

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)	
DTE GAS COMPANY for reconciliation of its)	
gas cost recovery plan (Case No. U-20816))	Case No. U-20817
for the 12 months ended March 31, 2022.)	
_____)	

At the January 18, 2024 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Katherine L. Peretick, Commissioner
Hon. Alessandra R. Carreon, Commissioner

ORDER

Procedural History

On June 28, 2022, DTE Gas Company (DTE Gas) filed an application with supporting testimony and exhibits, pursuant to Public Act 304 of 1982 (Act 304), requesting authority to reconcile its gas cost recovery (GCR) revenues and expenses for the 12-month period ended March 31, 2022. On June 29, 2022, DTE Gas filed an erratum correcting several errors in the initial application. DTE Gas stated that, for the 12-month period, it had a net underrecovery of approximately \$49.9 million, inclusive of interest, for GCR customers and a net overrecovery of approximately \$1.8 million, inclusive of interest, for gas customer choice (GCC) customers. Application, p. 2; *see*, Exhibit A-19, p. 2.

The GCR plan for the 12-month period was approved in the October 27, 2022 order in Case No. U-20816. DTE Gas’s most recent GCR reconciliation was addressed in the December 9,

2022 order in Case No. U-20544 (December 9 order). In that proceeding, the Commission determined a net underrecovery for DTE Gas's GCR customers of \$5,421,024, inclusive of interest, which was reflected as the 2021-2022 GCR reconciliation beginning balance.

December 9 order, p. 24. The Commission further determined a net overrecovery, inclusive of interest, of \$2,014,855 for DTE Gas's GCC customers, which was rolled-in as the 2021-2022 GCC beginning balance. *Id.*

A prehearing conference was held on August 11, 2022, before Administrative Law Judge Katherine E. Talbot (ALJ Talbot), at which ALJ Talbot granted intervention to the Retail Energy Supply Association (RESA). DTE Gas and the Commission Staff (Staff) also participated in the proceeding. On September 6, 2022, the Michigan Department of Attorney General filed a notice of intervention.¹ On February 23, 2023, ALJ Talbot issued a protective order. On March 24, 2023, ALJ Talbot was replaced by Administrative Law Judge Lesley C. Fairrow (ALJ), who presided over the matter thereafter.

On March 31, 2023, the Staff and the Attorney General filed testimony and exhibits. On April 28, 2023, DTE Gas filed rebuttal testimony and exhibits. On May 30, 2023, DTE Gas filed a motion for partial summary disposition, along with a brief in support of the motion. An evidentiary hearing was held on June 9, 2023, during which all testimony was bound into the record and cross-examination was waived. At the conclusion of the evidentiary hearing, the ALJ determined that the parties would address the motion for partial summary disposition in their initial and reply briefs, with oral argument to follow at a later date. 2 Tr 276-279. DTE Gas, the

¹ Although the ALJ made no ruling or otherwise acknowledged the Attorney General's notice of intervention, the Commission finds the Attorney General a proper party to the proceeding pursuant to MCL 14.28.

Staff, RESA, and the Attorney General filed initial briefs on July 13, 2023. DTE Gas, the Staff, and the Attorney General filed reply briefs on August 3, 2023. On August 14, 2023, the ALJ held oral arguments on DTE Gas's motion for partial summary disposition.

On September 18, 2023, the ALJ issued a Proposal for Decision (PFD). The Attorney General and DTE Gas filed exceptions to the PFD on October 9, 2023, and DTE Gas, the Staff, and the Attorney General filed replies to exceptions on October 23, 2023. The record in this matter consists of 302 pages of transcript and 63 exhibits admitted into evidence.

Proposal for Decision

The ALJ provided a thorough overview of the record on pages 3-25 of the PFD, which will not be repeated here. Along with discussing DTE Gas's partial motion for summary disposition, the ALJ determined that the issues in dispute were whether DTE Gas's purchases during the 2021-2022 GCR plan year were reasonable and prudent, especially those related to the agreement with NEXUS Gas Transmission, LLC (NEXUS), and whether DTE Gas should recover waived penalty fees related to unauthorized gas usage. PFD, p. 27.

