STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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| In the matter of the application of **DTE ELECTRIC COMPANY** for approval to implement a power supply cost recovery plan for the 12 months ending December 31, 2019. | ) ) ) ) ) | Case No. U-20221 |

At the May 8, 2020 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**

On September 28, 2018, DTE Electric Company (DTE Electric) filed an application, with supporting testimony and exhibits, pursuant to 1982 PA 304 (Act 304), MCL 460.6j *et seq.,* seeking authority to implement a power supply cost recovery (PSCR) plan in its rate schedules for 2019 metered jurisdictional sales of electricity and requesting review of its five-year forecast. DTE Electric requested a 2019 levelized maximum monthly PSCR billing factor of 1.81 mills per kilowatt-hour (kWh) based on a projected 2018 PSCR underrecovery of $68.7 million. DTE Electric also sought Commission approval to recover as PSCR costs the transportation-related expense associated with its execution of both the July 31, 2014 Precedent Agreement, Exhibit A-28, (precedent agreement) and Rate Agreement with NEXUS Gas Transmission**,** LLC (NEXUS).

A prehearing conference was held on December 5, 2018, before Administrative Law Judge Sharon L. Feldman (ALJ). The ALJ granted intervenor status to the Association of Businesses Advocating Tariff Equity (ABATE) and the Michigan Environmental Council (MEC). The Commission Staff (Staff) also participated in the proceeding. On December 6, 2018, the Michigan Department of Attorney General (Attorney General) filed a notice of intervention, and subsequently participated in the case.

The ALJ issued a Proposal for Decision (PFD) on January 24, 2020. DTE Electric, MEC, and the Attorney General filed exceptions to the PFD on February 14, 2020. MEC, the Attorney General, and the Staff filed replies to exceptions on February 28, 2020. DTE Electric filed replies to exceptions on March 2, 2020. The record in this proceeding consists of 554 pages of transcript and 110 exhibits admitted into evidence, with official notice taken of Exhibit A-30 from Case No. U-20235, as well as a confidential transcript volume and confidential versions of certain exhibits.

An overview of the record and the positions of the parties are detailed in the PFD, pages 3-54, and will not be repeated here. In the PFD, the ALJ identifies the following disputes: (1) DTE Electric's contracts with NEXUS, and the extent to which the Commission has already resolved the factual and legal contentions of the parties; (2) the Texas Eastern Appalachian Lease (TEAL) amendment to the NEXUS contract and a proposed Section 7 warning; (3) cost recovery of the NEXUS capacity costs for unused capacity; and (4) the Code of Conduct. These issues are addressed *ad seriatim* below.

1. DTE Electric Company's Contracts with NEXUS Gas Transmission, LLC

The parties disputed the significance of the Commission's orders in prior plan cases that addressed DTE Electric's contracts with NEXUS. DTE Electric argued that the Commission

previously found its agreements with NEXUS to be reasonable and prudent. The Staff concurred. MEC and the Attorney General argued that the Commission did not approve NEXUS costs in prior cases, and therefore should evaluate the prudency of the costs in this case. MEC asserted that the Commission's prior finding that DTE Electric's decision to contract with NEXUS was reasonable and prudent does not also mean that all future PSCR costs incurred under the NEXUS contract should be treated as pre-approved. MEC's initial brief, pp. 13-14. DTE Electric acknowledged that *res judicata* and collateral estoppel do not apply in a strict sense to Commission decisions, but argued that issues fully decided in earlier MPSC proceedings need not be completely relitigated in later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result is unreasonable. DTE Electric's initial brief, p. 32.

MEC disagreed with DTE Electric's argument that Act 304 does not require the Commission to reevaluate contracts in each PSCR plan case. Instead, MEC argued DTE Electric must demonstrate in each reconciliation proceeding that the contracts and purchasing decisions were reasonable and prudent at the time they were executed and that they remain reasonable under current market conditions. MEC's initial brief, pp. 55-56.

The ALJ reasoned that DTE Electric's obligation to take all appropriate steps to minimize PSCR costs is not equivalent to ignoring the Commission's prior decision that DTE Electric's decision to contract with NEXUS was reasonable and prudent. No party identified any actions DTE Electric should have taken to reduce or mitigate the costs it incurs under the NEXUS Agreements, excluding the TEAL amendments that are discussed below. PFD, p. 41. Therefore, the ALJ recommended that the Commission's findings in its February 7, 2019 order in Case No. U-18403 (February 7 order) be given preclusive effect in this case because those findings have not

been shown to be erroneous and no new evidence contemporaneous to DTE Electric's decision-making has been provided. PFD, p. 55.

