

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission’s own motion, )  
to consider revisions to the prescribed fees to be )  
paid by a public utility in lieu of an assessment )  
pursuant to Public Act 299 of 1972; MCL 460.119, )  
for pipeline applications under Public Act 9 of 1929 )  
or Public Act 16 of 1929. )  
\_\_\_\_\_ )

Case No. U-20634

At the December 19, 2019 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman  
Hon. Daniel C. Scripps, Commissioner  
Hon. Tremaine L. Phillips, Commissioner

**ORDER**

History of Proceedings

On October 7, 2019, the Commission opened this docket to consider revisions to the current implementation of 1972 PA 299 (Act 299), MCL 460.111 *et seq.*, as it pertains to the fees prescribed by the Commission in MCL 460.119 (Section 9), for pipeline applications under 1929 PA 9 (Act 9) or 1929 PA 16 (Act 16). The order invited all companies subject to the Act 299 assessments or fees and other interested organizations to file comments in this docket concerning the proposed changes to the Section 9 fees. The order directed the Commission Staff (Staff) of the Commission’s Regulated Energy Division to analyze the comments, to consult with the other divisions of the Commission, and to make recommendations for the Commission’s consideration.

Comments were filed by Enbridge Energy, Limited Partnership (Enbridge), the Michigan Oil and Gas Association (MOGA), and the American Petroleum Institute (API). The Staff filed its report on November 18, 2019 (Staff's report).

### Discussion

As the Commission acknowledged in its October 7, 2019 order opening this docket, the Commission found it appropriate to re-evaluate the Act 299 fees to ensure up-to-date, equitable, and cost-based fees and assessments. The scope of these pipeline application proceedings can vary considerably based on the complexity of the project, including the need to acquire new rights-of-way, environmental issues, and the concerns of nearby residents. Accordingly, the Commission suggested that the two-tier fee structure for *ex parte* and contested cases is appropriate to maintain going forward but also recognized the potential for some applications to far exceed the cost of the contested case fee. It is difficult to accurately project the cost of more complex or controversial proceedings, which may require the retention of outside expert witnesses, additional Staff time handling technical issues and public comment, and public hearings outside of the Commission's office in Lansing. The Commission also acknowledged the pipeline siting recommendations of the Pipeline Safety Advisory Board as reflected in its December 2018 report<sup>1</sup> and the potential for such process and outreach improvements by the Commission to increase public participation and interest in these types of proceedings. The Commission is concerned that the 2017 fee structure for natural gas pipelines and crude oil or petroleum pipelines is in need of adjustment to ensure other regulated entities are not subsidizing the Commission's regulatory activities surrounding natural gas producers, natural gas pipelines, and common carrier petroleum pipelines.

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<sup>1</sup> Michigan Pipeline Safety Advisory Board, "Final Report," Governor, State of Michigan, December 20, 2018, pp. 15-17.

Accordingly, the Commission proposed to directly account for and assign its costs for Act 9 and Act 16 pipeline siting proceedings, when the direct costs incurred by the Commission exceed the base fee amount for a contested case. The Commission proposed to include the fees in the final order in Act 9 and Act 16 cases, and make them payable following the issuance of the order as specified therein. The Commission also proposed to align the base amounts for pipeline application fees rather than having separate fee schedules for natural gas versus petroleum.

The Commission received comments from three organizations regarding the proposed fees. API commented that the Commission should ensure the fees are reasonable, necessary, and directly related to the proceeding under consideration. API further noted that the fees should not be duplicative or excessive. Additionally, API stated that the Commission should provide additional details regarding a process to resolve disputes and to clarify if there is an opportunity for the applicant to audit the fees. API's comments, pp. 2-4.

