earnings Incentive

The recommended decision suggests approving the company’s DSM incentive program, with staff’s modifications to provide for basing any incentive award on post-program evaluation. Under the company’s plan, it could realize an incentive of 5% of total DSM savings, capped at $5 million, if the achieved program results reach 40% or more of the DSM program goal. The recommended decision makes no provision for a penalty for failure to meet goals.

On exceptions, CPB argues DSM incentives have outlived their usefulness, impede competition, and should be phased out.

Under the particular circumstances of this case, instead of an earnings incentive, we will approve a negative incentive of 5% of total forgone resource savings if the company fails to achieve at least 80% of the resource savings goal, consistent with the program expense reductions ordered by us. This penalty-only incentive to ensure DSM compliance is consonant with the customer service incentives in these cases and with the goal of holding down rates, particularly in light of the extraordinary rate pressures faced by Niagara Mohawk.

\(^1\) On an annual basis, these reductions total $5.25 million; however, because some of these costs would be recovered through DIRAM factors extending into 1996, the 1995 impact is approximately $4.9 million.
Net Lost Revenue Recovery

The parties hotly contested the method for measuring and recovering the net revenue lost to the company as a result of successful demand side management. The Judges recommended elimination of the existing Niagara Mohawk Electric Revenue Adjustment Mechanism (NERAM) and recommended staff’s plan for a true-up of net lost revenues attributable to DSM. They rejected Niagara Mohawk’s and Pace/NRDC’s statistical modelling methods as overly complex and subject to gaming.

Niagara Mohawk argues the recommended true-up mechanism is a disguised one-way penalty that assumes all the company’s lost sales margin from DSM is reflected in the 1995 sales forecast and allows the company to recover lost revenues only if it exceeds 1995 energy saving goals. The company again offers its own method for truing up DSM lost sales margins.

Pace/NRDC argues decoupling of sales and profits is essential to energy efficiency and urges that NERAM be retained or be replaced with a statistical recoupling proposal that shifts weather and economic risks to Niagara Mohawk but decouples recovery of fixed costs from sales. In the alternative, Niagara Mohawk’s proposal rather than staff’s should be adopted, they suggest, because under staff’s proposal Niagara Mohawk recovers lost revenues only for DSM savings above the energy savings goals and those reflected in sales forecasts.

Staff replies its mechanism fairly compensates the company for 1995 DSM activities and provides the proper incentives to conduct its program. MI replies that Pace/NRDC’s witness pointed to no utility in the United States that has adopted its statistical recoupling and sees no basis for doing so here.

The exceptions of Pace/NRDC and the company are denied. Staff’s arguments as to the simplicity and reliability of the net lost revenue method, which has the extra benefit of eliminating bill adders, are convincing.
CUSTOMER SERVICE

Electric Reliability Penalties

The company’s MERIT incentive plan for electric service reliability is in place until the end of 1995. The Judges recommended adoption of staff’s proposed new reliability plan for 1996 and beyond. The new plan would penalize Niagara Mohawk five basis points ($2 million) if reliability fell below Commission standards for outage duration and an additional five basis permits if reliability fell below Commission standards for system interruption frequency.¹

No party excepts and staff’s penalty-based reliability incentive is adopted.

Electric Customer Service Penalties

The recommended decision found a disturbing decline in customer service, evidenced by the company’s growing customer complaint rate and its inability to meet its MERIT customer service goals and collect a MERIT award for the last two years.² The Judges nevertheless regarded the MERIT service quality incentive goals as too ambitious to be used as the measure for the 58-basis-point penalty staff proposed, and they recommended giving parties 30 days to present a different service quality measure. Once new measures were agreed on, the Judges concluded, the 58-basis-point (approximately $25 million) penalty would be appropriate.

Staff excepts to this procedure as unworkable alleging the company would face no penalty for customer service slippage for most of 1995. It renews its proposal to use MERIT target levels as the basis for the proposed penalties. The company replies any such standard would nullify the agreed-upon MERIT


² The MERIT goals relate to such matters as high bill investigations, percentage of estimated meter readings, and PSC complaint rates.
incentive program in place.

