

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the notice of)	
UPPER MICHIGAN ENERGY RESOURCES)	
CORPORATION for an intended three-phase service)	Case No. U-20829
extension pursuant to Mich Admin Code, R 460.3411.)	
_____)	

At the January 21, 2021 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

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

ORDER

History of Proceedings

On April 21, 2020, Upper Michigan Energy Resources Corporation (UMERC) filed a Notice of Intent to Serve (NIS) the three-phase electric needs of the Back Forty Mine with the Commission pursuant to Subrule 10 of Mich Admin Code, R 460.3411 (Rule 411). The NIS follows a request for proposal (RFP) issued by Aquila Resources USA, Inc. (Aquila) for three-phase electric service to an open pit mine and associated facilities development, collectively referred to as the Back Forty Mine, in Lake Township, Menominee County, in Michigan's Upper Peninsula. UMERC's bid was the lowest of two bids received in response to Aquila's RFP and was eventually accepted.

On May 6, 2020, Alger Delta Cooperative Electric Association (Alger Delta) filed a response objecting to UMERC's NIS and requested a hearing before the Commission. On July 8, 2020, a

prehearing conference was held before Administrative Law Judge Dennis W. Mack (ALJ), at which Aquila was granted intervention. The Commission Staff (Staff) also participated in the proceeding.

On August 14, 2020, UMEREC filed a motion to dismiss Alger Delta's objection. On the same date, both Alger Delta and Aquila filed separate motions for summary disposition. On September 18, 2020, UMEREC and Aquila filed responses to Alger Delta's motion for summary disposition, while Alger Delta filed separate responses to UMEREC's motion to dismiss and Aquila's motion for summary disposition. On September 23, 2020, Alger Delta filed a motion for leave to file a reply brief to UMEREC's response. On September 24, 2020, the ALJ granted leave to Alger Delta and approved the reply brief for filing in the docket. The ALJ also granted UMEREC and Aquila the opportunity to file reply briefs, with both companies filing on September 30, 2020.

On October 14, 2020, the ALJ issued his ruling on the motions, which he converted to a Proposal for Decision (PFD) under Mich Admin Code, R 792.10426 (Rule 426), and recommended that the Commission deny Alger Delta's motion for summary disposition and grant the motions filed by UMEREC and Aquila.

On November 4, 2020, Alger Delta and UMEREC filed exceptions to the PFD. On November 18, 2020, the Staff, UMEREC, Aquila,¹ and Alger Delta filed their respective replies to exceptions.

¹ Aquila titled its filing as a response to exceptions.

Motions of the Parties

Alger Delta Cooperative Electric Association's Motion

Alger Delta filed its motion for summary disposition under Rule 426 and MCR 2.116(I)(1), claiming that no genuine issue of material fact exists concerning its right to serve Aquila and the Back Forty Mine. The cooperative argued that, under Rule 411(11), because Aquila is an existing customer,² it is entitled to serve Aquila's entire premises. Alger Delta's brief in support, p. 8. Alger Delta further argued that this right "attaches at the moment the first utility serves a customer and applies to the entire premises on which those buildings and facilities sit." *Id.*, quoting *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27, 39; 799 NW2d 155 (2011). Alger Delta stated that it has served Aquila's operations, which includes several parcels in Lake Township, for the entirety of that company's operations. Thus, Alger Delta argued, the "extension of service to Aquila makes it the first utility to serve Aquila and its facilities, which means that Aquila is an existing customer of Alger Delta." *Id.*, p. 9. Alger Delta further argued that based on the foregoing, its entitlement to serve Aquila's load on the entire premises has been triggered. *Id.*

After triggering its alleged entitlement to serve, Alger Delta argued that any property acquired by Aquila adjoining the property that Alger Delta serves becomes part of the premises³ for purposes of Rule 411. *Id.* Thus, according to Alger Delta, Aquila's current facilities, the adjacent property, and the Back Forty Mine constitute a single enterprise for the purpose of distributing

² "Customer" is defined under Rule 411(1)(a) as "the buildings and facilities served rather than the individual, association, partnership, or corporation served."

³ "Premises" is defined under the Commission's Technical Standards for Electric Service rules, Mich Admin Code, R 460.3102(k) (Rule 102) as "an undivided piece of land that is not separated by public roads, streets, or alleys."

energy, and the Commission should reject Aquila's acquisition scheme meant to undermine the purpose of Rule 411, to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of service. *Id.*

Upper Michigan Energy Resources Corporation's Motion

UMERC filed its motion for summary disposition under Mich Admin Code, R 792.10432 (Rule 432) and MCR 2.116(C)(8) or (9), alleging that Alger Delta failed to state a valid claim or defense for which relief can be granted in its May 6, 2020 objection to UMER's notice.

