UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATION COMMISSION

Panhandle Eastern Pipe Line Company, LP	**Dockets Nos.**	**RP19-78-000**
		RP19-78-001
		RP19-1523-000
Southwest Gas Storage Company		**RP19-257-005**
		(consolidated)

REPLY BRIEF OF THE MICHIGAN PUBLIC SERVICE COMMISSION

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Table of Contents

Table of Authorities

Cases

Administrative Decisions

Other Authorities

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To: The Honorable Stephanie Nagel
Presiding Administrative Law Judge

In accordance with the revised procedural schedule established in the Presiding Judge's June 17, 2020 Order Granting In Part Unopposed Motion of the Joint Movants For Leave to Modify the Procedural Schedule, as well as the Judge's October 6, 2020 Order,[1] and Rule 706 of the Commission's Rules of Practice and Procedure,[2] the Michigan Public Service Commission (Michigan PSC) submits its Reply Brief in the above-captioned proceeding.

[1] Order Denying Panhandle Eastern Pipe Line Company, LP Motion to Strike Testimony, Suspend Procedural Schedule, and Institute Investigation and Granting Panhandle Eastern Pipe Line Company, LP Motion for Leave to Reply and Reply, Confirming Deadlines, Denying Interlocutory Appeal, and Closing the Record, Docket No. RP19-78-000, *et al*. (issued October 6, 2020).

[2] 18 C.F.R. § 385.706 (2020).

ARGUMENT

I. Rate Base

A. What Is the Appropriate Rate Base?

1. What is the appropriate gas plant?

Panhandle Eastern Pipe Line Company, LP (Panhandle) claims in its Initial Brief that its rate base consists of (i) Net Plant of $1,132,419,185; (ii) ADIT of $0; (iii) Regulatory Liabilities of $0; and (iv) Working Capital of $15,393,430. Panhandle further states that "[n]o intervenor offered testimony on the issue of Panhandle's rate base."[3] This statement is false. Michigan PSC Witness Nichols testified that the excess Accumulated Deferred Income Taxes (ADIT) attributable to the reduction in the corporate federal income tax rate from 35 percent to 21 percent should be treated as a regulatory liability amortized in rates over the remaining life of Panhandle's pipeline and the unamortized balance should be deducted from rate base.[4] In addition, Witness Nichols recommends that the ADIT balances attributable to the 21 percent federal corporate income tax rate be deducted from rate base until either they are paid to the taxing authority, returned to ratepayers, or the book/tax timing differences have reversed.[5] The support for both of Witness Nichols' recommendations is discussed below, in Issues II.A and II.B.

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[3] Panhandle Initial Brief at 1.

[4] Answering Test. of Michigan PSC Witness Robert F. Nichols II, CPA (Exhibit No. MPC-0024) (Nichols Answering Testimony), Docket No. RP19-78, et al., at 13:14-21 (filed March 20, 2020).

[5] Nichols Answering Testimony, Exhibit No. MPC-0024 at 19.

2. What is the appropriate amount of accumulated depreciation?

The Michigan PSC takes no position on this issue.

II. ADIT

A. What is the appropriate amount and treatment of excess ADIT?

The appropriate total amount of excess ADIT related to Panhandle's jurisdictional transportation services is $139,210,958.[6] That amount should be amortized over the remaining life of Panhandle's assets and the unamortized balance should be deducted from rate base.[7] Panhandle claims that the "appropriate amount of excess ADIT for purposes of determining Panhandle's rates is zero."[8] As discussed in the Michigan PSC's Initial Brief, and below, this position is inconsistent with governing precedent, and Panhandle – which bears the burden of proof with respect to these ADIT-related changes – has failed to muster adequate support for its proposals in light of such Commission precedent.[9]

Panhandle argues that its position is supported by the "clear guidance" provided by the Commission in its Revised Policy Statement "that an MLP pipeline (or other pass-through entity) no longer recovering an income tax allowance pursuant to the Commission's post-*United Airlines* policy may also eliminate previously-accumulated sums in ADIT from cost of service instead of flowing these previously-accumulated ADIT

[6] Michigan PSC Initial Brief at 13.