MOGA noted that, without data from the Staff regarding project time and costs, meaningful comments and analysis cannot be provided. MOGA expressed concerns about fees being imposed with "no constraints or limits, no accountability, or any right to challenge." MOGA's comments, p. 2. MOGA suggested the Commission place a cap on the fee of no more than 1% of the estimated construction costs. *Id.* MOGA requested notice to the parties for any contested case proceedings, and a detailed notice of fees to be imposed in each case. *Id.* MOGA argued that an intervenor to a contested case should bear a proportionate share of the costs, that the Commission should set standards for an *ex parte* versus contested case application, that court fees should not include attorney fees, that the Staff's hours should not include any fees for an attorney representing the Staff, that an appeal of a Commission order should not incur additional Staff

hours, and that a refund should be issued if the contested case takes less than 150 Staff hours. *Id.*, pp. 3-4.

Enbridge pointed out that there have been no recent pipeline proceedings or other data to justify changing the fees, which were adjusted in 2017. Enbridge's comments, p. 2. Enbridge commented that the fees must be reasonable and necessary, not duplicative, and not excessive. *Id.*, pp. 4-5. Additionally, Enbridge noted environmental reporting and testing, court fees, and external public meetings should be clarified to demonstrate statutory authority, regulatory necessity, and relevance to the applicant's contested case. *Id.*, pp. 5-6.

The Staff provided 13 recommendations based on the comments provided and the Commission's operational needs. The Staff recommendations are:

1. That the Commission develop a process that provides the applicant with an opportunity to object to any assessed fee(s) as part of a contested case proceeding.
2. That the final order in this instant case adopt language specifying that all hearing reporting costs associated with Staff hours will be included in the "Additional Staff hours" category and not the "Court fees" category.
3. That the final order in this instant case adopt language specifying that the new fee structure will only apply to prospective projects submitted on or after the effective date of the final order.
4. That the category titled "Environmental reporting and testing" in Attachment A to the October 7, 2019 order be clarified to state that any fees included in this category would be limited to those necessary to satisfy the Commission's required agency review and environmental obligations under the Michigan Environmental Protection Act (MEPA), Part 17 of the Natural Resources and Environmental Protection Act, MCL 324.1701 *et seq.*, and the Michigan Supreme

Court's application of MEPA in *State Hwy Comm v Vanderkloot*, 392 Mich 159, 185; 220 NW2d 416 (1974).

5. That within 15 days after receiving an application under Act 9 or Act 16 requesting *ex parte* treatment, the Staff issue a written notice to the applicant specifying whether the *ex parte* request will be denied and the basis for that denial. This notice can be posted to the docket created for the case.

6. That, if the proceeding will be a contested case, the Staff will provide, within 30 days after the prehearing conference, an estimate of the Staff's expected hours in the case and what outside resources may be necessary to procure. As part of this estimate, the Staff recommends that it include language that establishes that the Staff is not limited to the estimate and any opposition to the incurred costs would be addressed as part of a contested case proceeding.

7. That, prior to officially hiring a third-party expert, the Staff be required to provide notice to the applicant of: (a) the name, address, and subject matter expertise of the expert/consultant; (b) a detailed description of the tasks to be performed; (c) the estimated amount to be charged for the work to be performed; and (d) an explanation of why the expert/consultant needs to be retained.

8. That the final order in this instant case adopt language specifying that the applicant shall not be held responsible for any attorney fees accrued by any third-party intervenors to a contested case proceeding.

9. That the final order in this instant case adopt language specifying that the fees associated with attorneys representing the Staff will not be included in any fees assessed to the applicant.

10. That the final order in this instant case adopt language specifying that Staff hours associated with any appeal of a final Commission decision will not be assessed through the mechanism provided for in MCL 460.119.

11. That the final order in this instant case adopt language that any assessed fees would only be those expenses directly associated with the contested case prehearing conference, cross-examination, and evidentiary hearing.

12. That applicants be able to request the current hours accrued on a contested case proceeding and all other expenses that will be assessed that are known as of the date of the request. The Staff recommends that the Commission have 15 days to respond to this request.

13. That the final order in this instant case remove the “Onsite inspection” category. Staff’s report, pp. 8-10.

Additionally, the Staff recommendations addressed the comments submitted as follows:

(1) the Staff agreed with API’s concerns and addressed them in Staff recommendations 1-4; (2) the Staff partially agreed with many of MOGA’s comments and provided Staff recommendations 1, 5-10 to incorporate those concerns; and (3) Staff recommendations 1 and 11 address some concerns from Enbridge. *Id.*, pp. 2-8.