UMERC argued that it is undisputed that there is no 3-phase service lines closer than one-half mile from the Back Forty Mine. UMER's motion, p. 4. UMER further argued that it is also undisputed that the Back Forty Mine project will meet the requisite load requirement to qualify under the Standard Industrial Classification Manual (SICM), Division D, Manufacturing, for 3-phase service that will have a connected load of more than 500 kilowatts (kW). *Id.* Rule 411(9) (Subrule 9) provides that:

Regardless of any other provision in these rules, a prospective industrial customer, as defined under the industrial classification manual, division D, manufacturing, for 3-phase service that will have a connected load of more than 500 kilowatts shall have its choice of service from any nearby utility that is willing to construct the necessary facilities. The facilities that are constructed to serve an industrial customer that would otherwise have been served by another utility shall not qualify as a measuring point in determining which utility will serve new customers in the future.

UMERC contended that, under this language, Aquila has its choice of service from any nearby utility willing to construct the necessary facilities. *Id.*, pp. 4-5. UMER further stated that Alger Delta only provides single-phase service to Aquila, and even if the cooperative could demonstrate that the Back Forty Mine is part of the "premises" it serves, it does not provide 3-phase service. *Id.* Therefore, UMER argued, because the Back Forty Mine will meet the requisite load

requirement with the primary electric-load-consuming activities being ore beneficiation and processing equipment, Subrule 9 controls the outcome. *Id.*

In further support of its motion, UMERC argued that Rule 411 expressly states that new 3-phase service does not duplicate existing single-phase service when extended to serve a 3-phase customer. Specifically:

Regardless of other provisions of this rule, except subrule (9), a utility shall not extend service to a new customer in a manner that will duplicate the electric distribution facilities of another utility, except where both utilities are within 300 feet of the prospective customer. Three-phase service does not duplicate single-phase service when extended to serve a three-phase customer.

Id., p. 6 (quoting Rule 411(14)). Because Subrule 9 applies regardless of any other provision in Rule 411, UMERC argued that Alger Delta cannot compel Aquila's Back Forty Mine to become a 3-phase customer of Alger Delta. *Id.*, p. 7.

Aquila Resources Inc.'s Motion

Aquila filed its motion for summary disposition pursuant to Rule 426 and stated that there is no genuine issue of material fact, and that Aquila is entitled to choose UMERC as its electric service provider for the Back Forty Mine project without concern for duplicating existing facilities. Aquila contended that it is undisputed that the Back Forty Mine's nonferrous ore processing and beneficiation facilities will require 3-phase electric service in an amount greater than 500 kW. Aquila's brief in support, p. 1. It is also undisputed, Aquila stated, that no utility has provided 3-phase service to the premises where the Back Forty Mine is located. *Id.* Thus, Aquila argued, under Rule 411(14) and Rule 411(9), Aquila's decision to select UMERC as its 3-phase electric service provider for the Back Forty Mine does not violate Rule 411's general prohibition on duplicating services because Alger Delta has never provided 3-phase service to the premises where the Back Forty Mine will be located. *Id.*, p. 2.

Aquila further stated that Alger Delta did not respond to its RFP for 3-phase service to the Back Forty Mine, but instead relied upon a December 6, 2017 email that provided proposed rates for the project that would cost approximately \$3-4 million more than UMEREC's bid per year. *Id.*, p. 3. Thus, according to Aquila, the Commission should allow the project to receive 3-phase service from a provider charging rates \$3-4 million less per year. *Id.*

Aquila also argued that the Commission need not reach a conclusion on Alger Delta's arguments relying on Rule 411(2) and Rule 411(11), because the exception provided in Rule 411(14) draws a clear distinction between single-phase and 3-phase service and specifically provides that 3-phase service does not duplicate single-phase service.

Aquila also argued that the Back Forty Mine is the type of customer the Rule 411(9) exception was intended to cover. *Id.*, p. 9. Aquila provided that it is undisputed that the Back Forty Mine's total electric load will be well in excess of 500 kW. Aquila also argued that it is undisputed that the Back Forty Mine operation will be a large industrial customer as defined within the SICM, Division D, Manufacturing, and referenced in Rule 411(9). *Id.* Thus, according to Aquila, it is entitled to the "choice of service from any utility." *Id.*(quoting Rule 411(9)).

