STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **DTE MICHIGAN LATERAL COMPANY** for issuance of a certificate of public convenience and necessity to convert and operate portions of its pipeline system and to construct and operate portions of a pipeline system to provide an additional supply source to the areas of Manistee, Traverse City, Alpena, and Rogers City.	)	Case No. U-20894

At the July 27, 2021 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick, Commissioner

ORDER

History of Proceedings

On February 10, 2021, DTE Michigan Lateral Company (DMLC)[1] filed an *ex parte* application, with supporting testimony and exhibits, pursuant to Public Act 9 of 1929, MCL 483.101 *et seq*. (Act 9) and applicable administrative rules, for a certificate of public convenience and necessity to convert existing pipelines in the company's[2] Wet Header System

[1] DMLC is not a utility but was a subsidiary of DTE Energy Company at the time of filing its application and through the closing of the record in this case. Application, p. 1; 3 Tr 142.

[2] Use of the word "company" in this order refers to DMLC.

from (unregulated)[3] gas gathering to (regulated) dry gas transmission service, and to construct, operate, and maintain connector pipelines from the existing system to interconnect into existing DTE Gas Company (DTE Gas) transmission facilities serving DTE Gas in Traverse City, Alpena, Rogers City, and Manistee. Associated with this project, DMLC also seeks Commission approval of its Converted Assets Transportation Agreement (firm transportation contract) with DTE Gas.[4] DMLC further requests a Commission order in this matter by July 31, 2021, to accommodate a build schedule with an in-service date in early 2022.

On April 8, 2021, a prehearing conference was held before Administrative Law Judge Kandra K. Robbins (ALJ). At the prehearing conference, at which DMLC and the Commission Staff (Staff) also participated, the ALJ granted intervenor status as of right to the Michigan Department of Attorney General (Attorney General) and took North Bay Energy, LLC's (North Bay's) petition to intervene under advisement, subsequently granting the request on April 12, 2021. On April 19, 2021, the ALJ entered a protective order for use in the matter, and, during oral argument on April 26, 2021, the ALJ granted Riverside Energy Michigan, LLC's (Riverside's) late motion to intervene.[5]

On June 2, 2021, an evidentiary hearing was held, wherein testimony and exhibits were bound into the record and cross-examination was waived. On June 14, 2021, all parties filed initial briefs, and, on June 21, 2021, the Attorney General and DMLC filed reply briefs. On June 30,

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[3] *See*, Application, Qualifications and Direct Testimony of Philip W. Coleman, p. 2; 3 Tr 123.

[4] DTE Gas is currently DMLC's only customer. Application, p. 6; 3 Tr 138.

[5] Lambda Energy Resources LLC (Lambda) also participated in initial proceedings but on a limited basis, not seeking to be a party or to intervene in the matter. *See*, 1 Tr 4; 2 Tr 49; Case No. U-20894, filings #U-20894-0025 and -0056. Also of note, Lambda filed its own Act 9 application, relating to the instant matter, in Case No. U-21091, on or around May 28, 2021.

2021, the ALJ issued a Proposal for Decision (PFD). On July 9, 2021, Riverside, DMLC, the Attorney General, and North Bay filed exceptions to the PFD. On July 15 and 16, 2021, the Staff, the Attorney General, and DMLC filed replies to exceptions.

The record in this case consists of 262 pages of transcript and 87 exhibits admitted into evidence.[6]

Proposal for Decision

The ALJ provided an overview of the record and positions of the parties on pages 3-30 of the PFD, which will not be repeated here, and on pages 30-39, in the discussion portion of the PFD, summarized issues raised in the case, including preventative remediation measures and processes, route deviations, timing for conversion, rates and contingency expenditures, the firm transportation contract, and environmental and cultural processes. Then, the ALJ discussed the Wet Header conversion project in Section A of the PFD; the route, construction, and testing of conversion in Section B;[7] and the firm transportation contract in Section C, culminating with the ALJ's recommendation that the Wet Header conversion project be approved with provisos as set forth in the PFD. *See*, PFD, pp. 40-51.

Riverside, DMLC, the Attorney General, and North Bay filed exceptions on several issues, as discussed below. The Commission finds the PFD to be well-reasoned and therefore adopts the ALJ's findings, analysis, and conclusions regarding all uncontested issues. And while not raised in exceptions, the Commission further addresses below the Michigan Environmental Protection

[6] The docket in this case also contains several public comments.

[7] On page 39 of the PFD, Section B is described as addressing "the Route, Construction and Testing of Conversion;" however, on page 44, this section is titled as "Section B: Project Route and Testing." (Emphasis omitted.) Given exceptions on construction requirements from this section, this order later refers to Section B as initially described in the PFD.

Act (MEPA), Part 17 of Act 451 of 1994, MCL 324.1701 *et seq*., as necessary in connection with its decision in this case.

Discussion

1. Wet Header Conversion Project

    a. Timing for Conversion

DMLC initially indicated its plan to start construction associated with the project in the summer of 2021, with an in-service date for the entire project in early 2022, specifically with a target in-service date of January 31, 2022, but no later than August 31, 2022. Application, pp. 3, 6; 3 Tr 169; Exhibit A-12, p. 4. The Staff, Riverside, and North Bay all objected to this timeline due to concerns raised. The Staff asserted that conversion should not take place until Lambda is granted approval to, and has completed construction of, its Act 9 project to allow for continued operation of the Wet Header System, or until May 1, 2022, whichever occurs first. 2 Tr 187. Riverside and North Bay both asserted that approval for the conversion should be conditioned specifically on Lambda's approval and construction of its project to allow for continued operation of the Wet Header System until a replacement system is in place. 2 Tr 257; North Bay's initial brief, pp. 13-16; Riverside's initial brief, pp. 7-14. In rebuttal, DMLC stated that it could, and would be acceptable to, begin conversion no later than May 1, 2022, if workable with Lambda and DTE Gas. 3 Tr 106. DMLC, however, disagreed with an indefinite delay and thus offered a middle-ground, best efforts approach on the issue. DMLC's reply brief, p. 5.

The ALJ found that no party addressed DMLC's middle-ground, best efforts approach. The ALJ further found that the approach appears to be reasonable and would address coordination concerns raised by other parties and thus recommended that the Commission accept the same. Specifically, the ALJ recommended that the Commission authorize the conversion of the Wet

Header Pipeline and construction of the necessary extensions, with direction for DMLC to use best efforts to obtain contract amendments with Lambda and DTE Gas to the extent necessary for DMLC to continue operating the Wet Header Pipeline until May 1, 2022. PFD, pp. 44, 50.

Riverside excepts to the ALJ's recommendation and asserts that the ALJ disregarded the unanimous consensus of the parties (aside from DMLC) that the conversion of the Wet Header System be expressly conditioned on Lambda's completion of a natural gas pipeline project, to guarantee the continued, uninterrupted operation of the current Wet Header System. Riverside's exceptions, p. 2; 3 Tr 187-188, 195-196, 243-244, 255-257. Riverside states that the ALJ, instead, took verbatim the best efforts approach advocated by DMLC, despite it being "undisputed that if DMLC dismantles the Wet Header System before the replacement system proposed by Lambda is in place, ten natural gas producers will be without a means to transport natural gas." Riverside's exceptions, p. 2. According to Riverside, the ALJ did not address the issue that "those producers who relied on the Wet Header System for decades will have no way to transport, treat, or move natural gas to market" without conditioning the conversion with Lambda's proposed replacement. *Id*., p. 5. Moreover, as stated by Riverside:

> DMLC, in the proffered testimony of Mr. Lyle, acknowledged that it can in fact continue to operate the Wet Header System if Lambda continues to pay DMLC to do so and could begin conversion of the Wet Header System no later than May 1, 2022 – the date by which it is anticipated Lambda will have a replacement to the Wet Header System in place. Mr. Lyle testified that this would be acceptable to DMLC. Thus, it is not clear why the ALJ disregarding [sic] the proffered testimony given the near unanimous sentiment expressed by the parties that the conversion of the Wet Header be coordinated with Lambda's proposed replacement as set forth in Lambda's application, Case No. U-21091. This is error on the part of the ALJ.

Id. (citing 3 Tr 106).

Also on this topic, Riverside states that neither DMLC nor the ALJ addressed the undisputed waste that will occur if DMLC does not coordinate conversion, along with the violation of

Section 14 of Act 9 (MCL 483.114) that will then result. According to Riverside, the impact of this waste issue cannot be overstated, as without coordination "the shippers who rely on the Wet Header System will be left without a way to transport and treat their gas," which "will result in shut-in wells, lost production, and lost revenue, including to the state of Michigan." Riverside's exceptions, pp. 5-6; 3 Tr 191.