Discussion

MCL 460.6h(12) provides, in relevant part, that in a GCR reconciliation:

The commission shall reconcile the revenues recorded pursuant to the gas cost recovery factor and the allowance for cost of gas included in the base rates established in the latest commission order for the gas utility with the amounts actually expensed and included in the cost of gas sold by the gas utility. The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review.

In the event that a gas utility seeks to recover costs in excess of the amount approved in the corresponding plan case, the following provision applies:

For excess costs incurred through actions contrary to the commission's gas supply and cost review order, the commission shall authorize a utility to recover costs incurred for gas sold in the 12-month period in excess of the amount recovered over the period only if the utility demonstrates by clear and convincing evidence that the excess expenses were beyond the ability of the utility to control through reasonable and prudent actions. For excess costs incurred through actions consistent with commission's gas supply and cost review order, the commission shall authorize a utility to recover costs incurred for gas sold in the 12-month period in excess of the amount recovered over the period only if the utility demonstrates that the excess expenses were reasonable and prudent.

MCL 460.6h(14). In determining whether the costs sought in a reconciliation proceeding are reasonable and prudent, the Commission shall judge the circumstances "in light of the existing conditions at the time the decision to purchase the gas was made." *Attorney General v Pub Serv Comm*, 161 Mich App 506, 517; 411 NW2d 469 (1987).

DTE Gas argued that its gas supply decisions for the April 2021 through March 2022 GCR reconciliation period were reasonable and prudent. DTE Gas's initial brief, p. 15. DTE Gas explained through witness testimony that the utility's net underrecovery for the 2021-2022 GCR reconciliation period, including interest, was approximately \$49.9 million. *Id.*, p. 25; 2 Tr 162. The following issues are discussed in light of these legal requirements.

Motion for Partial Summary Disposition

DTE Gas argued that prior Commission determinations finding the company's decision to enter into the NEXUS contract to be reasonable and prudent estop the Attorney General from arguing that any costs related to entering into the transportation contract should be disallowed. DTE Gas's brief in support of motion, p. 5.² DTE Gas further argued that an issue that has been

² Because DTE Gas's brief in support of motion for partial summary disposition is unpaginated, references follow in natural order.

previously decided on its merits is not entitled to a fresh look and must be summarily rejected by the principles of collateral estoppel. *Id.*, p. 7. DTE Gas contended that collateral estoppel is grounds for summary disposition under MCR 2.116(C)(7) and that the utility is entitled to judgment as a matter of law related to the Attorney General's recommended disallowance of \$26,610,255 for excessive gas supply costs. *Id.*, pp. 2, 9.

The Attorney General argued that she is not attempting to relitigate issues related to DTE Gas's decisions to enter into the NEXUS gas transportation contract but that the statutory scheme in GCR proceedings allows for examination of all GCR costs, including transportation costs, during the plan year. Attorney General's initial brief, p. 8. Thus, the Attorney General argued that all gas costs for which DTE Gas seeks recovery are examined for reasonableness and prudence annually coinciding with the GCR plan year. *Id.*

The Attorney General also contended that summary disposition based on MCR 2.116(C)(7) is inappropriate for several reasons. First, the Attorney General pointed out that under the Commission's Rules of Practice and Procedure:

A party may make a motion for summary disposition of all or part of a proceeding. If the presiding officer determines that there is no genuine issue of material fact..., the presiding officer may recommend, to the commission, summary disposition of all or part of the proceeding. If the entire proceeding is disposed of, the presiding officer shall issue a proposal for decision. If only part of the proceeding is disposed of, the presiding officer may issue a partial proposal for decision.

Mich Admin Code, R 792.10426. Additionally, the Attorney General stated that Mich Admin Code, R 792.10403 provides, in pertinent part, that:

These rules govern practice and procedure in all proceedings before the commission, except as otherwise provided by statute or these rules. In areas not addressed by these rules, the presiding officer may rely on appropriate provisions of the Michigan court rules.