Ruling on Motions/Proposal for Decision

The ALJ reviewed the submitted motions, briefs, and exhibits and determined that the underlying facts were undisputed. Based on the undisputed facts, the ALJ concluded, the only issue is whether Rule 411 entitles Alger Delta to provide all of Aquila's electric service, or whether Aquila has the right to select the utility it will take 3-phase electric service from at the Back Forty Mine. PFD, p. 9.

The ALJ first determined that for purposes of Rule 411 Aquila is a customer of Alger Delta. According to the ALJ, it is undisputed that Alger Delta supplied electric service to Aquila for

approximately 10 years prior to the RFP. *Id.* The ALJ concluded that Rule 411(11) makes no distinction between single-phase service and 3-phase service and therefore, absent an exception, if the desired service is part of the premises already served by Alger Delta, then Alger Delta's right to serve is initially established. *Id.*

The ALJ next turned to determining whether the Back Forty Mine was part of Aquila's previously served premises. The ALJ provided the following analysis of the undisputed facts:

The Back Forty Mine site is located adjacent to the Menominee River in Lake Township, Menominee County[.] Aquila Response, Exhibit A; see also Alger Delta Reply pgs. 2-3, Exhibits 1 and 4. In its Response to Alger Delta's Motion, Aquila identified the 9 locations identified in discovery where Alger Delta provides it [sic] service in the area of the Back Forty Mine site. Of those locations, one, identified as location 9, is miles from the project site, another, identified as location 8, is at the northeast boundary, and the rest, locations 1-7, at the western boundary along the Menominee River and River Road. Response, pgs. 7-8; Exhibit C. Aquila contends locations 1-3, 5-7 and 9 are all separated from the project site by public roads, meaning the service Alger Delta is currently providing to its buildings and facilities on those parcel[s] are not part [of the] premises of the Back Forty Mine. *Id.*, pg. 7. Locations 4 and 8 are separated from the project site by state-owned land, and thus Aquila contends are not an undivided piece of land, which it terms as property owned by the same entity as one continuous parcel, under the definition of "premises" in Rule 102(k). *Id.*, pgs. 7-8; Exhibit C.

Alger Delta does not dispute the locations of the parcels it provides service to Aquila in relation to the Back Forty Mine site. Locations 1-3, 5-7 and 9 are all separated from the project site by public roads, meaning under Rule 102(k) those parcels are not part of the Aquila "premises" that includes the Back Forty Mine site. However, locations 4 and 8 are not separated by a public road from that site so both can be considered as the premises of Aquila if they are an "undivided piece of land". In this regard, Alger Delta argues the determination of whether property is a single undivided set of premises is controlled by whether it is "owned by the same entity as one continuous parcel." Case No. U-10116, February 8, 1993 Order, pg. 9. Aquila accepts this definition but argues locations 4 and 8 are not one continuous parcel because both are separated from the Back Forty Mine by state-owned property.

Aquila's argument of what constitutes "one continuous parcel" effectively substitutes continuous with contiguous, which is inconsistent with the purpose of the rule. Obviously, if the parcel where service is being provided is contiguous with the parcel where service is sought both are part of the premises being served. In defining "premises" Rule 102(k) only addresses a situation where a parcel is

receiving service and a parcel where service is being sought are separated by public roads, streets or alleys, meaning separation resulting from property owned by another entity is immaterial. In this case, the Back Forty Mine site and locations 4 and 8 are part of the premises that are served by Alger Delta because they are “an undivided piece of land that is not separated by public roads, streets, or alleys.” R 460.3102(k). Therefore, absent an exception, Alger Delta is entitled under Rule 411(11) to serve the entire load on Aquila’s premises, including the Back Forty Mine site. See *Great Wolf Lodge, supra*, 489 Mich at 39.

PFD, pp. 10-12 (notes omitted). The ALJ then addressed whether Rule 411(9) provides Aquila with an exception to choose the electric provider of its choice for the Back Forty Mine.