Further, the Staff replied to and provided insight on the comments not addressed in the recommendations. The Staff did not agree that MOGA could not provide appropriate comments without empirical data as the method proposed is a direct billing of hours for Staff time, the number of hours each case has taken previously is not necessary to comment on the proposed fee structure; additionally, the Staff states that the majority of cases handled in the past two years have been *ex parte* and would not require additional fees. *Id.*, p. 3. Moreover, the Staff did not agree with MOGA that a cap should be placed on the fee, nor should the fee be based on a percentage of the estimated cost of the project, because any fee above the percent charged would then be subsidized by the regulated providers’ assessment fees. Furthermore, the project costs do not necessarily represent the amount of due diligence the Staff needs to perform. *Id.*, pp. 3-4. The

Staff did not recommend that a good faith estimate of the fees be provided at the contested case prehearing conference, as requested by MOGA; however, the Staff recommended providing the estimate within 30 days after the prehearing conference, as this would allow for a truer estimate and would allow for any objections to be argued during the contested case.

Further, in reply to MOGA's comment requesting notice and additional hearings, the Staff recommended a procedure for disputing fees and objecting to proposed experts or consultants during the contested proceeding. *Id.*, pp. 4-5. The Staff pointed out the impracticality of requiring intervenors to pay a portion of the fee as MOGA suggested; and noted that charging intervenors would deter their involvement in proceedings and imposing a fee on an intervenor is not authorized by MCL 460.119. *Id.*, p. 5. MOGA requested a clear set of standards for determining when a matter will be *ex parte* and when it will be a contested case. The Staff's response to this request indicated the internal process currently in place has not changed and has no bearing on the fees prescribed by the Commission in this matter. *Id.* Lastly, MOGA suggested the Commission should refund any unused portion of the fee if the contested case does not exceed 150 hours; in response, the Staff reminded MOGA that fees are not refundable, and the hours indicated are an approximation to guide applicants with project estimates. *Id.*, p. 6.

The Staff addressed Enbridge's comment about justification for the fee change with a reminder that MCL 460.119 provides the Commission with the authority to prescribe fees in lieu of annual assessments under Act 299, and it is in the Commission's discretion to exercise that authority. *Id.* Further, Enbridge expressed concern about the Commission's authority for environmental testing and reporting, and the Staff responded:

The Commission is required to comply with the Michigan Environmental Protection Act (MEPA), and the obligations set forth for State agencies as determined in the Michigan Supreme Court's application of MEPA in *Mich State Hwy Comm v Vanderkloot*, 392 Mich 159, 185; 220 NW2d 416 (1974).

As specified in *Mich State Hwy Comm v Vanderkloot*:

...the Legislature need not specifically incorporate environment provisions in each and every pertinent act but may properly respond to the constitution with general legislation, and has done so in the Environmental Protection Act of 1970.

\* \* \*

The act is broad indeed and applies to state agencies and private individuals, as a reading of section 2 clearly shows.

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This language does not confine itself to any one narrow area, but applies to any action on the part of any public agency or private entity which has harmed the environment or is likely to do so.

Additionally, in *Buggs v Pub Serv Comm*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2015 (Docket Nos. 315058, 315064):

In making its new determinations of necessity, the Commission shall specifically address the environmental impact as required under the MEPA and the decision in [*State Hwy Comm v Vanderkloot*, 392 Mich 159, 184-190; 220 NW2d 416 (1974) (opinion by WILLIAMS, J.)]. [Buggs, unpub op at 11.]

*Id.*, p. 7. Lastly, Enbridge expressed a concern that the fee for external public meetings was contrary to the Commission's rules governing intervention in a contested case. The Staff responded to clarify that the external public meetings category is not intended to replace or assess fees for any part of a formal contested case proceeding, but is to encompass any meeting outside of the contested case proceeding which may be necessary to fulfill the Commission's obligations in determining the project's convenience and necessity. *Id.*, p. 8.