Niagara Mohawk also excepts, contending the recommended penalties are excessive, unjustified on the record, and punitively asymmetrical. It opposes the establishment of a MERIT-based customer service penalty program for 1995, arguing the MERIT goals were ambitious improvement targets, complaint rates decreased in 1994, and service quality is good. Noting as well that staff has not proposed a penalty-only incentive for any other utility, the company expresses its willingness to work with parties to present a reasonable service quality measure for 1995, as the recommended decision suggests. Staff replies that penalties are needed, especially to protect residential customers without alternatives, and that the proposed 58-basis-point penalty is fair inasmuch as it equals the MERIT incentives the company could have earned in 1993-1995.

We adopt the recommended decision insofar as the company will be subject to an estimated $20 million penalty (annualized) if it fails to meet customer service quality goals. Instead of leaving these goals to be negotiated among the parties, however, we have set them equal to the actual year-end 1994 levels for the customer service indicators (see Appendix 2). The minimum goal of the incentive-penalty mechanism is to ensure there is no deterioration in service quality, and if the company fails to maintain service at 1994 levels it will be subject to the penalty. However, the penalty amount will be annualized to cover the period from the issuance of the order on April 21, 1995 through December 31, 1995.

The Low-Income Customer Assistance Program Penalty

Niagara Mohawk has a successful low-income customer assistance program (LICAP). LICAP is a three-year plan for moderating rates and reducing uncollectibles reduction; it integrates temporary customer charge waivers, HEAP benefits, weatherization, and other energy conservation options for HEAP-eligible customers. At issue was the utility’s obligation to
increase the number of eligible customers availing themselves of the program. The Judges modified staff’s proposed 50-basis-point ($20 million) penalty to a 5-basis-point penalty for failure to enroll 5,000 eligible customers, and they suggested requiring parties to report a reasonable enrollment goal within 30 days.

Conceding a 50-basis-point penalty is too high but maintaining five basis points is too low, staff on exceptions advocates a penalty of 25 basis points. Niagara Mohawk argues that even a 5-basis-point penalty is arbitrary, unfair, and excessive. Noting this was a voluntary company initiative, not required of utilities statewide, it objects to being penalized for any failure to expand the program on staff’s timetable. The company also sees it as unreasonable to assess the same penalty for missing the target by one or 1,000 customers and regards a $2 million penalty as disproportionate for a shortfall in implementing a $4.1 million program. It counters with a proposal that any LICAP penalty be made comparable to existing statutory penalties for failure to initiate timely service.

Staff replies that LICAP is the only program available to reduce uncollectibles and address the needs of low-income customers. It points out the target enrollment of 5,000 customers is only one-fourth of the company’s lowest estimate of the number of eligible customers. It further replies that pegging LICAP penalties to statutory penalties would be arbitrary.

In light of indications that the company is promoting this program where appropriate, we see no need to impose a penalty regimen here.

Herbicide Reporting

Niagara Mohawk agreed to submit annually a report of the number of gallons and types of herbicides used in the past year. The recommended decision found that if Niagara Mohawk’s reporting on amounts and types of herbicides used on rights-of-way was insufficient for safety review, as staff had claimed, the
company should be ordered to provide fuller accounting.

On exceptions, staff requests the company be ordered to include in annual reports the methods of application of herbicides and pesticides, and the number of miles covered by these applications. In staff’s view, this would be sufficient, and is the minimum necessary for staff to evaluate the safety and efficacy of herbicide use.

Niagara Mohawk requests that before additional reporting is ordered it be given an opportunity to comment on the asserted costs and burdens of compliance. Staff replies the company has had ample occasion to comment on the reporting requirements; and it points out that the company maintains this information on a per-mile basis and merely has to communicate information it has already compiled.

The company has had an opportunity to demonstrate that these reporting requirements are unduly burdensome, and since the requested confirmation is already compiled by the company, it can easily be provided to staff in order to gauge the safety and effectiveness of the herbicide program. Niagara Mohawk’s exception is denied, and the company is ordered to provide the additional information.