[7] *Id*. (citing Nichols Answering Testimony, Exhibit No. MPC-0024 at 13:14-21).

[8] Panhandle Initial Brief at 6-7.

[9] Michigan PSC Initial Brief at 12.

balances to ratepayers."[10] According to Panhandle, the position taken by the Michigan PSC and others in this proceeding with respect to this issue has "been thoroughly considered and rejected by the Commission and the D.C. Circuit."[11]

Panhandle repeatedly points to the Commission's Order on Rehearing of Revised Policy Statement, which it alleges supports its position. Panhandle's reliance is misplaced. The Revised Policy Statement was intended to address MLPs, such as SFPP L.P. (SFPP), and "other pass-through entities" *required* to eliminate their income tax allowance due to the holding in *United Airlines v. FERC*, 827 F.3d 122 (D.C. Cir. 2016).[12] The term "other pass-through entities" within the context of the Revised Policy Statement refers to other non-MLP forms of partnerships.[13] The Revised Policy Statement did not apply to pipelines that were structured, as of the date of issuance of such statement, as federal corporate income tax-paying entities that continued to lawfully include a corporate income tax expense and related excess ADIT balances as regulatory liabilities in their rates. There is

[10] Panhandle Initial Brief at 6-7 (quoting *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, Docket No. PL17-1, Revised Policy Statement on Treatment of Income Taxes, 162 FERC ¶ 61,227 (2018) and Order on Rehearing, 164 FERC ¶ 61,030 at P 10 (2018) ("Revised Policy Statement")).

[11] Panhandle Initial Brief at 8 (citing *SFPP, L.P.*, Opinion No. 511-D, 166 FERC ¶ 61,142 at PP 96-106 (2019) ("Opinion No. 511-D"), *aff'd*, *SFPP, L.P. v. FERC*, 967 F.3d 788, at 801-803 (D.C. Cir. 2020) ("*SFPP*"); *Public Utilities Comm'n of Cal. v. FERC*, 894 F.2d 1372, at 1378-1384 (D.C. Cir. 1990) ("*Public Utilities*")).

[12] Order on Rehearing of Revised Policy Statement, 164 FERC ¶ 61,030 at PP 3, 4 (2018) (emphasis added).

[13] *See Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdiction Rates*, Notice of Inquiry, 162 FERC ¶ 61,223 at PP 24-25 (2018) ("other non-MLP pass-through entities" would need to "address the double recovery concern.").

no support for Panhandle's position that the Revised Policy Statement was an invitation for such pipelines to *prospectively* change their ownership structure to an MLP entitled to then transform excess ADITs from a regulatory liability scheduled to be returned to its customers, to a gain to be returned to stockholders. If so, all pipelines structured as corporations would accept the invitation and restructure as MLPs in order to transfer their excess ADITs from regulatory liabilities to retained earnings.

Panhandle argues that the timing of any reorganization "has no bearing on the application of the Revised Policy Statement."[14] And it argues "[i]t is wholly immaterial for either the disallowance of the income tax allowance or the treatment of excess ADIT and ADIT that Panhandle became an MLP after the Commission issued its Revised Policy Statement," and "[t]he Commission only looks at whether the pipeline currently is an MLP when it applies the Revised Policy Statement, as shown in the subsequent Commission orders applying this policy."[15] But its arguments overlook the key distinction between the *SFPP L.P.* precedent and the circumstances in which Panhandle has placed itself of its own accord. Namely, the excess ADIT issue in this case does not "rest on a post hoc finding that [Panhandle's] past rates were not just and reasonable."[16] Rather, it involves a pipeline structured as a *corporate taxpaying entity* that was unaffected by the *United Airlines* decision and the Commission's Revised Policy Statement.

[14] Panhandle Initial Brief at 14.

[15] *Id.* at 13-14.