The Attorney General argued that because summary disposition is specifically governed by Commission rules, there is no need to rely on any other Michigan court rule. Attorney General's initial brief., pp. 10-11. The Attorney General also argued that collateral estoppel does not apply in a strict sense to Commission decisions. *Id.*, p 11. The Attorney General maintained that in *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1; 420 NW2d 156, 160 (1988), the Michigan Court of Appeals determined that collateral estoppel is inapplicable to the fixing and regulating of rates by the Commission because fixing and regulating rates is a legislative function, not a judicial one, and that the Attorney General's arguments are not barred by that doctrine. Attorney General's initial brief, p. 12. The Attorney General, however, acknowledged that *Pennwalt* does note the Commission's ability to deny fully relitigating issues decided in prior proceedings. *Id.*

The Staff agrees with the Attorney General that all costs incurred over the 2021-2022 operating year are open for scrutiny but recommends that the Commission focus its review on the 2021-2022 operational commodity costs rather than previously approved, known, and fixed NEXUS transportation costs. Staff's initial brief, p. 4.

The ALJ noted that the Attorney General conceded that she was not attempting to relitigate issues related to entering into the NEXUS agreement. However, the ALJ agreed that questions of fact regarding the reasonableness and prudence of 2021-2022 GCR costs remained, and therefore summary disposition was not appropriate. PFD, pp. 27-28.

In its exceptions to the PFD, DTE Gas argues that the ALJ erroneously found that a factual dispute prevented a favorable ruling on its motion for partial summary disposition. DTE Gas argues that the ALJ did not cite any specific factual dispute but relied, broadly, on the Attorney General's concession to not relitigate prior decisions. DTE Gas's exceptions, p. 3. DTE Gas

contends that there is no factual dispute that the Commission has previously ruled that the NEXUS agreement was reasonable and prudent and that the Attorney General continues to relitigate the utility's decision to enter into the NEXUS transportation capacity agreement. *Id.*,

p. 4. In support of its exception, DTE Gas points to witness testimony from the Attorney General that reads:

The evidence is clear that the [c]ompany made an imprudent decision in entering into the NEXUS transportation capacity agreement in order to support a pipeline project partially sponsored by an affiliated company. Customers should not be burdened by the incremental cost resulting from the imprudent decision. Therefore, I recommend that the Commission disallow recovery of the excess gas supply costs of \$26,610,255 calculated in this GCR reconciliation in Exhibit AG2.

Id., p. 5 (citing 2 Tr 264-265) (emphasis omitted). DTE Gas argued that the Attorney General is making the same arguments previously ruled upon in prior proceedings and that the utility is entitled to judgment as a matter of law. *Id.*

In replies to exceptions, the Attorney General reminds the Commission that DTE Gas bears the burden of proof to demonstrate that the decisions the utility made during the 2021-2022 GCR plan year were reasonable and prudent. Attorney General's replies to exceptions, p. 2. The Attorney General argues that DTE Gas's motion is misplaced, because it fails to acknowledge factual issues related to reviewable annual costs for the 2021-2022 GCR plan year. *Id.*, p. 4. In short, the Attorney General maintains that the ALJ clearly agreed there was a factual dispute on whether DTE Gas should have sourced more expensive gas from the NEXUS pipeline during the 2021-2022 GCR year, rendering summary disposition inappropriate under the Commission's rules. *Id.*, p. 5.

The Commission has previously provided preclusive effect to arguments regarding DTE Gas's decision to enter into the NEXUS agreement. In Case No. U-20221, the Commission agreed with the ALJ that opposing parties failed to present any new evidence related to DTE

Gas's decision-making that would justify altering the Commission's previous ruling in Case No. U-18403. May 8, 2020 order in Case No. U-20221, p. 5. Additionally, in Case No. U-20816, the Commission reaffirmed prior determinations that contracting for the NEXUS pipeline was reasonable and prudent at the time it was entered into, finding it unnecessary to reevaluate the original agreement in subsequent cases. October 27, 2022 order in Case No. U-20816, p. 20. However, the Commission also stated that DTE Gas was still under a "continuing obligation to monitor and respond to market conditions and system needs with the burden to demonstrate the reasonableness and prudence of its fuel costs." *Id.* (quoting the September 24, 2021 order in Case No. U-20222). The Commission again finds that issues related to DTE Gas's decision to enter into the NEXUS agreement are precluded. The Commission notes, however, that disputed costs related to decisions to enter into the NEXUS contract are muddled with DTE Gas's required duty to continuously monitor and respond to market conditions for the 2021-2022 GCR period. Therefore, the Commission agrees with the ALJ's recommendation to deny the motion for partial summary disposition.