The Attorney General takes exception to the ALJ's conclusion that previous Commission decisions are preclusive. The Attorney General argues that an incorrect legal standard was applied by the ALJ and that the Commission may consider changed circumstances to conclude that an earlier result is unreasonable, rather than requiring a showing of new evidence contemporaneous with a utility's decision-making to reach such a conclusion. The Attorney General argues that the language in the PFD is overly narrow and harsh, as compared to the actual legal standard, and would inappropriately limit the Commission's ability to evaluate the reasonableness of NEXUS costs in this and future PSCR plan cases. Attorney General's exceptions, pp. 4-6.

MEC also takes exception to the ALJ's conclusion that the holdings in Case No. U-18403 are preclusive in this case. MEC argues that the Commission should clarify that a party may overcome that effect by showing either new evidence or changed circumstances since that decision. MEC's exceptions, pp. 2-3.

In reply, DTE Electric argues that the ALJ was correct and reminds the Attorney General and MEC that the Commission, only a year ago, confirmed that it is a reasonable and prudent policy and practice for the company to have planned to utilize long-term firm NEXUS natural gas transportation capacity. Furthermore, DTE Electric argues that both MEC and the Attorney General incorrectly argue that the ALJ misapplied the decades-old *Pennwalt v PSC*, 166 Mich App 1; 420 NW2d 156 (1988) standard that affirms the Commission's authority to avoid unreasonable and repetitive consideration of matters. Furthermore, DTE Electric argues that the simple passing of time, minimal cost fluctuations, or the annual nature of PSCR proceedings do

not provide justification for perpetual review of previously decided matters. DTE Electric's replies to exceptions, pp. 2-6.

The Commission has considered the parties' arguments, the evidentiary record on this issue, and the ALJ's findings and conclusions. The Commission finds that the Attorney General and MEC failed to demonstrate that there were new circumstances that would justify altering the Commission's earlier decision. As noted by the ALJ:

> While MEC and the Attorney General have presented evidence and argument to show the speculative nature of the future savings DTE Electric anticipates will materialize sometime after the five-year plan period, they have not presented new evidence regarding DTE Electric's past decision-making that was not available in prior cases. Instead, any new evidence addressing decision-making the Commission evaluated in prior cases generally tends to show the limitations or inaccuracies in the ICF [ICF Resources, LLC] forecast in light of actual natural gas prices or alternate current gas price forecasts. DTE Electric correctly characterizes this evidence as hindsight. It should also be noted that the parties' arguments focus on DTE Electric's estimate of savings derived from a future price differential between the MichCon citygate and the Marcellus/Utica region, i.e. the original and updated forecast reflected in Exhibits A-27 and A-17, rather than on DTE Electric's estimate of savings due to an overall reduction in the cost of gas at the MichCon citygate, reflected in Exhibits A-27 and A-16.

PFD, pp. 38-39 (footnotes omitted). The Commission finds the ALJ's findings and conclusions to be well-reasoned and adopts the ALJ's recommendation on this issue and gives the Commission's findings in Case No. U-18403 preclusive effect in this case.

2. <u>The Texas Eastern Appalachian Lease Amendment</u>

The October 2018 TEAL amendments revised both the rate and service agreements to provide for the addition of the Clarington receipt point for half of the contract volumes (15,000 dekatherm per day (dth/day)) at an additional cost of $0.15 per dth/day plus an additional fuel cost of 0.6%, for a term of four years. Because the amendments were executed in October 2018, they were not considered in the 2018 plan case nor were they included in DTE Electric's initial filing in this case. DTE Electric filed revised testimony and exhibits on February 20, 2019, to incorporate the

TEAL amendments. In the revised testimony, DTE Electric argued that the TEAL amendments were reasonable and prudent. 2 Tr 87-91. DTE Electric estimated savings of $2.4 million from the October 2018 TEAL amendments, which reflected a $3.3 million contract cost offset by $5.2 million in lower gas costs over the four-year term, based on an estimated gas price differential between Kensington and Clarington. 2 Tr 136-140. DTE Electric did not claim that the TEAL amendments it entered into in October 2018 would reduce the cost of gas at the MichCon citygate, unlike the company's initial agreement with NEXUS; DTE Electric asserted only that adding the Clarington receipt point would justify the additional cost incurred by providing access to lower-cost gas than would be available at Kensington. *Id.*