Riverside states that Section 14 of Act 9 and related case law "makes clear the importance of the conservation of natural gas and grants the Commission broad powers over the preservation of waste." Riverside's exceptions, p. 6. Riverside also references Mich Admin Code, R 460.857 and Part 615 of Act 451 of 1994, MCL 324.61501 *et seq*., for their addressal of waste. Per Riverside, the shut-in that will occur if DMLC's application is approved:

> will result in incalculable waste and is in direct violation of Section 14 of Act 9, R 460.857(1), and Part 615. The [ALJ] does not address this waste and does not otherwise justify the shutting in of wells and the damage to oil and gas reservoirs. For this reason, the conversion of the Wet Header System must be contingent upon the availability of a replacement system so that the current uses of it are not left without a way to transport and treat their gas.

Riverside's exceptions, p. 7; 3 Tr 243-244.

Riverside further asserts that it was not given the opportunity to address DMLC's claim that DMLC would use best efforts to secure contract amendments with Lambda and DTE Gas to enable continued operation of the Wet Header System, contrary to the ALJ stating that no party addressed this suggestion, as DMLC's best efforts suggestion was presented in the company's reply brief, with no opportunity for responsive briefs in the case schedule. Riverside asserts error on behalf of the ALJ concerning her timing of the conversion recommendation and argues the Commission should not adopt the ALJ's recommendation in this regard. Riverside's exceptions, p. 8.

Riverside continues that this best efforts standard is ambiguous, is unenforceable, and should not be the measure of DMLC's efforts. More specifically, Riverside states that this best efforts standard was neither explained nor defined and also lacks any measurement or timeframe in which to evaluate the same, thus rendering it essentially unenforceable. Riverside avers that:

> It is entirely possible that DMLC will deem that it has already used its "best efforts" given the testimony proffered in this case and thus there is no protection or consideration given to the existing users of the Wet Header System. This recommendation is useless, flies in the face of those concerns raised by both [Commission] Staff and the Intervenors, does nothing to address the undisputed waste that will occur if the Wet Header System is dismantled before a replacement is available, and should not be adopted by the Commission. Instead, the Commission should require that DMLC continue operating the Wet Header System until such time as Lambda's proposed replacement system (as described in Case No. U-21091) is completed in order to ensure uninterrupted service to those producers currently utilizing the Wet Header System.

Riverside's exceptions, pp. 8-9.

North Bay similarly objects to the ALJ's recommendation on this issue and begins by asserting that the ALJ completely ignored, and did not address, the fact that conversion without an alternate transmission system would constitute waste in violation of Michigan law.

North Bay recalls undisputed testimony on its behalf, and on behalf of Riverside and the Staff, that there are no less than 10 active shippers utilizing the existing Wet Header System—a system, along with the Kalkaska Plant, that is critical and the only option to transport and treat natural gas for Northern Michigan gas producers and that a failure to maintain this system, or in the absence of an immediate alternative, would result in shut-ins of oil and natural gas productions, the shutdown of the Kalkaska Plant, stranded producing wells, and ramifications beyond the isolated producers themselves. North Bay's exceptions, pp. 1-3; 3 Tr 191, 243-244, 257-258.

Like Riverside, North Bay also discusses the legal authority set forth in Act 9, the Commission's rules, and Part 615 regarding the regulation of carrying and transporting natural gas

through pipelines, with particular emphasis on the definition and prevention of waste. North Bay reiterates:

> Converting the Wet Header System without an available alternative for transportation of gas[ ] will cause wells to be stranded and would unquestionably reduce the total quantity of gas ultimately recoverable in those areas. It is indisputable that allowing conversion of the existing Wet Header System without an available alternative would constitute waste as defined under applicable Michigan law.

North Bay's exceptions, pp. 3-4. Given the above, North Bay declares that the ALJ's failure to address this issue was an error and that any order by the Commission authorizing conversion must be conditioned on the approval of Lambda's application for replacement service in Case No. U-21091, along with "the completion of Lambda's construction and all necessary testing and approvals, so that Lambda can actually provide the same transportation service to shippers as has historically been provided in the Wet Header System." North Bay's exceptions, p. 4.

Continuing, North Bay next asserts that the Commission should reject the ALJ's recommendation to adopt DMLC's timing of the conversion proposal. North Bay, like Riverside, also highlights that this proposal was raised in DMLC's reply brief without opportunity for any party to respond.[8] North Bay further declares that the ALJ's statement "that DMLC's proposal 'would address the coordination concerns raised by the other parties' . . . is simply not true," as direct testimony on behalf of North Bay, Riverside, and the Staff all indicates that conversion should be delayed until Lambda completes all replacement work relative to the conversion. *Id*., p. 5 (quoting PFD, p. 44).

[8] North Bay does, however, note that it did address the Staff's proposal to place a back-end conversion date of May 1, 2022, on pages 13-16 of its initial brief. North Bay's exceptions, p. 5, n. 1.

North Bay reiterates the concern it has with the May 1, 2022 back-end conversion date, based on Lambda's proposed schedule, and argues that, because Lambda is not a party to this proceeding and neither North Bay nor any other party has had an opportunity to cross-examine Lambda on this, the Commission should not adopt this arbitrary date "based on what amounts to hearsay in this proceeding" and "should further refrain from limiting the condition that an alternative transmission path must be available prior to [conversion] . . . ." North Bay's exceptions, p. 6; 3 Tr 187-188. North Bay further restates:

> DMLC has argued that it should not be forced to indefinitely delay its conversion, but as set forth in North Bay's initial brief, DMLC's arguments in this regard are without merit. To the extent DMLC is concerned that such a delay may extend indefinitely, the Commission's order could provide that DMLC could file a subsequent petition based on changes in circumstances if there is an unanticipated delay that extends far beyond the proposed Lambda "pessimistic" schedule. That would allow the Commission to make a fully informed decision based on the circumstances as they actually exist at that time, as opposed to setting a date now that may or may not ultimately prove to be realistic and appropriate.

North Bay's exceptions, pp. 6-7. Indeed, per North Bay, such an approach would be entirely consistent with, and materially identical to, the ALJ's recommendation regarding contingency costs, as it is not possible to determine based on facts available whether a May 1, 2022 back-end conversion date is reasonable and prudent at this time. North Bay asserts that the Commission "should simply order that conversion must be delayed until there is alternate service available" and that:

> [i]f at some point in the future DMLC contends that further delay would be unreasonable based on the totality of facts and circumstances as they actually exist at that point, DMLC can seek approval to convert and the Commission can make its determination based on actual evidence rather than speculation.

Id., p. 7.

Lastly, North Bay argues that the Commission should reject DMLC's best efforts standard, even if the Commission adopts the back-end conversion date of May 1, 2022, because the standard

proposed by DMLC is vague and unenforceable. *Id*.; PFD, p. 43. Similar to Riverside, North Bay asserts that best efforts is neither explained nor delineated and that there are no standards on which to evaluate or determine whether best efforts have been taken, "which renders any such purported 'best efforts' requirement impossible to enforce and ripe for further litigation." North Bay's exceptions, p. 8. North Bay postulates that DMLC could, upon issuance of the Commission's order in this case, claim that it already used best efforts and that it is not bound to delay conversion at all. North Bay thus avers that the order in this case "should be crafted to resolve the concerns expressed by the parties, and not create further uncertainty and litigation." *Id*.

North Bay concludes:

> The [Commission] Staff, Riverside and North Bay have all argued, with substantial supporting evidence, that at a minimum any conversion of the Wet Header System must be delayed until Lambda has a full opportunity to bring its alternative system online, which according to Lambda's schedule means a deferral at least until May 1, 2022. Allowing DMLC to use a "best efforts" loophole to convert the existing system prior to the availability of an alternative system will result in disaster, potentially including the shut-in of all flowing gas west of Kalkaska for lack of access to a pipeline. DMLC's own witness, Arthur R. Lyle II, testified that it "would be acceptable to DMLC" to begin conversion of its existing assets no later than May 1, 2022, so long as it can continue to operate the Wet Header System. . . . There is no evidence in this record to indicate that Lambda has any objection to DMLC's continued operation of the Wet Header System, and indeed, Lambda has filed its own proceeding seeking to coordinate a smooth transition of service from DMLC to Lambda (Case No. U-21091).

Id., pp. 8-9 (quoting 3 Tr 106).

The Attorney General also objects to the recommendation made by the ALJ on this issue and, as a preliminary matter, begins by asserting that the ALJ erred in her consideration of DMLC's reply brief on this issue and elsewhere in the rendering of her PFD, as DMLC's reply brief improperly attempted to raise arguments and discussion that should have been included in the company's initial brief.