NEXUS Transportation Costs

DTE Gas argued that the NEXUS pipeline reduced costs to its customers over the reconciliation period by \$1.8 million. 2 Tr 74-76, 84. DTE Gas further argued that the NEXUS pipeline brings diversity of supply to Michigan and puts downward pressure on gas prices within the State. DTE Gas's initial brief, pp. 12-13.

The Attorney General argued that there was an increase of \$26.6 million for the 2021-2022 GCR year due to the incremental cost of NEXUS gas supply versus similar purchases. Attorney General's initial brief, p. 16. The Attorney General argued that an estimated calculation for purchases through other pipelines based on the terms of their long-term contracts would have

cost between \$2.80 and \$2.86 per dekatherm (Dth). Whereas, the Attorney General continued, DTE Gas paid NEXUS \$3.90 per Dth. The Attorney General also argued that DTE Gas rejected alternative gas supply bids for lower prices amounting to \$221,950 in excessive costs when compared to the prices the utility paid in transactions dated December 21, 2021, and January 24, 2022. *Id.*, pp. 19-22.

DTE Gas argued that the Attorney General miscalculated gas costs by including the transportation demand costs in the analysis, which are sunk costs. 2 Tr 70. DTE Gas further argued that the Attorney General's calculations for capacity utilization failed to include the fact that approximately 100% of the capacity on the Texas Eastern Appalachian Lease project (TEAL) and 99% on NEXUS was used during the reconciliation period, which includes 75,000 Dth per day of capacity from Kensington to MichCon Citygate and 37,500 Dth per day on TEAL from Clarington. 2 Tr 88. With respect to the two transactions, DTE Gas argued that the purchases were reasonable and prudent and that these secondary purchases were among the lowest when evaluating all the costs in December 2021 and January 2022.

The Staff did not address specific costs associated with NEXUS but agreed with DTE Gas that the company procured gas and operated in a way that adhered to its 2021-2022 GCR plan and made no recommendation for any disallowance on this issue. Staff's initial brief, p. 1. The Staff, however, adjusted DTE Gas's underrecovery based on an audit of the utility's invoices, ledger accounts, and other supporting documentation.

The ALJ did not recommend any disallowances for NEXUS transportation costs but found the noted discrepancies from the Staff's audit compelling, stating that:

DTE Gas purchased more gas volume in December 2021 than reported, a reduction in the jurisdictional rate slightly based on the increase in gas volume, a reduced sales cost for the sales that are priced with the no GCR factor, a reduction in the prior period storage adjustment based on Staff calculating the LIFO [last in

first out] rate at \$3.3020, and increased storage costs based on the Staff's calculation with the adjusted LIFO rate.

PFD, p. 31 (citing 2 Tr 197, 200). The ALJ further stated that no party argued against the Staff's calculations. *Id.*

DTE Gas filed exceptions to the PFD but only addresses the ALJ's ruling on the motion for partial summary disposition. The Attorney General, in replies to exceptions, points out DTE Gas's failure to address the factual dispute recognized and discussed by the ALJ related to 2021-2022 GCR costs. Attorney General's replies to exceptions, p. 5. The Attorney General also strongly objects to statements from DTE Gas challenging the veracity of her assertion that she is not seeking to relitigate previously determined issues in this proceeding. *Id.*, p. 8.

The Commission agrees with the Staff that DTE Gas procured gas and operated in a way that adhered to its 2021-2022 GCR plan. The Commission also agrees with DTE Gas that the Attorney General's arguments regarding increased 2021-2022 GCR costs are intrinsically tied to DTE Gas's decisions to enter into the NEXUS agreement. The Commission has repeatedly rejected proposed disallowances related to DTE Gas's decisions to enter the original NEXUS agreement and amendments in subsequent proceedings after initially finding those decisions to be reasonable and prudent at the time they were made, and reaffirms those decisions here.

Penalty Waivers

The Attorney General argued that DTE Gas is attempting to circumvent specific tariff rules regarding penalties for unauthorized gas use by end-use transportation (EUT) customers that exceed their respective storage withdrawal quantity. Attorney General's initial brief, p. 22. The Attorney General contended that the approximately \$656,000 in waived penalties that DTE Gas

now seeks to recover from GCR customers is inconsistent with the tariff and should be disallowed. *Id.*, p. 24.