The Attorney General and MEC disputed DTE Electric's savings analysis and decision-making. The Attorney General objected to the TEAL amendments based on her conclusion that DTE Electric had not justified the additional cost. Further, the Attorney General characterized the TEAL amendments as another affiliate transaction that raises concerns about self-dealing and cross-subsidization. Attorney General's initial brief, pp. 10-11. The Attorney General further argued that DTE Electric failed to support the reasonableness of the additional $0.15 per dth/day charge as the product of a meaningful negotiation. Attorney General's initial brief, pp. 18-19, Attorney General's reply brief, p. 10.

MEC objected that the price spreads between Kensington and Clarington did not reach the level of the company's total obligations under the NEXUS agreements and that the primary utilization of the Clarington receipt point from November 1, 2018 through April 1, 2019, was under a hedging contract entered into by DTE Electric's asset manager. 2 Tr 524-525. MEC disputed that the impact from the TEAL amendments is *de minimis*, as DTE Electric argued. 2 Tr 539-540.

In rebuttal, DTE Electric disputed that the TEAL amendments were misleading or that it initially concealed the TEAL amendments. 2 Tr 101, 102-103. DTE Electric characterized the projected savings of $2.4 million over four years as having a *de minimis*, or an approximate $500,000, impact on annual PSCR costs. 2 Tr 102. DTE Electric addressed the price forecast underlying the savings estimates, and argued that they were based on indicative price quotations. 2 Tr 104-105. Responding principally to the Attorney General's argument about the utilization of the pipeline capacity, DTE Electric explained that in addition to gas volumes transported from Clarington to serve DTE Electric plants, the company's asset manager used almost all the available capacity from Clarington, providing compensation to DTE Electric and PSCR customers for deliveries to third parties. 2 Tr 105-106. DTE Electric also objected to the Attorney General's proposed tracking mechanism. DTE Electric's initial brief, pp. 35-36.

MEC also argued that DTE Electric's rationale for entering the TEAL amendments validates MEC's concern about the affiliate relationship underlying the prior agreements. MEC disagreed that DTE Electric negotiated the agreements in good faith, and disputed DTE Electric's estimated savings of $2.4 million over a four-year period associated with the TEAL amendments. MEC argued that any savings must be evaluated in the context of the costs it ascribes to the underlying NEXUS transportation agreements and that DTE Electric unreasonably relied on a loosely-constructed price differential between Kensington and Clarington for the purported savings. MEC's initial brief, pp. 16-21.

The ALJ found that a review of the record shows that DTE Electric's savings estimates were not based on reliable or rigorous price estimates. Additionally, the ALJ found that, although the company's pricing estimates were not well-supported, the utilization data reflects a price differential over the six-month period for which data was available. However, the ALJ determined

that this short-term utilization does not justify DTE Electric's reliance on short-term, non-firm price quotes to support savings estimates over the four-year contract term. Additionally, the ALJ agreed with MEC that DTE Electric's savings analysis and the current utilization data do not reflect the full potential cost of the TEAL amendments. Further, the ALJ found that nothing in the record indicates the potential magnitude of the company's obligation to pay these charges, which makes the company's estimated savings and its claim that the TEAL amendments are *de minimis* subject to significant uncertainty. The ALJ recommended that the Commission find that DTE Electric has not established the reasonableness and prudence of its decision to execute the TEAL amendments, and caution DTE Electric that it may not recover the full cost of the TEAL amendments under MCL 460.6j(7). The ALJ also recommended that the Commission reject the tracking mechanism proposed by the Attorney General, because the issue can reasonably be addressed within future reconciliations and plan cases, and does not justify the complexity associated with such a mechanism for an agreement that has only a four-year term. The ALJ found that the conclusion in the February 7 order is controlling in this case and thus the $0.695 per dth/day rate should be used as a projected cost in this plan case. PFD, pp. 46-49, 55. Specifically, the ALJ referenced language in the Commission's order stating that:

> the negotiated rate of $0.695 per dth/day should be used as a projected cost, with DTE Electric directed to provide a more substantive discussion of the reasonableness of the negotiated $0.695 per dth/day rate in its reconciliation of 2018 PSCR costs in order to receive full recovery of NEXUS transportation costs.