The Attorney General states that "[i]t is common practice, and in fact it is a Michigan Court Rule, in proceedings before the Commission to include all factual and legal arguments and related discussion in initial briefs." Attorney General's exceptions, pp. 1-2; Mich Admin Code, R 792.10434; MCR 7.212(G). The Attorney General continues:

> At the point in a proceeding where initial briefs are being filed, after the applicant's filing, other parties' testimony, rebuttal, and any associated cross, the contours of the various parties' cases and arguments are clear. While much of that testimony, etc. is necessarily repeated or incorporated in initial briefs, it is not new information and parties then address that testimony by coupling it with arguments developed in rebuttal or during additional discovery and cross examination.
>
> Reply briefs are then used to respond directly to arguments and information in parties' initial briefs in a narrow, more directed fashion, picking out specific points raised in initial briefs and providing more focused replies. Reserving all argument to the reply brief is counter to Court rules and common practice and deprives the ALJ and Commission of an entire record to work from. When a party puts all its arguments in a reply brief, other parties have no chance to respond to those arguments, and thus the ALJ and Commission are left with only a one-sided discussion that no party has had a chance to reply to and/or provide a counterpoint.

Attorney General's exceptions, p. 3.

The Attorney General argued that DMLC reserved its entire argument for its reply brief, which the Attorney General noted in her initial brief was completely lacking in the initial brief filed by DMLC. In fact, as highlighted by the Attorney General, "[t]here is zero mention of Staff's disagreements with DMLC, and zero mentions period, of intervenor positions and arguments [in DMLC's initial brief]." *Id*., p. 4. Further:

> In its reply brief then, DMLC clearly provides argument that should have been provided in an initial brief. The vast majority of its citations are to the transcript and the record, as opposed to parties' initial briefs, and it provides argument directly to positions laid out in Staff and Intervenor testimony. The Commission has previously cautioned against waiting until reply briefs to raise arguments, because no party has a proper chance to respond. Additionally, DMLC provides new, non-record information and novel argument in its reply brief. While non-record information is typically not appropriate to provide in initial briefs, new arguments involving non-record information are certainly not acceptable to provide in a reply brief that parties are not able to respond to.

Id., pp. 4-5 (footnotes omitted). The Attorney General argues that DMLC has circumvented the procedural process and has deprived other parties an opportunity to respond, which in turn deprives the ALJ and the Commission of a complete record and works as a disservice to ratepayers and the public at large. The Attorney General further provides examples from the PFD for demonstration on this and concludes this point by asserting that "DMLC should not be rewarded for procedural maneuvering that leaves parties without ample opportunity to respond to arguments it has withheld." *Id*., pp. 5-7; PFD, pp. 30-39, 43-44.

For the reason raised directly above, the Attorney General repeats that the ALJ erred in her analysis and recommendation regarding the timeline for construction of the Wet Header project, which again was a novel approach raised by DMLC in its reply brief that no party had a chance to address. The Attorney General additionally notes that she does not support directives for an applicant to use best efforts, "as that is a nebulous, unenforceable standard that leaves too much up to the applicant's discretion." Attorney General's exceptions, p. 7.

In replies to exceptions, the Staff corrects misstatements in exceptions regarding its position on the timing of the Wet Header conversion. The Staff states:

> Staff's witness, Kevin Spence, had testified that the conversion of the wet header system to dry gas transmission should not take place until either Lambda Energy has completed its Act 9 pipeline or until May 1, 2022, whichever comes first. (3 TR 187). Staff's reasoning was to balance the needs of both DMLC and the natural gas shippers. Mr. Spence testified that Lambda Energy had represented to him that its pessimistic date for completion of its project was May 1, 2022. (3 TR 187-188). Staff testified that this date should provide enough time to complete the Lambda Energy project, thus providing producers with as little disruption as possible, while also not unduly delaying DMLC's conversion to dry gas transmission. (3 TR 188). Staff has not taken the position that the conversion should be delayed beyond May 1, 2022.

Staff's replies to exceptions, pp. 1-2.

DMLC argues that the Commission should reject the Attorney General's claim, and misunderstanding, that parties must in initial briefs address every statement in testimony and anticipate and respond to every possible argument by every party. DMLC avers that there is no basis in law or fundamental fairness to this and that such an approach would be unnecessarily cumbersome. Instead, according to DMLC:

> the briefing process is designed for parties to present a narrowed argument based on the other parties' presentation of their case-in-chief through initial briefs. This approach is clear here, but becomes even more clear in the context of cases like general rate cases where numerous intervenors may introduce dozens of positions in testimony that do not make it into that parties' briefing. The Attorney General's suggested approach would flip the process on its head and ask parties to anticipate which issues (in addition to its own case) it must address in its initial brief.

DMLC's replies to exceptions, p. 3; Attorney General's exceptions, p. 5. DMLC asserts that its approach here is appropriate and consistent with other Commission cases, with DMLC specifically referencing the May 31, 2017 order in Case No. U-17332-R discussing this very procedural approach therein.

Furthermore, as set forth by DMLC:

> the proposed compromise that the Attorney General complains about was included both in DMLC Witness Lyle's testimony (3 Tr p 106) and in DMLC's Initial Brief (p 11), meaning the Attorney General had an opportunity to both cross examine Witness Lyle about the proposal (but declined to do so) and to address it either in her Initial Brief or Reply Brief. It is baseless now for the Attorney General to argue that she is harmed, and that because she chose not to address the proposal, the ALJ should not have adopted it as reasonable.

DMLC's replies to exceptions, p. 4. Given this, DMLC asserts that the Attorney General's misdirected arguments on briefing are "simply unfounded and should be rejected." *Id*.

DMLC next contends that the Commission should adopt the ALJ's conclusion that a compromise solution, based on record evidence, to achieve the conversion not later than May 1, 2022, is appropriate. DMLC states that, contrary to intervenors' concerns otherwise, along with

their suggested indefinite postponement, there is no record evidence that the May 1, 2022 timeline is not feasible or is unlikely. In fact, per DMLC, the "Staff's testimony explains that date is the most 'pessimistic' date that 'would allow Lambda time to complete the necessary work on their end to keep the producers in operation without placing an unreasonable amount of delay upon DMLC for their conversion of service.'" DMLC's replies to exceptions, p. 5 (quoting 3 Tr 188).

DMLC asserts that, with multi-lateral contracts in place, it would be unreasonable for the Commission to condition approval here on DMLC executing a contract with third parties. DMLC states that its contract with Lambda expires at the end of 2021 and that it is impossible for DMLC to force Lambda to extend that contract under terms and conditions that are reasonable to DMLC. DMLC further states that its contract with DTE Gas also has fixed dates regarding construction that would need to be amended, which DTE Gas is not required to agree to. Recognizing these facts:

> the [ALJ] requires DMLC to use its best efforts to do so. The best efforts standard is not a new concept and is a standard contract requirement for situations in which an outcome is out of a party's control, but for which a party can try their best to achieve that outcome. That is the case here and the [ALJ] would have DMLC try its best to renegotiate its contracts with the recognition it may not be possible to convince counter-parties to agree to the required changes.

DMLC's replies to exceptions, p. 5. Continuing, DMLC states:

> As the Michigan Court of Appeals has explained, "[w]hen the term 'best efforts' is not defined, the standard is generally what is reasonable under the circumstances." *Frick v Spice*, unpublished per curiam opinion of the Michigan Court of Appeals, issued Dec. 11, 2018 (Docket No. 341498), p 4. Additionally, as the Attorney General noted in a 2019 Motion to Compel, the use of the "best efforts" standard has become the Commission's "recent custom" with regard to discovery. *In re Application of DTE Electric Company for Reconciliation of its Power Supply Cost Recovery Plan* (Case No. U-18403). Accordingly, the [ALJ]'s use of the "best efforts" standard is appropriate and requires DMLC to do what is reasonable under the circumstances to attempt to negotiate new contracts with Lambda and DTE [Gas].

DMLC's replies to exceptions, p. 6 (first alteration in original).

DMLC contends that, if its contract with Lambda expires at the end of the year without an extension, there is nothing in the record to indicate how shippers will continue to transport on Lambda's pipelines. Additionally, per DMLC, its contracts with the shippers, which transferred to Lambda, provides for termination of the contracts with 30 days' notice; thus, if an extension is not negotiated or Lambda gives notice of termination, the shippers will be unable to transport on the pipeline. DMLC argues:

> Frankly, having a set date of May 1, 2022 seems to provide much more certainty than the current status quo of having an undedicated production source under a 30-day contract. Given that reality, it is surprising that all of the parties have not embraced the [ALJ]'s proposed solution to require DMLC to attempt to renegotiate the contract to ensure continued service, but it appears the Intervenors are so busy fighting over a few saplings that they have forgotten about the forest.