Under the language of Rule 411(9), the ALJ considered whether Aquila was a “prospective industrial customer” or whether the existing service provided by Alger Delta precludes Aquila from choosing its provider. The ALJ determined that it is undisputed that the Back Forty Mine is an industrial customer and that because Alger Delta does not currently provide 3-phase service to Aquila, for purposes of Rule 411(9), Aquila is not a customer of Alger Delta for 3-phase service over 500 kW. PFD, p. 15. Thus, Aquila is a prospective industrial customer for purposes of Rule 411(9) and any right under Rule 411(11) Alger Delta possessed to serve the entire load is effectively extinguished under the exception. *Id.*

Based on the foregoing, the ALJ converted the rulings on the motions to a PFD (which disposes of the entire case) and recommended that the Commission deny Alger Delta’s motion for summary disposition and grant the motion for summary disposition filed by Aquila and the motion to dismiss filed by UMER.

Exceptions and Replies to Exceptions

Alger Delta takes exception to the PFD and argues that the ALJ ignored provisions of Rule 411, previous case law, and Commission orders. First, Alger Delta argues that the case is controlled by *Consumers Energy Co v Pub Serv Comm*, 255 Mich App 496; 660 NW2d 785 (2002). According to Alger Delta, the Court in that case determined that the size of the load is not determinative under Rule 411(11) and that the incumbent utility was entitled to serve the entire load no matter the size of the requested service. Alger Delta's exceptions, pp. 2-3. As an existing customer, Alger Delta argues, *Consumers* requires Aquila to allow the cooperative to serve its entire load, including the Back Forty Mine. *Id.*

The Staff, UMERC, and Aquila each filed replies to this exception, with each pointing out that the Court in *Consumers* was not called upon to nor did it address the exception of Rule 411(9) or Rule 411(14). Thus, the opposing parties argue the case Alger Delta cites as precedent is inapplicable to the circumstances presented in this proceeding. *See*, Staff's replies to exceptions, p. 2. The Staff further points out that, unlike Aquila's Back Forty Mine, the establishment seeking service in *Consumers* was not a large industrial customer meeting the requirements under Rule 411(9). *Id.*

Alger Delta next argues that the ALJ incorrectly applied the exception in Rule 411(9) because Aquila is an existing customer and therefore cannot be a prospective customer as required by the subrule. Alger Delta's exceptions, pp. 5-6. Alger Delta argues that the overall purpose of Rule 411 is to prevent duplicative infrastructure and inefficiencies and thus Rule 411(9) must be read to provide an exception to the distance requirements of Rule 411(6)-(8). *Id.* Alger Delta further argues that Rule 411(14) does not alter the meaning of "prospective customer," and that the

ALJ's interpretation of this provision could create two customers on the same premises; one that is single-phase and one that is 3-phase. *Id.*, p. 7.

The Staff argues in reply that Alger Delta's interpretation of Rule 411 is misplaced. Staff's replies to exceptions, p. 2. The Staff argues that the plain language of Rule 411(9) clearly states that the subrule applies "regardless of any other provision in these rules." The Staff notes that Rule 411(9) does not state that it only applies to Rule 411(6)-(8). *Id.* The Staff further argues that Rule 411(9) must be applied as written and the ALJ correctly determined that the Back Forty Mine is a prospective industrial customer, as defined under the rule, and is therefore free to choose 3-phase service from any nearby provider. *Id.*, pp. 2-3. The Staff further points out that the ALJ correctly determined that Rule 411(9) "creates an exception which allows a specific type of customer- an industrial customer requiring 3-phase service - the right to select its provider." *Id.*

UMERC argues in reply that Alger Delta muddles the terms "customer" and "premises" and that the two terms are entirely distinct for purposes of Rule 411. UMER's replies to exceptions, p. 5. UMER contends that Rule 411 does not expand the definition of "customer," and that "customer" for purposes of Rule 411 means only the buildings and facilities served. *Id.* (citing *City of Holland v Consumers Energy Co*, 308 Mich App 676, 697-698; 866 NW2d 871 (2015)). Thus, UMER argues that buildings and facilities not served are not "existing customers" but "prospective customers." *Id.* Additionally, UMER argues, the ALJ correctly determined that any possible right that Alger Delta may have had under Rule 411 to serve the Back Forty Mine was extinguished once the project satisfied the load requirement and definition of "industrial customer" that trigger the Rule 411(9) exception, and that this exception supersedes any other provisions of Rule 411. *Id.* Aquila also argues in reply that the Back Forty Mine is a prospective

industrial customer as defined under Rule 411(9) and that this subrule supersedes other provisions of Rule 411. Aquila's replies to exceptions, pp. 5-6.