After reviewing the comments provided by industry and organizations, as well as the recommendations and comments in the Staff's report, the Commission finds it appropriate to exercise its authority to revise the prescribed fees for the regulation of natural gas producers, natural gas pipelines, and common carrier petroleum pipelines, as required by MCL 460.119. The

new fees, as provided in Attachment A to this order, provide a single fee for *ex parte* filings. Additionally, there is a base fee for contested case filings which will allow for up to 150 hours of the Staff's time, with an hourly fee billable after the initial hours are completed. The proposed prescribed fees will align with the actual, prudent, and reasonable expenses of the Commission and will ensure fair and equitable regulatory treatment.

With respect to the Staff's 13 recommendations, the Commission states the following:

1. The Commission agrees with Staff's recommendation 1 that a process should be developed which provides the applicant an opportunity to object to any assessed fee(s) as part of a contested case proceeding and adopts the following process to effectuate this. After cross-examination or the final evidentiary hearing in a contested case proceeding, whichever is later, the Staff shall file an exhibit containing the total assessed fees (Fee Exhibit). Within 14 days of the filing and service of the Fee Exhibit, the applicant shall file any objections to the total assessed fees. Within 14 days of any objections filed, the Staff shall file a response indicating its position on the disputed issues. If a dispute remains after the required filings, the administrative law judge who presided over the proceedings shall include a decision regarding the total assessed fees in the proposal for final decision (PFD) without further proceeding unless an additional hearing is deemed necessary. If a contested case is settled prior to the issuance of a PFD, the Staff shall expeditiously file the Fee Exhibit, and the applicant shall file any objection to the total assessed fees within 14 days of the filing and service of the Fee Exhibit. The Commission will render a decision with regard to the total assessed fee in its final order. Furthermore, if a contested case proceeding is settled by the parties and accrued Staff time does not exceed 150 hours, the base application fee of \$10,000 must still be paid by the applicant, along with the additional fees, as described in Attachment A to this

order. There will be no reduction in the base application fee for a contested case proceeding if Staff hours are less than 150 hours.

2. As described in Attachment A to this order, all hearing costs associated with Staff hours will be included in “Additional Staff hours.”

3. The revised fee schedule attached as Attachment A to this order shall apply to applications filed after December 19, 2019.

4. Environmental reporting and testing fees are limited to those related to the Commission’s required agency review and environmental obligations, as described in Attachment A to this order.

5. In order to provide an applicant with an indication of whether a case will proceed on an *ex parte* or contested basis, when an Act 9 or Act 16 application has been filed requesting *ex parte* approval, the application fees will be based on the *ex parte* fees outlined in Attachment A, unless a schedule for a contested case is set by an administrative law judge following an initial prehearing conference, or if the Commission issues an order directing that a schedule be set in the case.

6. The Staff may provide a non-binding estimate of its expected hours and anticipated additional fees, upon the reasonable request of an applicant.

7. The Commission has concerns with Staff’s recommendation 7, as it would require disclosing information about a potential state contract before it is finalized, and would unnecessarily disclose to the applicant details about the Staff’s potential witnesses and strategy in the proceeding. The Commission finds it is more appropriate for the Staff to work informally with the applicant to give the applicant a sense of whether fees associated with outside expert witnesses would be expected to support the Staff’s case and the magnitude of such costs.

8. As described in Attachment A to this order, the applicant will not be responsible for any attorney fees accrued by any third-party intervenors to a contested case proceeding under the provisions of MCL 460.119.

9. As described in Attachment A to this order, fees associated with attorneys representing the Staff will not be included in any fees assessed to the applicant under the provisions of MCL 460.119.

10. As described in Attachment A to this order, Staff hours associated with any appeal of a final Commission order will not be included in any fees assessed to the applicant under the provisions of MCL 460.119.