Id.

DMLC next asserts that there would not be waste even if there is a temporary stop in shipping. DMLC argues that the intervenors confuse gas waste under Act 9 with economic waste and are apparently frustrated that the ALJ did not address their arguments regarding waste; however, the ALJ need not address every issue raised, particularly those immaterial to the ALJ's findings and the case. DMLC contends that "[a]ll of the cases and statutes the Intervenors cited regarding 'waste' relate to wells themselves improperly using reservoir energy. . . . They do not relate to the current circumstances of a potential temporary well shut in during a changeover in pipelines." *Id*., p. 7. DMLC states that the Commission addressed the distinction between wasting natural gas and economic waste in its September 8, 2016 order in Case No. U-17929, wherein the Commission agreed that waste under Act 9 and the Commission's rules refers to physical waste of natural gas, not economic waste, and with the Commission noting testimony about the confusion of waste with delayed revenues concerning the shutting in of wells. Per DMLC:

> As demonstrated by the record in this case, DMLC has operated the wet header system at a significant loss to retain producer service. During the transition to the new pipeline, DMLC's long-term loss may cause a short-term financial impact on the shippers that will be resolved as soon as Lambda's new pipeline is complete in spring 2022. The shippers are interested only in their own economic interests and not the underlying public necessity of the project. The ALJ properly weighed the relevant issues presented in the record and correctly did not give weight to the Intervenors' argument that the transition should be delayed because of the shippers' potential temporary economic loss during the pipeline transition.

DMLC's replies to exceptions, pp. 7-8.

The Commission agrees with Riverside and North Bay and finds that seamless coordination is of paramount importance here to guarantee the continued, uninterrupted operation of the Wet Header System. As set forth in testimony, not only are there ramifications for shippers and producers who have used and relied on this system for decades if this conversion and Lambda's project in Case No. U-21091 are not properly coordinated, but there are also ramifications to the state of Michigan as a whole and possibly its residents, particularly with heating. 3 Tr 190-192. Based on representations made and relayed in this case and Case No. U-21091, as referenced in the record, the Commission has no reason to believe that May 1, 2022, is an unlikely date for conversion and that an indefinite delay is in anyone's interest, whether that be DMLC, DTE Gas, or Lambda. Nevertheless, the Commission finds that the conversion of this critical system must unequivocally be conditioned on Lambda's alternative natural gas gathering system being approved and completed, with, however, the Commission's expectation that diligent and good faith efforts be made by all involved to effectuate these projects in a timely manner.

2. Route, Construction, and Testing of Conversion

    a. Depth of Cover

DMLC's Environmental Impact Report indicated that trenching for the Norwalk Manistee Connector (NMC) and Rogers City Connector (RCC) pipelines would be "to a depth sufficient to

provide the appropriate amount of cover, which is generally a minimum of three feet." Exhibit A-6.0, p. 7. Given concerns regarding the disruption to agricultural operations, as well as concerns regarding the depth of cover for the pipeline, specifically that an insufficient depth could result in accidental strikes on the line during farming operations, the Staff recommended that the depth of cover be increased to five feet in agricultural fields to mitigate this possibility. 3 Tr 174-175, 193; Staff's initial brief, p. 16. DMLC disagreed, stating that the minimum required depth of cover is three feet per existing standards in such areas, assuming a design for a Class II or higher location, and arguing that it is not known why the Staff is making this recommendation as most agricultural activity will not impact depths at three feet. 3 Tr 104.

The ALJ recommended that the Commission accept the Staff's recommendation of five feet for minimum depth of cover in agricultural fields. PFD, pp. 45, 50.

DMLC argues that the ALJ erred, as this recommendation exceeds the minimum depth of cover of three feet normally for such areas required by the Michigan Gas Safety Standards (MGSS), Mich Admin Code, R 460.20101 *et seq*. DMLC's exceptions, p. 6; 3 Tr 104, 174; Mich Admin Code, R 460.20201; 49 CFR 192.5, 192.327(a). DMLC asserts that, aside from the Staff's stated concern, "there is no tangible evidence in this case as to why five feet should be the depth of cover" and avers that the ALJ's recommendation "is problematic because it unlawfully imposes greater depth of cover requirements than contemplated by the Michigan Gas Safety Standards and increases costs beyond those contemplated in the rate proposed by DMLC." DMLC's exceptions, p. 6; *see also*, *id*., pp. 7-8; 3 Tr 100. Per DMLC, the Staff's proposal contains no data-based or rule-based explanation and reiterates that most agricultural activity will not impact depths at three feet. DMLC further argues that the ALJ's recommendation:

> is in effect an arbitrary and unlawful amendment of an existing rule. An agency is under a duty to follow its own rules. *Rand v Civil Serv Comm*, 71 Mich App 581;

> 248 NW2d 624 (1976). The proper action for the Commission to amend an existing rule is to engage in rulemaking, not through its contested case orders. *Michigan Electric & Gas Ass'n v Pub Serv Comm*, 252 Mich App 254, 264-268; 652 NW2d 1 (2002).

DMLC's exceptions, p. 7. Based on the above legal and practical problems, and arguing that this is not a requirement in the MGSS, DMLC asserts that the Commission should reject the ALJ's recommendation that the depth of cover for agricultural areas be five feet.

In replies to exceptions, the Staff asserts that the ALJ's recommendation is reasonable. The Staff contends that:

> while the MGSS prescribe the minimum depth of cover at the time of construction, Staff has the responsibility to make the safety related recommendation (as may be adopted by the [ALJ] and approved/ordered by the Commission) for a greater depth of cover. The minimum depth of cover requirement in the regulations do not take into consideration current and future land use, soil conditions, and/or erosion. The recommendation is consistent with the Staff['s] position in other cases and consideration is given to factors beyond the minimum requirements in the regulations.

Staff's replies to exceptions, pp. 5-6.

The Commission agrees with the Staff and the ALJ and finds that the minimum depth of cover for the proposed NMC and RCC pipelines should be five feet in all agricultural fields. The Commission finds the Staff's concerns to be valid and further finds that, in other Act 9 cases of late, the depth of cover in agricultural areas exceeded minimum standards. *See*, e.g., Case Nos. U-20198, U-20618, and U-20853.

3. Firm Transportation Contract

    a. Contingency Expenses

DMLC's firm transportation contract—which DMLC requests approval of "based on the Code of Conduct [Code] and not based upon Commission authority under Act 9"—includes $5,721,993 in contingency costs associated with the Wet Header conversion project in this case. 3 Tr 192,

218, 226; Exhibit A-5; Exhibit S-14, p. 2; Exhibits AG-6, p. 2, and AG-12; DMLC's initial brief, p. 4. The Staff and the Attorney General argued that all contingency costs associated with the proposed project should be disallowed due to uncertainty, consistent with past Commission cases, and the unreasonable and inappropriate risk such costs place on ratepayers, with the Staff further recommending that DMLC recalculate rates without this amount and file the recalculated rates in this docket. 3 Tr 192-193, 218; Attorney General's initial brief, pp. 9-12. The Staff also mentioned the filing of a rate amendment once construction is complete, if the need for the contingency expenditures arises and if such expenditures can be proven to have been justly and prudently made. 3 Tr 193. The Attorney General also mentioned the filing of a subsequent application to revise rates to reflect updated costs. 3 Tr 232. DMLC disagreed with the Staff and the Attorney General, arguing that it is not a utility and is thus not afforded similar rate recovery mechanisms like a utility, that the contract does not allow for the Staff's proposed filing of a rate amendment once construction is complete, and that the proposed contingency costs are normal and reasonable. 3 Tr 100-101, 141-144; DMLC's initial brief, pp. 13-14; DMLC's reply brief, pp. 10-13.

The ALJ agreed with the Staff and the Attorney General and recommended that contingency expenses be disallowed, stating that "[b]ecause of [sic] the costs are speculative, it is not possible to determine if the costs are reasonable and prudent at this time." PFD, p. 50. The ALJ further recommended that DMLC be required to recalculate its rate minus the contingency expenses. *Id*., p. 51.

DMLC argues that the ALJ erred in her recommendation. DMLC reiterates that this is not a rate case but rather a case that "involves the Project's rates intended to cover the life of a 20 year negotiated contract, which are scrutinized under Act 9 and the Code of Conduct." DMLC's

exceptions, p. 2. As such, as asserted by DMLC, "the Commission's traditional practice of excluding contingency costs from rate recovery until such time as the costs are incurred and reflected in the next rate case is not appropriately applied here." *Id*.