UMERC and Aquila both filed exceptions to the PFD to address the ALJ's conclusion that the Back Forty Mine is part of the premises served by Alger Delta. UMERC argues that the ALJ applied an incomplete definition to the term "premises" in his analysis. UMERC's exceptions, p. 2. UMERC contends that "premises" is defined in Rule 102 as "an undivided piece of land that is not separated by public roads, streets, or alleys." Rule 102(k). UMERC argues that the ALJ erred in not giving effect to the initial part of the definition - an undivided piece of land - and thus relied only on the second part of the definition - not separated by public roads, streets, or alleys. *Id.*, p. 3. Thus, UMERC argues, the ALJ essentially equated an undivided piece of land with any parcel not separated by public roads, streets, or alleys. *Id.* UMERC argues that the Commission employs a two-part query to determine if a parcel is the same premises, the first being whether the property is an undivided piece of land owned by the same entity as one continuous parcel, and the second being whether buildings are separated by any public roads, streets, or alleys. *See*, February 8, 1993 order in Case No. U-10116 (February 8 order), p. 9.

Aquila also takes exception to the ALJ's conclusion on this issue for substantially the same reason and agrees that the matter does not alter the ultimate recommendations within the PFD.

Aquila's exceptions, p. 2.

Alger Delta argues in reply that the leasehold Aquila acquired in mineral and surface rights of the state property between Aquila's served area and the Back Forty Mine creates a continuous premise for purposes of Rule 411. Alger Delta's replies to exceptions, pp. 1-2. Alger Delta claims that Aquila purchased these leasing rights in furtherance of the mining operation, and the leased areas are therefore part of a single enterprise. *Id.*

Discussion

The ALJ recommended dismissing Alger Delta's motion for summary disposition under Rule 426 and granting Aquila's motion for summary disposition and UMER's motion to dismiss. In recommending dismissing the proceeding in full, the ALJ's ruling on the motions was converted to a proposal for decision. Rule 426 addresses summary disposition as follows:

A party may make a motion for summary disposition of all or part of the proceeding. If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted, the presiding officer may recommend to the commission, summary disposition of all or part of the proceeding. If the entire proceeding is disposed of, the presiding officer may issue a proposal for decision.

Summary disposition following a determination that there is no genuine issue of material fact or for failure to state a claim for which relief can be granted is analogous to determinations made pursuant to MCR 2.116(C)(10) and MCR 2.116(C)(8), respectively. In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), the Michigan Supreme Court set forth the standard for evaluating motions for summary dismissal under each rule as follows:

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

The ALJ provided a thorough analysis of the positions of the parties and the controlling law but did not specifically state which standard of review applied in recommending denial of Alger

Delta's motion and granting the motions filed by UMERB and Aquila under Rule 426. However, it does appear that the ALJ reached outside the initial pleadings to reach his recommendations. *See* PFD, pp. 10-12. Therefore, the Commission will address the dismissal under the "no genuine issue of material fact" standard. *See, Maiden, supra*.

The first issue is whether Alger Delta has an initial right under Rule 411 to serve the Back Forty Mine. The ALJ provided an extensive overview of the property interests involved and the locations of current service to Aquila. PFD, pp. 10-12. The ALJ stated that:

Aquila's argument of what constitutes "one continuous parcel" effectively substitutes continuous with contiguous, which is inconsistent with the purpose of the rule. Obviously, if the parcel where service is being provided is contiguous with the parcel where service is sought both are part of the premises being served. In defining "premises" Rule 102(k) only addresses a situation where a parcel is receiving service and a parcel where service is being sought are separated by public roads, streets or alleys, meaning separation resulting from property owned by another entity is immaterial.

Id., p. 11. The ALJ ultimately concluded that ownership of the state land was immaterial because no public roads, streets, or alleys divided the properties in question, and therefore Alger Delta had an initial right to serve the Back Forty Mine. *Id.*, p. 12.

The Commission finds that the ALJ's application of the definition of "premises" in Rule 102(k) is inconsistent with the language of the rule and previous Commission decisions. As UMERB states in its exceptions, the Commission employs a two-part query to determine whether a parcel is part of the same premises. The first part is whether the property is an undivided piece of land owned by the same entity as one continuous parcel, and the second is whether buildings are separated by any public roads, streets, or alleys. *See*, February 8 order, p. 9, and the July 24, 1998 order in Case No. U-11513, p. 6.