11. As described in Attachment A to this order, Staff hours included in the assessed fees for a contested case proceeding shall be those hours associated with the contested case proceeding through the completion of cross-examination or the final evidentiary hearing, whichever is later. Additionally, as recommended by the Staff, another 15 hours of Staff time will be included in assessed fees to account for the Staff's efforts to work on initial briefs, reply briefs, and exceptions/replies to the PFD.

12. The Staff may provide a summary of accrued Staff hours associated with a contested case proceeding and other known expenses that will be assessed as part of the additional fees, upon the reasonable request of an applicant.

13. The Commission agrees with Staff's recommendation 13 and removes the "Onsite inspection" category outlined in Attachment A to the October 7, 2019 order in this docket.

Finally, the Commission acknowledges the comments filed by stakeholders and the Staff response to the comments, and thanks the stakeholders and the Staff for their participation in this important update to the assessed fees for applications filed under Act 9 and Act 16.

THEREFORE, IT IS ORDERED that the revised fee schedule for pipeline applications, attached hereto as Attachment A, is approved and reflects the fees as prescribed by the Commission pursuant to MCL 460.119, for applications filed after December 19, 2019.

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

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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Daniel C. Scripps, Commissioner

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Tremaine L. Phillips, Commissioner

By its action of December 19, 2019.

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Lisa Felice, Executive Secretary

**ATTACHMENT A**

Michigan Public Service Commission Fee Schedule (Proposed) Required by Sec. 9, Act 299, P.A. 1972	
	Pipeline Application
	Natural Gas (Act 9, PA 1929) or Petroleum (Act 16, PA 1929)
<b>Act 9 &amp; Act 16 Pipelines: Application fee</b>	
ex-parte	\$2,000
contested case (includes up to 150 staff hours.)	\$10,000
<b>Act 9 &amp; Act 16 Pipelines: Additional fees</b>	
Additional Staff hours <sup>1</sup>	Billed hourly above application fee
Expert testimony	Actual fees
External public meetings	Actual fees
Court fees - including transcription and court reporting <sup>2</sup>	Actual fees
Environmental reporting and testing <sup>3</sup>	Actual fees
<b>Miscellaneous filings and Additional fees</b>	
Formal complaints	\$500
Requests for Exceptions to Standard Rules	\$1,000
<b>Fees associated with the Rules for Production and Transmission of Natural Gas (D-2883)</b>	
Standard Well Connection Permits	\$500
Temporary Allowable	\$500
Gas Well Retesting	\$500

<sup>1</sup> Staff hours associated with any appeal of a final Commission order will not be included in any fees assessed to the applicant. Staff hours included in the assessed fees for a contested case proceeding shall be those hours associated with the contested case proceeding through the completion of cross-examination or the final evidentiary hearing, whichever is later. This line item also includes an additional fifteen (15) hours of Staff time to allow for Staff to work on briefs, reply briefs, and exceptions/replies to the proposal for decision (PFD).

<sup>2</sup> All hearing costs associated with Staff hours will be included in "Additional Staff hours"; not in "Court fees." The applicant will not be responsible for any attorney fees accrued by any third-party intervenors to a contested case proceeding. Fees associated with attorneys representing Staff will not be included in any fees assessed to the applicant.

<sup>3</sup> Any fees included in this category are limited to those necessary to satisfy the Commission's required agency review and environmental obligations under the Michigan Environmental Protection Act (MEPA), Part 17 of the Natural Resources and Environmental Protection Act, MCL 324.1701 et seq., and the Michigan Supreme Court's application of MEPA in *State Hwy Comm v Vanderkloot*, 392 Mich 159, 185; 220 NW2d 416(1974).


# PROOF OF SERVICE

STATE OF MICHIGAN )

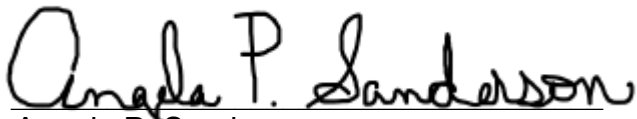
Case No. U-20634

County of Ingham )

Brianna Brown being duly sworn, deposes and says that on December 19, 2019 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 19<sup>th</sup> day of December 2019.



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

**Service List for Case: U-20634**

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