Referencing MCL 483.110, DMLC states that this case involves initial negotiated rates as required to be filed but which are not subject to review for reasonableness and prudence, nor scrutiny unless DMLC subsequently attempts to alter or amend the initial rates. DMLC avers that, "[a]t this point, . . . rates are relevant and submitted only to the extent DMLC is required to comply with the Commission's Code of Conduct, which requires DMLC to charge either: (1) market price; or (2) its fully embedded costs, plus 10%," under Mich Admin Code, R 460.10108(4) (Rule 8(4)). *Id*., p. 3. DMLC notes here, however, that it is no longer affiliated with DTE Gas, as of July 1, 2021. DMLC argues that "traditional ratemaking principals should not be applied in this case and the Commission should reject the hard line stance regarding contingency costs which is unmoored from the realities of this Project's construction." *Id*.

Expanding on this exception, DMLC avers that the Commission does not evaluate rates in Act 9 cases. DMLC quotes the requirements of MCL 483.110 and asserts that the ALJ's recommendation imposes a new requirement on DMLC which "is contrary to Act 9 and wholly unnecessary given that DMLC has already followed the correct statutory process for submitting initial negotiated rates." *Id*., p. 4. With the ALJ's recommendation, however, DMLC notes that it:

> has less objection to having to submit an application for approval of new rates after construction is completed provided that the hearing process is expedited and limited to review of the incurred contingent costs. Otherwise, DMLC will be compelled to provide service on "Day One" at the lower and inadequate rate approved in this case which does not provide an opportunity to fully recover all of its reasonable cost of service.

Id., n. 2. DMLC states that the contingency costs are forecasted just like the other costs in this case, avers that there no sound reason to exclude contingency costs under Act 9, and that the

record demonstrates that the firm transportation contract (at 10% over fully allocated embedded costs) complies with the Code.

DMLC next asserts that the contingency costs are reasonable. DMLC recalls testimony about the importance of, need for, and value of contingency costs and reiterates that "[t]he approximate 15% contingency is fair and reasonable when considering the challenges of converting an older pipe to meet transmission regulation requirements." *Id*., pp. 4-6; 3 Tr 100, 141-142. DMLC argues that the ALJ's recommendation that it must later seek a rate amendment after construction is complete "fails to recognize that this is a two-party contract and DMLC has no way to force DTE Gas to amend the contract, absent the Commission conditioning its approval of a contract amendment providing for the lower rate and allowing for future rate increases." DMLC's exceptions, p. 6. Given the above, DMLC contends that the Commission should reject the ALJ's recommendation to exclude contingency costs from the approved rate in this case. In the event that the Commission, however, instructs it to remove contingency costs, DMLC "requests the initiation of a Commission proceeding that results in expeditious approval of the recalculated rate." *Id*., p. 8.

In replies to exceptions, the Staff asserts that the ALJ correctly recommended the disallowance of contingency expenses because the speculative nature of such expenses makes it impossible to review the same for reasonableness and prudence.

The Staff argues that there is nothing in Act 9 that indicates that recommendations cannot be made concerning costs included in the rates as part of a contested case proceeding. The Staff states that it has a long history of making recommendations regarding contingencies and that the Commission too has a long history of not allowing such expenses to be included in rates. The Staff avers that "if the Commission approves the recovery of these costs in a future DTE Gas

proceeding, these contingency costs will be passed on to the DTE Gas rate payers, whether actually realized or not, it is not appropriate for them to be included in the rates at this time." Staff's replies to exceptions, p. 4.

The Staff additionally argues that the affiliate relationship between DMLC and DTE Gas, when rates were negotiated, needs to be taken into consideration when considering all costs associated with these rates. Per the Staff, "It would be inappropriate for the rates to include an unrealized cost and additionally a ROE [return on equity] associated with those unrealized costs." *Id*. Also, "the exclusion of the contingencies provides additional incentives to the DMLC to keep the cost associated with the construction for conversion of service in check." *Id*.

Lastly, as set forth by the Staff:

> the Company provide[s] no justification in its case for the inclusion of the contingencies, what the contingency rates were, and how the contingencies were calculated, in fact, there is no mention of contingencies anywhere in the Company's case. In the rebuttal testimony of Mr. Steven M. Richman, the Company does address the reasonableness of the contingency expenses, stating "The approximate 15% contingency is fair and reasonable when considering the challenges of converting an older pipe to meet transmission regulation requirements." (3 TR 141). The only quantitative example the Company provides for justification of the contingency is that "steel pipe costs increased 20% 2019 to 2020." (3 TR 142). The Company does not relate how these increases in steel prices will impact this specific project or if the Company has secured the necessary pipe for this project prior to these increases.

Id., pp. 4-5.

The Attorney General argues that DMLC's exception on this issue is erroneous and should be rejected in favor of adopting the recommendation set forth by the ALJ, the Attorney General, and the Staff. The Attorney General avers that DMLC's assertion that the Commission cannot evaluate rates in Act 9 cases would force the Commission to accept any level of costs presented by a natural gas carrier in such a proceeding. According to the Attorney General:

> DMLC's argument is that the Commission has zero ability to review, adjust, or reject any level of costs DMLC and its affiliate, DTE Gas, agree to in a contract, subject only to the constraints of the Commission Code of Conduct's rule for affiliate transactions, and that in a situation where there is no existing market for comparison purposes. So, according to DMLC's interpretation, if this contract was not between affiliates, then there would be zero constraints on the rates, and the Commission, and consequently ratepayers, would simply have to accept any level of rates proffered, as long as they are filed with the Commission.

Attorney General's replies to exceptions, p. 3.[9] This, the Attorney General declares, "is a wholly inappropriate interpretation that removes any safeguards that prevent customers from paying exorbitant rates." *Id*., p. 4. Continuing, the Attorney General states:

> Again, under MCL 483.110 the Commission may make rules and set conditions for service for the regulation of common carriers of natural gas, which includes "[t]he price to be paid and the rates and charges." The [Attorney General] argues that this means the Commission can regulate new contracts such as the one between DMLC and DTE Gas, as DMLC has already admitted, as well as amended contracts. To hold otherwise would deprive ratepayers of any ability to question the level of costs they are ultimately asked to shoulder. Additionally, the ability of the Commission to examine charges in an amended contract, but not a new contract, would be an arbitrary distinction, unsupported by any reasonable rationale.

Id. (First alteration in original; footnote omitted.)

The Attorney General next takes issue with several footnotes that DMLC includes in its exceptions. DMLC's first footnote stating that it is no longer affiliated with DTE Gas as of July 1, 2021, is irrelevant to this case, per the Attorney General, as the contract was negotiated between affiliates, and, therefore, the Code applies. According to the Attorney General, DMLC's second footnote about providing service on Day 1 at a lower and inadequate rate, which appears to include a new proposal at this stage of the case, is "self-serving," incorrect, and should be rejected, as the Attorney General's rate proposal would allow ample opportunity for full recovery of all reasonable

[9] Because the Attorney General's replies to exceptions are not paginated, the Commission clarifies that page 1 starts in natural order with the first page where her introduction begins.

cost of service (COS). The Attorney General states that she "presented a transparent model with clear calculations and assumptions with supported cost forecasts" and that:

> The calculations Mr. Coppola performed in his revised testimony and exhibits allow DMLC to recover all its costs plus provides a ROE of 9.9% after tax, which is equivalent to a pre-tax return on equity capital of 12.3%. The [ALJ] failed to examine the merits of DMLC's model, or the assumptions contained therein, and the AG's model, which again provides a return of the costs and a 9.9% after tax ROE, is reasonable and more than fair.

Attorney General's replies to exceptions, p. 5 (footnote omitted). Given the above, the Attorney General asserts that the Commission "can, and should, review the reasonableness and prudence of the level of rates proposed by DMLC in this case." *Id*.

Further disagreeing with DMLC, the Attorney General next argues that DMLC's requested contingency costs are not reasonable and prudent. The Attorney General states that DMLC merely reiterates testimony, rather than excepting to anything specific in the PFD, whereas the Attorney General provided extensive discussion on this topic and maintains that the Commission has repeatedly found that "it is not reasonable to saddle ratepayers with rates that provide a return on costs that may never be incurred." *Id*., p. 6. As declared by the Attorney General:

> Allowing inclusion of these contingency costs would remove the incentive for DMLC to properly control costs and work diligently to stay within its budget and schedule. DMLC's and DTE Gas's attempts to remove their own risk and increase their returns by passing that risk on to customers of DTE Gas should be rejected by the Commission.

Id.