[16] *SFPP, L.P., v. FERC*, 967 F.3d 788 at 802 (D.C. Cir. 2020) (*quoting* Opinion No. 511-D at P 93).

Panhandle's position fails to recognize that the Revised Policy Statement was issued in response to the D.C. Circuit remand in *United Airlines* based on the holding that the Commission failed to demonstrate that there was no double recovery of income taxes when permitting SFPP, an MLP, to recover both an income tax allowance and an ROE pursuant to the DCF methodology.[17] In response, the Commission issued Opinion Nos. 511-C and 511-D,[18] directing SFPP to remove the federal income tax allowance from its rates.[19] The Commission also permitted SFPP to eliminate the ADIT balance from rates.[20] As explained by the Commission:

> Requiring SFPP, whose tax allowance is eliminated, to amortize to ratepayers ADIT that was lawfully collected under previously filed and approved rates would infringe on the rule against retroactive ratemaking. To do so would, effectively, retroactively apply the holding in Opinion No. 511-C by requiring SFPP to refund either the income tax allowance expenses or deferred tax reserves recovered under past rates for service prior to the commencement of this proceeding. Any attempt to refund such amount to shippers would be impermissible, as it would rest on a post hoc finding that SFPP's past rates were not just and reasonable.[21]

The D.C. Circuit subsequently affirmed Opinion Nos. 511-C and 511-D in *SFPP, L.P. v. FERC*, 967 F. 3d 788 (D.C. Cir. July 31, 2020). In its decision, the court agreed

[17] Revised Policy Statement, 162 FERC ¶ 61,227 at P 1.

[18] *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, at PP 21-22 (2018); *SFPP, L.P.*, Opinion No. 511-D, 166 FERC ¶ 61,142 (2019).

[19] Opinion No. 511-C at PP 21-22.

[20] Opinion No. 511-D at P 93 (*citing Public Utilities Comm'n of State of Cal. v. FERC*, 894 F.2d 1372, at 1382-84 (D.C. Cir. 1990)).

[21] *Id.*, P 93.

with FERC that ratemaking decisions violate the filed rate doctrine if they "rest[ ] on a Commission view that the [prior] rates . . . were in retrospect too high" or unjust and unreasonable.[22]

Panhandle misplaces its reliance on the Commission's Opinion No. 511-D for the proposition that the rule against retroactive ratemaking serves as an "absolute bar to requiring Panhandle to return excess ADIT."[23] While the filed rate doctrine and the related rule against retroactive ratemaking provide that a pipeline may not charge any rate other than what has been filed with the Commission and allowed to go into effect,[24] the D.C. Circuit has made clear that "no violation of the filed rate doctrine or the prohibition against retroactive ratemaking occurs when buyers are on adequate [advanced] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service."[25] The provision of notice "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."[26] As the Michigan PSC explained in its Initial Brief,[27] Panhandle

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[22] *SFPP, L.P. v. FERC*, 967 F. 3d 788 at 803 (D.C. Cir. July 31, 2020) (*citing Public Utilities Comm'n of State of Cal. v. FERC*, 894 F.2d at 1380) (*SFPP, L.P.*).

[23] Panhandle Initial Brief at 19.

[24] *See Ark. La. Geo. Co. v. Hall*, 453 U.S. 571, 578 (1981) (finding that "The Commission itself has no power to alter a rate retroactively").

[25] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, at 1231 (D.C. Cir. 2018).

[26] *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990); *see also, Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, at 1141 (D.C. Cir. 1987).