February 7 order, pp. 45-46.

DTE Electric takes exception to the ALJ's recommendation that the Commission warn DTE Electric about potential disallowances. DTE Electric argues that the Commission order will not be issued until mid-2020, giving DTE Electric no practical means of conforming its actions to a warning. DTE Electric further argues it would be unjust, unreasonable, arbitrary, and capricious to

issue a warning without clear explanation of the standard and after the expiration of the relevant time period. DTE Electric's exceptions, pp. 3-4. DTE Electric also asserts in exceptions that the speculative conclusions in the PFD are inconsistent with the evidence on the record and are not supported by any facts in the record which contradicts the company's savings analysis with respect to the TEAL amendments. DTE Electric reiterates that the $0.15 per dth/day rate the company paid to contract for TEAL capacity, the annual charge adjustment, is clearly not significant in the scope of the overall contract. DTE Electric's exceptions, pp. 4-11.

In her replies to DTE Electric's exceptions, the Attorney General states that it is unclear what DTE Electric means on page 3 of the company's exceptions by "standard," "relevant time period," or what relevance the argument has to a warning pursuant to MCL 460.6j(7) (Section 7 warning). Attorney General's replies to exceptions, p. 4. The Attorney General contends that DTE Electric is arguing that a Section 7 warning in mid-2020 would make it hard for DTE Electric to recover costs for a deal that DTE Electric has already made. However, she asserts that this is the risk DTE Electric took when it engaged in an unreasonable and imprudent deal without the Commission's approval of cost recovery. Attorney General's replies to exceptions, pp. 4-6.

MEC replies that the ALJ was correct to recommend a Section 7 warning because the timing is appropriate, and the TEAL agreement is not reasonable and prudent. MEC argues that the record shows that DTE Electric accepted the TEAL amendment on a take-it-or-leave-it basis without prudent and proper negotiation. Therefore, MEC requests that the Commission adopt the ALJ's recommendation. MEC's replies to exceptions, pp. 2-3.

The Staff's reply to DTE Electric's exception states that DTE Electric mischaracterized the Staff's position on the TEAL amendments. The Staff reiterates that it supports the addition of a fuel source and increased fuel diversity but did not offer support for the negotiated rate. The Staff

agrees with the ALJ that a Section 7 warning is reasonable and that DTE Electric's hypothetical savings analysis from the TEAL amendments are speculative. The Staff argues it is appropriate to warn DTE Electric that reasonableness of costs will be determined on solid evidence, which has not been presented at this point. Staff's replies to exceptions, pp. 1-2.

The Commission has considered the parties' arguments, the evidentiary record on this issue, and the ALJ's findings and conclusions. The Commission finds the ALJ's findings and conclusions to be well-reasoned and adopts the ALJ's recommendation on this issue. Moreover, the Commission agrees with the ALJ on the deficiencies in the record and the need to warn DTE Electric that it may not recover the full costs of the TEAL amendments under MCL 460.6j(7). With such a record, the Commission finds that a caution with respect to future amounts associated with the TEAL amendment is necessary.[1] These costs will be examined in each reconciliation, where the utility will need to provide adequate support for the reasonableness and prudence of the amounts associated with the NEXUS Agreement and Amendment.

3. Cost Recovery of the NEXUS Capacity Costs for Unused Capacity

Both the Attorney General and MEC noted that little of the NEXUS capacity DTE Electric contracted for has been used to supply DTE Electric generating plants. DTE Electric argued that it plans to use a significant portion of the NEXUS capacity to supply its gas-fired peaker plants in 2019, and, on days when the peakers are not operating, may inject gas into storage for future use. DTE Electric cited the asset management agreement with a natural gas marketer granting DTE Electric the firm right to use the transportation capacity as needed but allowing the marketer to deliver gas to third parties when DTE Electric does not use the capacity. DTE Electric also argued that long-term gas supply contracts are expressly provided for in MCL 460.6j(1)(a) and 460.6j(3).

[1] *See also,* the May 8, 2020 order in Case No. U-20235, p. 6.