The Commission finds that, in agreement with the Attorney General, the Commission does have the authority to review the rates in the firm transportation contract, to ensure that the same are just and reasonable, under MCL 483.110.

MCL 483.110 provides:

> A common purchaser or common carrier of natural gas, before receiving the gas for transmission or delivery, shall file with the commission a schedule of the rates and price at which the common purchaser or common carrier will receive gas at delivery stations from a well, field, or source of supply, as well as the rates or charges at which the common purchaser or common carrier will deliver gas to connecting carriers or distributing lines or customers, and, if the common purchaser or common carrier is operating as a carrier for hire, the rates and charges which the common purchaser or common carrier will charge for the service to be performed by it. A common purchaser or common carrier operating as a carrier for hire also shall file a copy of each contract for purchasing, receiving, or supplying gas. The price to be paid and the rates and charges shall be stated and set up in the manner and form required by the commission and outlined in the rules of the commission for filing of rates of artificial gas utilities or pursuant to rules and conditions of service adopted by the commission, which the commission may make for the regulation of common purchasers and common carriers of natural gas. Thereafter, a common purchaser or common carrier of natural gas may alter or amend its price paid, rates, charges, and conditions of service by application to and approval by the commission in the same manner and by the same process and under the same legal limitations and like right as are now provided by statute for the regulation by the commission of the rates for electricity transmitted in this state and process of appeal provided in section 26 of Act No. 300 of the Public Acts of 1909, being section 462.26 of the Michigan Compiled Laws.

In *Antrim Resources v Pub Serv Comm*, 179 Mich App 603, 610-611; 446 NW2d 515 (1989), the Michigan Court of Appeals analyzed this statute (prior to and considering the amendment via Public Act 6 of 1987) and said:

> Section 10 [of Act 9] requires that copies of the initial contracts between common purchasers and natural gas producers be filed with the [Commission] along with a schedule of the rates and price at which the common purchaser will receive gas. The statute is silent as to [Commission] approval of the initial price. It provides, however, that these contracts
>
> > be stated and set up in the manner and form required by the commission and outlined in its rules and regulations for filing of rates of artificial gas utilities or in accordance with such rules, regulations and conditions of service as may be hereafter adopted by the commission and which it is hereby empowered to make for the regulation of such common purchasers.
>
> Clearly, the statute does not contemplate that producers and [a common purchaser] may enter into initial contracts for the purchase of gas which contain pricing

> provisions or rate schedules determined at the parties' whim and caprice. The statute mandates that these initial contracts adhere to the rules and regulations of the [Commission].

The Court went on to say that "[p]roducers who enter into contracts with common purchasers are charged with the knowledge that they are subject to the jurisdiction of the [Commission] to the extent that the pricing provisions in their contracts with common purchasers and any alterations or amendments in the price are subject to [Commission] approval," concluding that the Commission, in looking to MCL 460.557, "has jurisdiction to determine whether the price which [a common purchaser] may pay for natural gas is just and reasonable." *Id*., p. 612. The Court further discussed the Commission's long-standing reliance upon Section 10 of Act 9 for interpreting and inspecting pricing provisions of gas purchase contracts filed by common purchasers, which is to be given respectful consideration by the courts, and, in addressing the amendment to MCL 483.110, found that the amendment "merely clarifies some statutory language and adds a statutory provision for appeal from orders of the [Commission], contains the same requirements as the original statute for filing of contracts and for approval of any alterations or amendments in the price paid for gas." *Id*., p. 614.

Against this background, the Commission agrees with the Staff, the Attorney General, and the ALJ and finds that all contingency costs associated with the proposed project should be disallowed at this time and that DMLC, as proposed by the Staff and recommended by the ALJ, should recalculate its rates, excluding the contingency expenditures, and file the recalculated rates in the docket. The Commission notes here that contingency amounts previously disallowed that have been incurred and have been shown to be just and prudently spent have been subsequently allowed for inclusion in rates, which DMLC could pursue via the altering/amendatory provisions of

MCL 483.110 and seemingly through Section 10.7 of the contract addressing a regulatory event. Exhibit A-12, p. 13.

Indeed, DMLC itself seems to anticipate such a result in its exceptions, where it states that it has "less objection to having to submit an application for approval of new rates after construction is completed provided that the hearing process is expedited and limited to review of the incurred contingent costs." DMLC's exceptions, p. 4, n. 2. The Commission finds this process of evaluating renegotiated rates based on DMLC's actual incurred costs, together with the accounting treatment for rates paid by DTE Gas to DMLC authorized in today's order in Case No. U-21102, should provide sufficient comfort that DMLC will be able to recover actual costs associated with the conversion project without unreasonably assigning to DTE Gas's customers costs that may never be actually incurred.

Finally, the Commission acknowledges that DMLC is not a regulated utility and that inclusion of contingency costs within a contract negotiated at arm's length between parties may not always be inappropriate. However, as noted by the Staff, "the affiliate relationship between DTE Gas and DMLC when the rates were negotiated has to be taken into consideration when considering all the costs associated with these rates." Staff's replies to exceptions, p. 4. In this case, DMLC and DTE Gas were affiliates at the time the contract was negotiated, and indeed, this was precisely the reason that DMLC sought approval of the contract as consistent with the Code. This affiliate relationship provides additional support to reject the inclusion of speculative contingency costs in this contract, while providing an opportunity for recovery of actual costs incurred.

b. Additional Pricing Provisions of the Firm Transportation Contract

Again, DMLC requested approval of its firm transportation contract with DTE Gas, along with the rates therein. Exhibit A-12. The Attorney General argued that DMLC's calculated rates and

proposed demand charges are excessive, based on unknown and contingent capital investments with highly inflated costs using a methodology that does not conform to traditional ratemaking. The Attorney General thus offered an alternative demand charge based on a traditional and generally accepted COS model. The Attorney General also recommended the adoption of an 80/20 sharing of revenues from any additional future shippers, with 80% credited to DTE Gas, as opposed to the 50/50 sharing proposal presented by DMLC. Attorney General's initial brief, pp. 3-4. DMLC disagreed with the Attorney General's approach and recommendations and asserted that the Attorney General's position regarding rates is not relevant in an Act 9 case and should be ignored. 3 Tr 150-153; DMLC's reply brief, pp. 5-14.

The ALJ discussed the parties' positions on these provisions of the contract and found that "[t]he 50/50 sharing of revenues appears appropriate," rejecting the Attorney General's 80/20 proposal. PFD, p. 50.

Aside from contingency expenses addressed above, the Attorney General argues that the ALJ erred in her analysis and recommendation regarding the firm transportation contract between DMLC and DTE Gas. The Attorney General states that the ALJ's entire analysis, discussion, and recommendation on this topic only provides analysis as to the disallowance of contingency costs that the Attorney General agrees with but fails to provide any analysis concerning her proposal about a more appropriate sharing of incremental revenues. The Attorney General states that she:

> provided discussion on this topic in her initial brief, arguing that because DTE Gas is absorbing the full cost of service, an 80/20 structure is more appropriate and more equitable for ratepayers. DMLC did not rebut this discussion in either its initial or reply brief, and thus it is unclear what the ALJ based her decision on. The AG's argument is reasonable, unrebutted, and the Commission should reject the ALJ's unsupported conclusion and adopt an 80/20 sharing of the incremental revenues at issue, with 80% credited to DTE Gas.

Attorney General's exceptions, pp. 8-9; Attorney General's initial brief, pp. 25-26.

Continuing, the Attorney General states that the ALJ further provided no analysis, discussion, or recommendation on COS methodology, internal rate of return, and operations and maintenance (O&M) costs. Per the Attorney General, "not providing any of this was in error and leaves uncertain the import and final recommendation of the PFD regarding the firm transportation contract." Attorney General's exceptions, p. 9. The Attorney General states that, if the ALJ's ultimate recommendation is to approve these aspects of DMLC's firm transportation contract with DTE Gas, the Attorney General excepts as follows, first addressing the relevance of her position in Act 9 cases and then the substance of her position thereafter. *Id*., pp. 9-18.

The Attorney General asserts that, contrary to DMLC's inconsistent argument otherwise on page 6 of its reply brief, her position on rates here is relevant under Act 9. The Attorney General avers this portion of DMLC's reply brief to be confusing and argues that it "fails to accurately identify what the Commission is able to review in Act 9 cases and repeatedly reneges on positions it has previously taken." Attorney General's exceptions, p. 10. The Attorney General states:

> It is important to first identify what is actually at issue in this case. DMLC is seeking Commission approval of a contract to provide transmission service and to recover the project costs from DTE Gas. This is a *new* contract. DMLC is not currently providing this "redundancy" service to DTE Gas, as the connector pipelines are not yet built. Importantly, in its reply brief DMLC expressly states that "the Attorney General is correct that a new contract would be subject to rate case treatment." Accordingly, per DMLC's own reply brief the [Attorney General's] contentions are correct and Commission review of these costs is proper. That alone is sufficient for the Commission to find in favor of the [Attorney General's] position. However, these exceptions will attempt to further unravel DMLC's reply brief arguments.