[27] Michigan PSC Initial Brief at 19.

indeed was on notice, as a corporate taxpaying entity, of the Commission's policy and regulations requiring an excess ADIT balance attributable to a reduction in federal income taxes to be amortized back to ratepayers and to reflect the unamortized balance as a reduction to rate base.[28]

Longstanding Commission precedent and Section 154.305(d) of the Commission's regulations make clear that excess ADIT must be transferred to Account 254–Other Regulatory Liabilities, and amortized (flowed back to ratepayers as a credit to the cost of service) over the remaining life of the pipeline assets.[29] Costs recorded during past rate periods in Account 254—Other Regulatory Liabilities are, by the terms of such account, eligible for inclusion in future rates.[30] In this respect, there is no dispute that Panhandle, on January 1, 2018, the effective date of the reduction in the federal corporate income tax rate from 35 percent to 21 percent, transferred $234,018,627 of excess ADIT to Account

[28] Section 154.305(d)(2) of the Commission's regulations provide that: "the interstate pipeline must compute the income tax component in its cost of service by making provision for any excess or deficiency in deferred taxes." *See* Exhibit No. MPC-0027 at 2; *see Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdiction Rates,* Notice of Inquiry, 162 FERC ¶ 61,223 at PP 12-13 (2018).

[29] Nichols Answering Testimony, Exhibit No. MPC-0024 at 6:14-21. *Accounting and Ratemaking Treatment of Accumulated Deferred Income Taxes and Treatment Following the Sale or Retirement of an Asset*, Policy Statement, 165 FERC ¶ 61, 115 at P 7 and n.24 (2018) (citing 18 C.F.R. § 154.305(d)) (ADIT Policy Statement); *Algonquin Gas Transmission Co.*, 76 FERC ¶ 61,075 at 61,449 (1996).

[30] *Pub. Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes,* Order No. 864, 169 FERC ¶ 61,139, P 8 (2019); *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdiction Rates,* Notice of Inquiry, 162 FERC ¶ 61,223 (2018); *Empire District Elec. Co.*, 166 FERC ¶ 61,164, P 29 (2019); *So. Cal. Edison Co.*, 166 FERC ¶ 61,006, 63,014 (2019).

No. 254–Other Regulatory Liabilities.[31] Such transfer demonstrates that Panhandle was on notice of Commission policy requiring excess ADIT be treated as a regulatory liability. It did not challenge such policy.

Thus, there is no valid argument to be made that application of the Commission's longstanding precedent regarding excess ADIT constitutes retroactive ratemaking. Nor is there any precedent supporting Panhandle's position that its voluntary restructuring from a corporate tax-paying entity to an MLP *after* issuance of the Revised Policy Statement, entitles it to terminate the amortization of more than $139 million of excess ADIT.

As ostensive support for its position, Panhandle cites to factually distinct and largely irrelevant Commission decisions, which should be rejected out of hand. In *Enbridge Energy*,[32] Panhandle argues, the Commission addressed a circumstance involving a pipeline reorganization, and "ruled that the fact such reorganization occurred at all, or the timing of such, has no bearing on the application of the Revised Policy Statement."[33] But *Enbridge Energy* did not address an entity structured as a corporation on the date of issuance of the Revised Policy Statement that subsequently changes its structure to an MLP. That case addressed the opposite scenario: Enbridge was structured as an MLP at the time of issuance of the Commission's Revised Policy Statement. As such, it submitted

[31] Nichols Answering Testimony, Exhibit No. MPC-0024 at 13:8-11; Exhibit No. MPC-0031.

[32] *Enbridge Energy, LP*, 169 FERC ¶ 61,109 (2019).

[33] Panhandle Initial Brief at 14.

its required filing in compliance with the Revised Policy Statement[34] by proposing to remove its income tax allowance and ADIT balance as of March 21, 2018. The Commission accepted Enbridge's filing, over the objection of parties seeking amortization of such ADIT amounts.[35] Subsequently, in December 2018, Enbridge restructured as a corporation, and thus reinstituted the income tax allowance and began accumulating ADIT.[36] By contrast, this case involves a pipeline structured as a *corporate taxpaying entity* that changed to an MLP *after* the *United Airlines* decision and the Commission's Revised Policy Statement. The Commission previously has addressed that scenario and squarely rejected the pipeline's position that it is entitled to retain the ADIT balances.[37]

Panhandle's reliance on *RH energytrans, LLC* similarly is unavailing.[38] That case involved a new interstate pipeline, proposing to include a corporate income tax allowance in its cost of service.[39] RH energytrans "elect[ed] to be treated as a corporation for income tax purposes,"[40] and the Commission concluded that "[t]o the extent RH energytrans elects to be treated as a corporation for income tax purposes," it "will permit RH energytrans to include an income tax allowance in its cost of service. . ."[41] The Commission explained

[34] *Enbridge Energy, LP*, 169 FERC ¶ 61,109, P 27.