2 Tr 155-157.

Although DTE Electric has paid for but not used a significant percentage of the NEXUS pipeline capacity it contracted for, the company stated that some of the capacity is used by its asset manager, for which the company receives some form of reimbursement. DTE Electric explained that the marketer delivers gas to third parties and in return the marketer provides revenues to DTE Electric equal to the value of the pipeline capacity, which DTE Electric intends to credit against PSCR expenses. DTE Electric's initial brief, p. 24.

MEC objected to ratepayers funding capacity that is not used to provide fuel to power plants. MEC argued that transportation capacity marketed to third parties may not be recovered through the PSCR clause, and further, that some pipeline capacity DTE Electric proposes to charge customers for is entirely unused. MEC further argued that Act 304 does not permit DTE Electric to recover through the PSCR clause ~~for~~ transportation costs not directly linked to natural gas shipments to DTE Electric plants. MEC cited MCL 460.6j(b) and asserted:

> "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of an electric utility that permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, **of fuel burned by the utility for electric generation** and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices. Where fuel supply capacity has been released for delivery to third parties, and is not delivered to DTE generating units, those costs do not fit within the meaning of a 'power supply cost recovery clause.'

MEC's initial brief, p. 27 (emphasis in original). MEC further contended that cost recovery is limited to the costs incurred to supply existing sources of electric generation. MEC argued MCL 460.6j(3) requires the utility to file a description of all major contracts and power supply arrangements. MEC also cited MCL 460.6j(13)(f) for the reconciliation requirement that the Commission "[d]isallow charges unreasonably or imprudently incurred for fuel not taken." MEC

reasoned that only costs to transport volumes to DTE Electric generating plants may be recovered under Act 304. Additionally, MEC disputed that the NEXUS agreements constitute long-term firm gas transportation, citing the definition in MCL 460.6j(1)(a) specifying an agreement "to provide firm delivery of natural gas to an electric generation facility." MEC's reply brief, p. 9.

The ALJ did not find MEC's argument persuasive. The ALJ reasoned that DTE Electric can recover the booked cost of fuel incurred under reasonable policies and practices, and no party argued that DTE Electric cannot book the cost of its transportation contracts, including capacity costs, as part of the booked cost of fuel. The ALJ noted that long-term gas transportation contracts must be disclosed in the company's filings under MCL 460.6j, but inherent in the concept of a "firm" transportation contract is some form of capacity payment or reservation charge. PFD, p. 52. The ALJ further reasoned that DTE Electric is obligated to administer its contracts to minimize the costs to ratepayers, which includes marketing unused pipeline capacity. Because no party seriously disputed that a stated purpose of the NEXUS agreements was to provide gas supply to the company's generating units and the Commission has previously found DTE Electric's decision to enter into the NEXUS agreements reasonable and prudent, the ALJ determined that the company would ordinarily expect to recover the reasonable and prudent costs associated with those agreements. Furthermore, the ALJ found that the company's efforts to manage gas purchases and utilization of the contract capacity to minimize costs to ratepayers will be reviewed in the reconciliation. Therefore, the ALJ found that, as a matter of law, MCL 460.6j does not preclude DTE Electric from recovering reasonably and prudently incurred gas pipeline transportation capacity costs, even if the capacity is not fully used to supply DTE Electric generating plants. PFD, pp. 51-52, 55.

MEC excepts to the recommendation that Act 304 does not preclude DTE Electric from recovering from ratepayers NEXUS transportation capacity costs for fuel not burned by DTE Electric generating plants. MEC again argues that there is no lawful basis for DTE Electric to charge ratepayers through the PSCR clause for fuel not burned by DTE Electric for electric generation. MEC's exceptions, pp. 3-4.

DTE Electric replies, explaining that during the 2019 PSCR year, DTE Electric expects to utilize a significant portion of its NEXUS transportation capacity to supply its existing gas-fired peaker plants and is also releasing its NEXUS capacity through an asset management agreement in order to retain the value of the pipeline capacity even when gas is not delivered for use at its power plants. DTE Electric further argues that MEC's persistent claims are based on semantics and an overly narrow interpretation of MCL 460.6j. DTE Electric contends that MEC argues as if there is only one PSCR case, with a one-year window of consideration that precludes any long-term planning. Instead, DTE Electric argues that MCL 460.6j provides for an ongoing series of annual PSCR cases that are designed to ensure contemporaneous cost recovery to provide a continuing reliable gas supply to DTE Electric gas-fired generation plants to serve DTE Electric customers over time. DTE Electric's replies to exceptions, pp. 6-13.