Id., pp. 10-11 (footnotes omitted, emphasis in original).

The Attorney General contends that DMLC's reply brief confuses concepts and that, despite DMLC's efforts to differentiate between the two, a new contract and an initial negotiated rate are the same thing. *Id*., pp. 11-12; DMLC's reply brief, pp. 5-7. The Attorney General states that

DMLC is requesting that the Commission find that its contract with DTE Gas is reasonable and prudent and that it satisfies the requirements of the Code. The Attorney General, however, argues that it is unclear how the Commission could find that the contract is reasonable and prudent without looking at the rates. The Attorney General declares:

> As noted by DMLC, MCL 483.110 covers new contracts and . . . [per the wording in the statute] gives the Commission some level of discretion over rates in new contracts and, as DMLC states, because the agreement at issue is a new contract between DMLC and DTE Gas, it is "subject to rate case treatment." Tellingly, Staff agrees with the [Attorney General's] position, as it also recommends removal of contingency costs in this case, but any mention of that is conspicuously absent from this section of DMLC's reply brief.

Attorney General's exceptions, pp. 12-13 (footnote omitted).

The Attorney General next discusses DMLC's addressal of the Code in its reply brief and argues that the Code does not contemplate the situation where market price is internally calculated when there is no market. In this type of situation, the Attorney General asserts that "market price will always be 'found' to be higher than 10% over fully allocated embedded costs, which means ratepayers will always wind up paying the additional 10%," and which "is a losing proposition for ratepayers . . . ." *Id*., p. 13. Because of this disconnect, the Attorney General disagrees that DMLC met its burden to show compliance with the Code.

Noting practical implications with DMLC's position here, the Attorney General asserts that, "[i]f DMLC's argument is accepted, the Commission would be required to approve any level of costs put forth in an Act 9 proceeding without review, except for a cursory application to the Code of Conduct, accepting as true any level of 'market' value put forward by the utility." *Id*., p. 14. The Attorney General further points out that, in Case No. U-20940 (DTE Gas's related rate case), DTE Gas points to the instant case for approval of the demand charge, which creates "a circular reference wherein both cases attempt to argue that the charges should be reviewed in the other

case. If this situation was to be accepted by the Commission, these costs would effectively avoid scrutiny." *Id*.; Case No. U-20940, filing #U-20940-0255, 5 Tr 1212-1213. Through the ALJ's recommendation that contingency expenses be disallowed, however, the Attorney General contends that this implicitly indicates that the costs in the firm transportation contract are within the Commission's purview in this case.

As to the substance of her positions, the Attorney General asserts that they are correct, contrary to DMLC's arguments otherwise. Attorney General's exceptions, p. 15; DMLC's reply brief, pp. 9-14. The Attorney General states that DMLC attacks her COS methodology argument in its reply brief, but does so by referring to the transcript and reiterating rebuttal testimony and then "argues that the [Attorney General's] argument in this area is based on unsupported speculation and conjecture that is the [Attorney General's] 'rather cynical hunches,' without providing any citation as to which portion of any of the [Attorney General's] filings DMLC is referring to." Attorney General's exceptions, p. 15; DMLC's reply brief, p. 10. As to her argument about DMLC being a shell company, the Attorney General further states that, in her initial brief to which DMLC did not respond to, she "pointed out that DMLC has zero employees directly employed or paid by the Company, instead contracting with DTE Gas to operate and maintain the wet header system. A company that is the registered owner of assets but has no employees is the very definition of a shell company." Attorney General's exceptions, p. 16; Attorney General's initial brief, pp. 17-22; Exhibit AG-15; DMLC's reply brief, p. 10.

The Attorney General next argues, in addition to previous argument above, that the proposed contingency costs in this case are not normal and reasonable, as set forth by her, the Staff, and also the ALJ, as "[i]t is wholly inappropriate to earn a return on contingency costs when those costs may never be incurred." Attorney General's exceptions, p. 16; *see also*, Staff's initial brief,

pp. 8, 18; PFD, p. 50. The Attorney General states that this portion of DMLC's reply brief is, once again, devoid of mention of other parties' initial briefs, which directly responded to rebuttal testimony on behalf of DMLC. The Attorney General repeats that the Commission should reject DMLC's position on contingency costs and adopt the position set forth by her, the Staff, and the ALJ.

The Attorney General next notes the same scenario with her argument surrounding DMLC's discounted internal rate of return—that DMLC's reply brief refers back to testimony rather than arguments set forth in initial briefs, with the Attorney General highlighting that she addressed this issue in both her initial and reply briefs, thus rendering her "contention that a 15% after-tax rate of return and 19% pre-tax return on equity is grossly inappropriate to pass through to customers . . . unrefuted." Attorney General's exceptions, p. 17; *see also*, DMLC's reply brief, pp. 12-13; Attorney General's initial brief, pp. 12-14; Attorney General's reply brief, pp. 5-6. The Attorney General further states that DMLC raised new assertions for the first time here in its reply brief, which parties cannot do. Attorney General's exceptions, p. 17; DMLC's reply brief, p. 13. To the extent the ALJ adopts DMLC's arguments on this topic, the Attorney General asserts that the Commission should reject those conclusions and instead adopt her position.

Finally, in maintaining her stance that DMLC should be expected to drastically reduce O&M costs after selling 76% of its system, the Attorney General, again addressing DMLC's reply brief, argues that DMLC failed "to identify any *actual* synergies and merely repeats the same sentence as backing for the point it is trying to support in the sentence before," both being the exact same sentence about DMLC now lacking synergies. Attorney General's exceptions, p. 18 (emphasis in original); DMLC's reply brief, pp. 13-14. To the Attorney General, "[t]his is akin to using a word

to define itself, is unhelpful, and to the extent the [ALJ] adopts these arguments should be rejected by the Commission." Attorney General's exceptions, p. 18.

In replies to exceptions, DMLC argues that the Commission should adopt the ALJ's recommendation of a 50/50 sharing of revenues from future shippers set forth in the firm transportation contract. DMLC contends that, coupled with contingencies, the Attorney General generally seems intent on DMLC assuming all risk, shippers being held fully harmless, and DMLC not receiving a reasonable share of revenue from future shippers in exchange for that risk.

Similar to its arguments above, DMLC avers that the Attorney General is frustrated because the ALJ did not find sufficient merit to provide a detailed analysis and that the Attorney General again fails to recognize that the ALJ need not thoroughly analyze every point, including those that are immaterial. Here, according to DMLC, "the ALJ clearly decided that the Attorney General's recommendations were not appropriate because: (1) the project is necessary for the public convenience; and (2) the contract price is reasonable." DMLC's replies to exceptions, p. 8.

Continuing, DMLC states:

> As part of the Attorney General's exceptions to the firm transportation contract between DMLC and DTE Gas, the Attorney General again takes a position that is contrary to Act 9's plain language. . . . The Attorney General continues to attempt to treat DMLC's request for approval of the firm transportation contract as a request to approve rates, however, that is not the Commission's role in an Act 9 case like this. With regard to new contracts, MCL 483.110 makes clear that a natural gas carrier with a new contract need only submit the contract for approval, but does not turn this case into a rate case in which the Commission determines whether the contract rate is reasonable and prudent. As discussed more fully in DMLC's Exceptions to the PFD, even the [ALJ]'s suggested approach for DMLC to amend and re-submit a new contract rate for Commission approval exceeds the Commission's role under Act 9. . . . Rather, the only analysis needed regarding the contract rate is whether it complies with the Code of Conduct, which it does.

Id., pp. 8-9. Furthermore:

> The Attorney General confuses this issue, in part, due to DMLC's Reply Brief which explained that "a new contract would be subject to rate case treatment." . . .

> The Attorney General read that statement as meaning all contracts. . . . DMLC intended that statement to refer to any new contract subsequently entered into would be subject to rate case treatment. Perhaps DMLC should have been more precise in differentiating between the existing contract that is the subject of this case and a prospective new contract that the Attorney General is advocating for, but it is clear from the context of DMLC's argument that DMLC is explaining that Act 9 provides for the Commission: (1) not to review initial contract rates; and (2) to review rates in amended contracts. Unlike the Attorney General though, the ALJ did not have any confusion about DMLC's statement in this regard, likely because any potential ambiguity regarding DMLC's position is clarified both by the context of the argument and by simply reading MCL 483.110.