The undisputed facts demonstrate that the Back Forty Mine is separated from the buildings and facilities currently served by Alger Delta by state-owned land. Thus, at first glance, it appears

that Alger Delta's initial right to serve is extinguished at this point. However, as the ALJ noted in footnote 5 of the PFD, Alger Delta's argument that Aquila and UMERL embarked on a scheme in contrivance of Rule 411 is factually driven. Thus, in reviewing the facts in a light most favorable to Alger Delta, the Commission finds that there is a genuine issue of material fact as to the extent of the leasehold of Aquila on the state-owned land in question, and whether that interest is sufficient to constitute a continuous interest for purposes of Rule 102 and Rule 411. Therefore, the Commission cannot make a determination as to whether Alger Delta holds an initial right to serve Aquila under Rule 411 in the absence of additional facts. The Commission does find, however, that such determination is immaterial to the ultimate recommendation of the ALJ.

The ALJ found that any right Alger Delta may have to serve the Back Forty Mine was extinguished when the undisputed facts established that the Back Forty Mine was an industrial customer seeking 3-phase service and that the requested load exceeded 500 kW. Rule 411(9) provides that:

Regardless of any other provision in these rules, a prospective industrial customer, as defined under the industrial classification manual, division D, manufacturing, for 3-phase service that will have a connected load of more than 500 kilowatts shall have its choice of service from any nearby utility that is willing to construct the necessary facilities. The facilities that are constructed to serve an industrial customer that would otherwise have been served by another utility shall not qualify as a measuring point in determining which utility will serve new customers in the future.

Rule 411(9). Alger Delta argues that the Back Forty Mine cannot be a "prospective" industrial customer since it already serves Aquila, and that its right to serve the entire load of this customer is established under Rule 411(11). Alger Delta argues that the exception in Subrule 9 only applies to the distance requirements of Rule 411(6)-(8).

The Commission finds Alger Delta's argument without merit. The undisputed facts demonstrate that Alger Delta only provides single-phase service to Aquila. It is further undisputed

that the Back Forty Mine currently has no buildings or facilities at the project and that it will require 3-phase service as an industrial customer for its load-consuming activities (being ore beneficiation and processing equipment). Additionally, as the Staff argues, the plain language of Rule 411(9) clearly states “regardless of any other provision in these rules.” It does not state that Rule 411(9) only applies to Rule 411(6)-(8). Staff’s replies to exceptions, p. 2. The Commission finds that the ALJ correctly determined that Rule 411(9) creates an exception which allows a specific type of customer - an industrial customer requiring 3-phase service - the right to select its provider.

The Commission finds that Rule 411(14) supports the same conclusion. This subrule provides, in part, that “[t]hree-phase service does not duplicate single-phase service when extended to serve a 3-phase customer.” All parties agree that the purpose of Rule 411 is to prevent duplication of services and inefficiencies. UMER providing 3-phase service to the Back Forty Mine does not duplicate Alger Delta’s single-phase service to Aquila and does not violate the Commission’s rules.

The Commission also finds Alger Delta’s reliance on *Consumers* misplaced. Unlike Aquila’s Back Forty Mine, the establishment seeking service in *Consumers* was not a large industrial customer meeting the specific requirements under Rule 411(9). Thus, neither the Commission nor the Court of Appeals addressed the exception in Rule 411(9) in that proceeding.

The Commission further finds that there is no genuine issue of material fact that prevents Aquila from choosing the provider of its choice for 3-phase service to the Back Forty Mine and adopts the recommendation of the ALJ on this issue. The Commission finds that a ruling on this issue disposes of the entire proceeding.

THEREFORE, IT IS ORDERED that Alger Delta Cooperative Electric Association's motion for summary disposition is denied, Upper Michigan Energy Resources Corporation's motion to dismiss is granted, and Aquila Resources USA, Inc.'s motion for summary disposition is granted.

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

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

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Tremaine L. Phillips, Commissioner

Katherine Peretick, Commissioner

By its action of January 21, 2021.

Lisa Felice, Executive Secretary


PROOF OF SERVICE

STATE OF MICHIGAN)

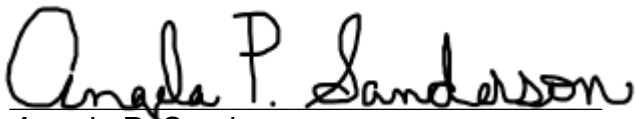
Case No. U-20829

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on January 21, 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 21st day of January 2021.



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

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