The Commission has considered the parties' arguments, the evidentiary record on this issue, and the ALJ's findings and conclusions. The Commission finds that DTE Electric is not precluded from recovering reasonable and prudent gas pipeline transportation capacity costs; however, the company is reminded that DTE Electric's efforts to manage gas purchases and minimize costs to ratepayers will be reviewed in DTE Electric's reconciliation. Specifically, the Commission will want to see additional evidence that the transportation capacity costs incurred were reasonably and prudently tied to power supply costs. While asset management agreements with natural gas

marketers to use excess capacity are not inherently inappropriate, the Commission shares MEC's concerns over costs being included in the PSCR that are ultimately for fuel not used for power generation. As such, DTE Electric will need to show that the level of contracted transportation capacity is in the best interests of its electric customers.

4. Code of Conduct

MEC argued that the Code of Conduct requires an annual evaluation to determine compliance with the affiliate compensation cap. MEC's initial brief, p. 15. MEC argued that the Commission did not address the affiliate compensation cap in the Code of Conduct in its prior orders, indicating this is a basis of MEC's appeal of the February 7 order. MEC continues to contend that DTE Electric has not presented any evidence that the NEXUS agreements comply with the Code of Conduct in this case. MEC's initial brief, pp. 29-36.

DTE Electric argued that the NEXUS agreements fully comply with the Code of Conduct. Specifically, the company asserted that, in this case, the applicable Code of Conduct is the one in effect when DTE Electric entered into its first agreement with NEXUS in 2014, adopted in Case No. U-12134, rather than the current Code of Conduct. DTE Electric's reply brief, p. 18.

The ALJ provided a thoughtful and well-reasoned discussion of the Code of Conduct issue on pages 53-54 of the PFD, and that discussion will not be repeated here. The ALJ noted that in discussing the Code of Conduct, the February 7 order seems to address compliance with this prohibition on intentional subsidization, rather than evaluating the pricing provisions to determine the recoverable affiliate transaction costs. *See*, February 7 order, pp. 42-43. Further, the ALJ noted that a review of the PFD in Case No. U-18403 shows there was no underlying analysis of compliance with the pricing provisions of the Code of Conduct *per se*. *See*, PFD in Case No. U-18403, pp. 78-83. The ALJ concluded that DTE Electric has an obligation to address the

recoverable affiliate compensation and demonstrate compliance with the pricing provisions of the Code of Conduct in the reconciliation, in which the Commission will determine the amount of affiliate transaction costs DTE Electric may recover. PFD, pp. 53-54, 56.

DTE Electric takes exception to the ALJ's recommendations arguing that the Commission determined in the February 7 order that DTE Electric's original NEXUS agreements did not violate the Code of Conduct, therefore the company should be able to rely on that decision and not be required to relitigate that decision every year in each new PSCR proceeding. DTE Electric argues that it is well settled that under Act 304 the determination of reasonableness and prudence is controlled by the circumstances known at the time the cost was incurred, and not in hindsight. *See*, *Attorney General v Pub Serv Comm,* 161 Mich App 506, 517; 411 NW2d 469 (1987); *Detroit Edison Co v Pub Serv Comm*, 261 Mich App 448, 452; 683 NW2d 679 (2004). DTE Electric argues that it would be arbitrary and unreasonable to reconsider the long-term transaction previously found to have complied with the Code of Conduct simply because it might be part of the annual activity of acquiring power supply. DTE Electric's exceptions, pp. 12-17.

The Attorney General argues that the Commission should reject DTE Electric's attempts to avoid any oversight under the Code of Conduct for all future NEXUS dealings. The Attorney General argues that the Code of Conduct's prohibition on above-market costs in affiliate transactions is unequivocal and applies on an ongoing basis. The Attorney General recommends adopting the ALJ's recommendation because PSCR and Gas Cost Recovery obligations are annual cost recovery plan and reconciliation obligations the Code of Conduct continually applies. Attorney General's replies to exceptions, pp. 11-13.