OTHER ISSUES

In addition to the issues previously discussed or mentioned, and the individual departmental expense and related issues made moot by the macro approach we are employing to set a total departmental expense allowance, the Judges reported to us on numerous other recommendations, exceptions, and replies.

The additional issues requiring action on our part are as follows:

1. We agree with Multiple Intervenors that some appendices to Niagara Mohawk’s briefs on and opposing exceptions are not reliable to the extent they do not reflect the recommended electric revenue allocation.

2. We do not agree with Niagara Mohawk’s objections
to the recommended treatment of the 53rd week of 1994 payroll, though it is clear the technical appendices to the recommended decision have to be modified to reflect correctly the Judges’ recommendation on this issue.

3. We agree with CPB’s explanation of why gains on the sale of non-utility property should be deferred and grant its exception to that extent.

4. We agree with staff’s proposal that further arguments about low-income gas rates should be raised in either Case 95-G-0050 or Niagara Mohawk’s next general rate case.

5. We agree as well with staff’s suggestion that we employ an avoided generation capacity cost estimate of $13/kW/year because, at the time of our decision in this case, a decision had not been rendered in the generic proceeding established to yield the most reasonable method for estimating such cost.

Other additional issues considered by us are as follows:

1. The Commercial Building Associations’ concerns about Niagara Mohawk contributing to the adverse financial reaction to staff’s direct case.

2. DOL’s concern about insufficient attention being given to the economic hardship a rate increase would cause.

3. Staff’s withdrawal of its objection to Exhibit 262.

4. Niagara Mohawk’s disagreement with the suggestion it cavalierly updated the record.

5. Staff’s exception to the alternative recommendation concerning the results of a New York State tax audit.

6. Staff’s exception to the recommended rejection of its revenue days in arrears adjustment to rate base.

7. CPB’s proposal to employ to a greater extent unbilled revenues as a rate moderator.

8. Niagara Mohawk’s exception to the recommended collections center move disallowance.
9. CPB’s proposed adjustments to other property tax expense.

10. Staff’s proposed HYDRA-CO royalty.

11. The correction of errors in the calculation of lost generation for purchased power expense.

12. Niagara Mohawk’s other operation and maintenance expenses for nuclear generation contractor services.

13. Niagara Mohawk’s and CPB’s exceptions to the forecast of transmission revenues.

14. CPB’s exception to the recommended inclusion in rate base of Niagara Mohawk’s $11.4 million investment in gas pipeline to serve the Sithe/Independence station.

15. CPB’s proposed adjustments to fuel inventory at the Albany, Oswego, and Roseton plants.

16. CPB’s proposal to remove Oswego Unit 5 from rate base.

17. MI’s concern about the inaccuracy of the projection of revenue changes attributable to discounts, given a revenue requirement determination lower than the company’s request.

18. Niagara Mohawk’s report that it bought out in 1994 its contractual obligations to ESEERCO.

19. CPB’s proposal that Mirror CWIP be employed as a rate moderator.

20. Niagara Mohawk’s opposition to an adjustment to Gas SBU start-up expense deferrals.


22. Staff’s objection to the Judges’ estimates of marginal transmission capacity costs.

23. CPB’s proposal to discontinue allocating SIR costs like rate base to recover them instead as if they were fuel costs.

Having considered the Judges’ recommendations and the reasons for them, and the parties’ arguments and replies on these
additional issues, we are adopting all of the Judges’ recommendations with the exception of those concerning embedded and marginal cost-of-service methodologies, which we do not need to reach, and the use of Mirror CWIP, which is rejected. To the extent this list is not all-inclusive, all the other Judges’ recommendations are adopted. To the extent the parties’ exceptions are inconsistent with these conclusions, they are denied.