Id., p. 9. In this regard, DMLC claims that the Attorney General has always wanted to turn this Act 9 case into a general rate case, which should be rejected as inconsistent with the statute's plain language separating MCL 483.110 into two parts—the first addressing initial contracts and the last sentence addressing amended contracts. Addressing statutory analysis, DMLC argues:

> It defies a reading of the plain language of the statute to interpret the last sentence of the section to apply rate case treatment to both initial and amended contracts when it clearly references only those contracts to "alter or amend its price paid, rates, charges, and conditions of service." If the Legislature wanted the Commission to apply rate case treatment on all cases, it would've said so rather than limiting the last sentence altering or amending an initial contract rate.

Id., p. 10. Given this, DMLC argues that the Commission should reject the Attorney General's attempt to treat the initial contract in this case the same as an amended contract under MCL 483.110.

Additionally, because DMLC has already followed the correct process for submitting its contract under Act 9, the Commission should reject the ALJ's recommendation, outside the scope of Act 9, to impose a new requirement on DMLC to amend its contract and resubmit a new rate for Commission approval. DMLC reiterates that the firm transportation contract is submitted only for the purpose of confirming compliance with the Code, which the contract does, as it is clearly at 10% over fully allocated embedded costs.

The Commission in reviewing these additional contract pricing provisions, in accordance with its authority under MCL 483.110 as addressed above, finds that the costs and calculations within the contract, aside from contingency expenses, are just and reasonable. For example, when converting an asset from being an unregulated asset to a regulated asset, it is reasonable for O&M costs to increase due to regulatory requirements. On this issue, the Commission also finds that the demand rate complies with the Code. Pursuant to Rule 8(4), compensation for the contract in this case must be "at the lower of market price or 10% over fully allocated embedded cost." Per the contract, "fair market value" used within that document is "the value which the Converted Assets Pipeline would be expected to command if offered for sale at that time in an open market." Exhibit A-12, p. 7. Although difficult to specifically calculate, because the sale of the pipelines in this case would generally be much higher than cost plus 10%, the Commission concludes that the demand rate complies with the Code, based on the record in this case. The Commission, however, highlights that approval of the firm transportation contract in this case is not tantamount to approval for inclusion of these costs in DTE Gas's rates; rather, that determination will be made by the Commission when DTE Gas makes such a request.

4. Michigan Environmental Protection Act

As adopted in this order, the Commission finds that the map, route, and type of construction are reasonable and should be approved, subject to minor route deviations that DMLC may find necessary during construction. As set forth by the Staff, recommended by the ALJ, and adopted in this order, minor route deviations shall be limited to "any alteration in location of no more than 150 feet from the centerline of the proposed route, which does not cross the property of any landowner, or their predecessor, who did not receive notice of this case." 3 Tr 176; PFD, pp. 45, 50. The Commission additionally finds that the proposed connector pipelines, along with the

conversion of the Wet Header system, will provide redundancy to locations that have only a single source of supply, will add resiliency to DTE Gas's transmission system, and will thus, when constructed, converted, and in operation, serve the convenience and necessity of the public. 3 Tr 82-85, 177-179; PFD, pp. 43, 50.

As set forth in testimony, use via conversion of the existing lines, as compared to new construction, for the majority of the route for new service requested for approval in this case limits new disturbances to the environment, with only approximately six miles of new pipeline to be constructed specifically for the RCC and the NMC, connectors that will follow existing roads or pipelines to limit overall impacts from installation and operation and that will be used to provide an additional source of supply and a second pipeline connection to serve the Rogers City, Alpena, and Manistee areas. 3 Tr 88, 90-91, 111. Testimony further reflects mitigation and restoration measures that will be utilized by DMLC during construction. *Id*., pp. 115-116. In addition and complementary to this testimony, the Environmental Impact Report for the Rogers City Connector and Norwalk Manistee Connector Pipelines Project (Environmental Impact Report), set forth in Exhibit A-6.0, concludes that DMLC anticipates no significant adverse environmental impacts will result from construction of the RCC and NMC pipelines as proposed; that construction was designed to minimize impacts to environmental resources including wetlands, waterbodies, and threatened and endangered species habitat; that use of horizontal directional drilling, adherence to tree-clearing windows, and implementation of best management practices during construction will help minimize construction impacts on these resources; and that DMLC will construct the project in accordance with permit conditions issued by the Michigan Department of Environment, Great Lakes, and Energy and Manistee and Presque Isle Counties. Exhibit A-6.0, p. 21. The Environmental Impact Report also discusses alternatives, specifically a no-action alternative and

route and construction alternatives. With the no-action alternative, meaning DMLC not proceeding with construction of the two connector pipelines, the Environmental Impact Report indicates that the primary alternative to this would be for the shipper (i.e., DTE Gas) to construct its own pipeline and possible compression assets to meet its needs, which "would require significantly more mileage of new pipeline including potential greenfield pipeline." *Id*., p. 9. And, with the route and construction alternatives, the Environmental Impact Report states that the NMC pipeline will be entirely within an existing pipeline right-of-way that alternative routes would not utilize—alternatives which would increase environmental impacts compared to the selected route—and that the selected route for the RCC pipeline "has the least constructability challenges and represents the fewest environmental impacts," in comparison to two other considered routes. *Id*., p. 10.

In light of the evidence in this case, the Commission finds that there will be minor impairment to the environment if the NMC and RCC pipelines are constructed as proposed but that there is no other feasible and prudent alternative to this impairment and that any environmental impact caused by the proposed connector pipelines is *de minimis* and consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. The Commission further finds that the record supports and satisfies the required agency review and environmental obligations of the Commission that arise from MEPA, MCL 324.1701 *et seq*., and the Michigan Supreme Court's application of MEPA in *Mich State Hwy Comm v Vanderkloot*, 392 Mich 159, 185; 220 NW2d 416 (1974). The Commission notes, however, that a finding of public convenience and necessity pursuant to Act 9 is not a determination that the proposed project complies with any other applicable statute or environmental reviews.

THEREFORE, IT IS ORDERED that:

A. Once Lambda Energy Resources LLC's alternative natural gas gathering system set forth in Case No. U-21091 is approved and completed, DTE Michigan Lateral Company is authorized to convert its existing Wet Header Pipeline from gas gathering to dry gas transmission service. Separately, after all necessary permits and easements have been obtained, DTE Michigan Lateral Company is also authorized to construct, operate, and maintain the Rogers City Connector and the Norwalk Manistee Connector pipelines, as set forth in this order.

B. The map, route, and type of construction of the connector pipelines are adopted as set forth in this order, with the requirement that minimum depth of cover in agricultural fields for such pipelines be five feet and allowing for minor route deviations as set forth herein.

C. DTE Michigan Lateral Company shall acquire global positioning system coordinates for all girth weld locations for the connector pipelines and shall, within a year of the connector pipelines being placed in service, conduct an in-line inspection using a tool capable of detecting dents and anomalous conditions, remediating the same if so detected.

D. No later than three months after the in-service date of the connector pipelines, DTE Michigan Lateral Company shall perform an above-ground electrical survey of the pipelines, and any defects in pipeline coating shall be remediated to prevent corrosion.

E. Within 60 days after completion of conversion and construction, DTE Michigan Lateral Company shall file a completion report containing pressure test data and an "as built" map of the entire project.

F. If DTE Michigan Lateral Company provides transportation for any other shippers, it shall file with the Commission the signed transportation contracts and shall provide transportation in a nondiscriminatory manner.

G. Upon abandonment or deactivation, the pipelines shall be abandoned in accordance with the Michigan Gas Safety Standards, MCL 483.151 *et seq*.

H. Within 30 days of the date of this order, DTE Michigan Lateral Company shall file, in this docket, recalculated rates minus contingency expenses, as set forth herein.

I. Pursuant to MCL 483.110, the pricing provisions and rate schedules within the Converted Assets Transportation Agreement between DTE Michigan Lateral Company and DTE Gas Company are approved as set forth in this order.

J. If, after the issuance of this order, the Converted Assets Transportation Agreement is altered or amended at any time with regard to price paid, rates, charges, or conditions of service, the altered or amended agreement shall be filed with the Commission for review and approval in accordance with MCL 483.110.

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, pursuant to 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 the Attorney General – Public Service Division at pungp1@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

Tremaine L. Phillips, Commissioner

Katherine L. Peretick, Commissioner

By its action of July 27, 2021.

Lisa Felice, Executive Secretary

P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-20894

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on July 27, 2021 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 27th day of July 2021.

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

Service List for Case: U-20894

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