MEC replies that, even if the Commission accepted that DTE Electric's early decision to contract with NEXUS was reasonable, DTE Electric's annual NEXUS PSCR costs cannot exceed

the Code of Conduct pricing cap. Therefore, MEC asserts that the ALJ correctly concluded that DTE must make that showing in the company's reconciliation. MEC's replies to exceptions, pp. 25-31.

The Staff replies, arguing that the ALJ correctly found that DTE Electric met the Code of Conduct's cross-subsidization prohibition in this case, however DTE Electric still has an obligation to address the recoverable affiliate compensation and must demonstrate compliance with the pricing provision in the reconciliation. Staff's replies to exceptions, pp. 3-4.

DTE Electric's replies to exceptions regarding the Code of Conduct state that:

> [T]here is no basis to revisit the previously-established conclusion that the Company's decision to execute the long-term NEXUS transportation capacity agreement and its amendments was reasonable, prudent and did not violate the Code of Conduct. See for example, *Application of Consumers Energy Co*, 291 Mich App 106, 122; 804 NW2d 574 (2010); *Pennwalt Corp v Public Service Comm,* 166 Mich App 1; 420 NW2d 156 (1988).

DTE Electric's replies to exceptions, p. 12. Therefore, DTE Electric requests the Commission reject the recommendations of the PFD. *Id.*, p. 14.

The Commission agrees that while DTE Electric is not required to relitigate the original NEXUS agreement decided in the February 7 order, the company does have an ongoing obligation to demonstrate compliance with the pricing provisions of the Code of Conduct in the reconciliation, which in turn will provide the Commission with the required information to determine the amount of affiliate transaction costs DTE Electric may recover. Furthermore, DTE Electric must demonstrate compliance with the Code of Conduct when new evidence or a showing of changed circumstances applies to a question of fact. *Consumers Energy Co v Pub Serv Comm*, 268 Mich App 171, 177-178 n. 3; 707 NW2d 633 (2005). Having considered the parties' arguments, the record, and the ALJ's recommendations regarding the Code of Conduct issue, the

Commission agrees with the ALJ's reasoning and adopts the findings and recommendations of the PFD.

THEREFORE, IT IS ORDERED that:

A. DTE Electric Company's application for a power supply cost recovery plan for 2019 metered jurisdictional electric sales is approved as set forth in this order.

B. DTE Electric Company's five-year forecast is accepted as set forth in this order.

C. DTE Electric Company is cautioned that it will need to establish the reasonableness and prudence of all costs associated with the amendments to the NEXUS pipeline agreement in order to receive recovery of those costs.

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

Sally A. Talberg, Chairman

Daniel C. Scripps, Commissioner

Tremaine L. Phillips, Commissioner

By its action of May 8, 2020.

Lisa Felice, Executive Secretary

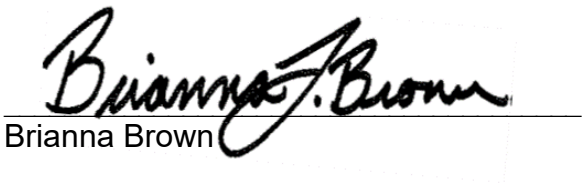
# P R O O F  O F  S E R V I C E

STATE OF MICHIGAN )

Case No. U-20221

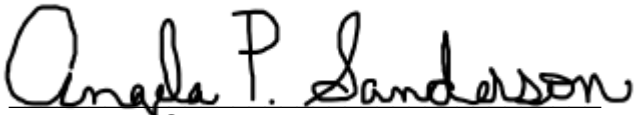
County of Ingham )

Brianna Brown being duly sworn, deposes and says that on May 8, 2020 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 8th day of May 2020.



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

**Service List for Case: U-20221**

| Name | Email Address |
|---|---|
| Amit T. Singh | singha9@michigan.gov |
| Benjamin J. Holwerda | holwerdab@michigan.gov |
| Christopher M. Bzdok | chris@envlaw.com |
| David S. Maquera | maquerad@dteenergy.com |
| DTE Energy Company | mpscfilings@dteenergy.com |
| Joel B. King | kingj38@michigan.gov |
| Jon P. Christinidis | jon.christinidis@dteenergy.com |
| Michael J. Orris | orrism@michigan.gov |
| Sharon Feldman | feldmans@michigan.gov |
| Stephen A. Campbell | scampbell@clarkhill.com |
| Tracy Jane Andrews | tjandrews@envlaw.com |