REVENUE EFFECTS OF THE EXTENDED SUSPENSION PERIOD

As noted, the normal maximum suspension period in these proceedings was extended, with the company’s agreement, by a total of 16 weeks. Several issues are presented with regard to how the resulting forgone revenues are to be treated. Under our previous determinations electric revenues and gas revenues are treated differently, and, with respect to electric revenues, distinctions are drawn between the first 12 weeks of the extension (January 5, 1995–March 29, 1995 and the final four weeks (March 30, 1995–April 26, 1995).\(^1\)

Electric Revenues

With respect to the first 12 weeks of the extension, the company may recover 50% of the forgone revenues;\(^2\) with respect to the final four weeks, it is to be made whole for 100% of any revenues forgone. The amount of revenues forgone must be determined. Recovery with respect to the first 12 weeks is to be via the company’s retention of credits otherwise due customers, and a decision must be made whether such a mechanism, rather than

\(^1\) Cases 94-E-0098 et al., Order Approving Agreements to Extend Suspension Period Through April 14, 1995 (issued November 8, 1994) and Order Approving Further Agreement to Extend Suspension Period Through April 26, 1995 (issued January 18, 1995).

\(^2\) Staff and the company agree that the 50% limitation does not apply to the portion of IPP capacity costs being transferred to base rates.
CASH, should also be used with respect to the final four weeks as well. Finally, we must consider the timing of any cash recovery and decide whether such recovery should be accomplished through a surcharge or through base rates.

Based on the rate recommendations, the total amount to be recovered by the company for the final four weeks of the extension comes to $9.316 million. Of that total amount, a $0.539 million set off will constitute the 1994 Fitzpatrick disallowance, $1.712 million will be set off against the Nine Mile 1 refueling outage exception granted staff as discussed above, $3.044 million will be set off against estimated credits to be generated by replacing the company’s interim January 1, 1995 – April 30, 1995 fuel and net benefit targets with those fuel and net benefit targets set herein, ¹ and the remaining $4.021 million will be recovered through a 12-month cash surcharge effective upon the issuance of the 1995 Rate Order.

Gas Revenues

Here, too, two periods are at issue: the two-week extension from January 5, 1995 to January 19, 1995, and the ensuing 14-week extension, from January 20, 1995 to April 26, 1995, during which time the company’s then-existing base rates were in effect on a temporary basis. ² The key distinction between the two periods is the applicability of the express provisions of the PSL to the latter but not to the former. In each case, we must determine the amount of revenue forgone, the mechanism for making the company whole, and the period over which that mechanism is to be applied.

¹ A true-up to this $3.044 million estimate is required and the ratemaking for the trued-up balance should be addressed in the company’s next rate case.

² Cases 94-E-0098 et al., Order Making Existing Gas Rates Temporary effective January 19, 1995 (issued January 18, 1995). Niagara Mohawk’s February 7, 1995 petition for rehearing of the previously cited order, which it sought a temporary gas revenue increase of $10.336 million (1.72%) effective February 24, 1995, was not acted upon.
The company’s compliance filing in response to the 1995 rate order estimates approximately $1.5 million of gas revenues were forgone by reason of the extension of the suspension date to April 26, and the company will be made whole for that amount. The finally determined amount of forgone revenues will be set off against gas pipeline refunds otherwise due customers. The set off should be accomplished, as the company proposed, in a manner that will (1) provide for interest on both the pipeline refunds and the forgone revenues and (2) ensure that no customer class is adversely affected by the use of the pipeline refunds in this manner rather than to provide direct customer refunds. Any pipeline refunds remaining after the offset should be returned to customers consistent with otherwise applicable procedures.

The Commission orders:

1. The order issued in these proceedings on April 21, 1995 is incorporated as part of this opinion and order.
2. To the extent it is consistent with this opinion and order, the recommended decision in these cases, issued January 26, 1995, is adopted as part of this opinion and order. Except as here granted, all exceptions to the recommended decision are denied.
3. The company must include in annual reports information it has compiled reporting the methods of application of herbicides and pesticides on rights-of-way, and the number of miles covered by these applications.
4. These proceedings are continued.

By the Commission,

(SIGNED) JOHN J. KELLIHER
Secretary