DTE Gas argued that \$551,391 of waived penalties to six EUT customers were due to extreme pricing events and that charging those customers penalties equivalent to their respective annual gas bills would not further the intent of the related tariff. DTE Gas's reply brief, p. 9. Additionally, DTE Gas argued that the additional \$144,671 of waived penalty fees were to a jail facility in a separate event. *Id.* DTE Gas maintained that in both instances the utility was not required to purchase expensive day gas at any point due to the unauthorized volume and that the penalty relief was reasonable. *Id.*

RESA agreed with DTE Gas's decision to provide penalty relief to the seven EUT customers. RESA argued that the intent of the tariff's penalty provision is to protect GCR customers and that no additional GCR customers were harmed because of the events. RESA's initial brief, pp. 2-6.

The Staff argued that the Commission should reject the arguments put forth by DTE Gas and RESA in their initial briefs, claiming the unauthorized gas usage credits should be included as reasonable costs. Staff's reply brief, pp. 1-2, 4. The Staff maintained that DTE Gas decided to issue these credits to provide relief for the customers that were assessed penalties pursuant to the applicable tariff provisions. *Id.* The Staff argued that it is incumbent upon the company, and not GCR customers, to absorb the resulting \$656,602 of costs assessed for violation of tariff rules. *Id.*, p. 2.

The ALJ agreed with the Staff and the Attorney General and recommended disallowing \$656,602 for the unauthorized gas use penalties. PFD, p. 33. The ALJ further added that "DTE

Gas cited no authority or precedent whereby the requirements of the tariff may be abandoned.”
Id., p. 34.

No party filed exceptions to the ALJ’s recommendation.

The Commission finds that the ALJ’s recommendation is reasonable and adopts the proposed disallowance of \$656,602 for the waived penalty fees. As the ALJ provided:

According to Section E14 of the Rate Book, penalties related to “Unauthorized Gas Usage” are triggered if a customer’s load balancing storage is below zero at the end of the month, if the customer exceeds the seasonal 3% storage withdrawal limitation during December through March, if on any Gas Day the quantity in the customers Load Balancing storage account is less than zero, and if a customer is deemed non-compliant during constrained operational conditions or an emergency situation as defined by the Rate Book. Section E14, Sheet Nos. E-17.00-E-17.01. The tariff dictates that under those circumstances the utility has discretion and “may” charge a penalty if on a Gas Day the quantity in the customer’s Load Balancing storage account is less than zero, but under the remaining three circumstances the utility “shall” charge the penalty. Section E14, Original Sheet Nos. E-17.00-E-17.01. And the Unauthorized Gas Usage “shall” be \$1 per cubic feet plus the highest price reported in Gas Daily in the midpoint column of the Daily Price Survey for the month in which the Unauthorized Has [*sic*] Use occurred. Section E14, Original Sheet No. E-17.01. The current language of the Tariff does not set a limit or maximum amount for the penalty.

PFD, pp. 33-34. DTE Gas provides no authority for which the penalty requirements in the tariff may be waived.

Consistent with the findings in this order, the Commission adopts the Staff’s calculations of a 2021-2022 GCR underrecovery of \$49,210,603, including interest.

THEREFORE, IT IS ORDERED that:

A. DTE Gas Company’s application for a gas supply cost recovery reconciliation is approved, as described in this order.

B. DTE Gas Company shall reflect a net underrecovery, with interest, of \$49,210,603 as its 2022-2023 gas cost recovery reconciliation beginning balance.

C. DTE Gas Company shall reflect a net overrecovery, with interest, of \$1,773,987 as its 2022-2023 gas customer choice beginning balance.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Katherine L. Peretick, Commissioner

Alessandra R. Carreon, Commissioner

By its action of January 18, 2024.

Lisa Felice, Executive Secretary


PROOF OF SERVICE

STATE OF MICHIGAN)

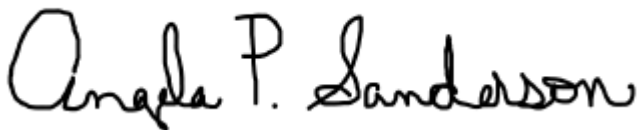
Case No. U-20817

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on January 18, 2024 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).


Brianna Brown

Subscribed and sworn to before me
this 18th day of January 2024.



Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

Service List for Case: U-20817

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