[35] *Id.*, P 1.

[36] *Id.*, P 5.

[37] *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 (1999) (discussed *infra*. at 16-17).

[38] *RH energytrans, LLC*, 165 FERC ¶ 61,218 at P 3 (2018).

[39] *Id.*, P 33.

[40] *Id.*, P 45.

[41] *Id.*, P 46.

that if RH energytrans "does not make that affirmative statement [that it has elected to be treated as a corporation for tax purposes] before it files its actual tariff records setting forth the initial rates for service, "those records must reflect rates recalculated to reflect removal of the proposed income tax allowance and [ADIT] from its cost of service."[42] Panhandle, meanwhile, involves a pipeline structured as a corporation that had been collecting ADIT, and that subsequently underwent a voluntary internal restructuring from a corporate tax-paying entity to an MLP. The facts underlying the two cases could not be more dissimilar, and *RH energytrans, LLC* does not support a finding that Panhandle properly eliminated its adjustments to rate base for ADIT balances.

One final point relating to the timing of excess ADITs: Panhandle discusses the treatment of excess ADIT related to the reductions in the federal income tax rate from 35 percent to 21 percent and ADIT related to the 21 percent tax rate as though they are "interchangeable."[43] But the Commission has made clear that "excess or deficient ADIT associated with post-December 31, 2017 [*i.e.*, after the effective date of the TCJA] asset dispositions and retirements should be treated differently than ADIT for ratemaking purposes."[44] The Commission stated that in this circumstance "the deficient or excess ADIT balance is more reflective of a regulatory liability or asset, and no longer reflects deferred taxes that are still to be settled with the IRS and need not be extinguished."[45]

[42] *Id.*, P 46.

[43] Panhandle Initial Brief at 7.

[44] ADIT Policy Statement at P 40.

[45] *Id.*

Consistent with the ADIT Policy Statement, the Michigan PSC is proposing to treat Panhandle's excess ADIT balance as a regulatory liability that need not be extinguished.[46]

Panhandle's reliance on *Public Utilities Comm'n of Cal. v. FERC*, 894 F.2d 1372 (D.C. Cir. 1990) also is misplaced.[47] That case dealt with the issue of whether the cost of service of El Paso's *transportation* service should reflect a credit for ADIT balances related to El Paso's gas *production* facilities. The court held that ADIT balances related to non-jurisdictional production facilities had nothing to do with jurisdictional transportation service.[48] FERC Trial Staff Witness Zachary K. Ruckert conducted a line-by-line analysis of the $179.0 million excess ADIT balance transferred by Panhandle to Account No. 254–Regulatory Liability and excluded $39.8 million not related to transportation service.[49] The remaining $139.2 million is a regulatory liability related to jurisdictional transportation service. Panhandle's scheme to transform such regulatory liability into a stockholder gain must be rejected.

Proposed Findings of Fact and Conclusions of Law:

Michigan PSC renews the following proposed findings of fact and conclusions of law, as outlined in its Initial Brief:

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[46] Similarly, in Issue II.B, *infra*, the Michigan PSC is proposing to retain the ADIT balance related to the 21 percent federal corporate income tax rate, because Panhandle's internal change in ownership did not trigger an immediate tax obligation.

[47] Panhandle Initial Brief at 6.

[48] *Public Utilities Comm'n of Cal. v. FERC*, 894 F.2d 1372, at 1380.

[49] Michigan PSC Initial Brief at 21; Exhibit No. S-0015 at 1, lines 26-42.

1. Panhandle has failed to meet its burden of proof to support its proposal to terminate the amortization of its regulatory liability related to excess ADIT. *See* Nichols Answering Testimony, Exhibit No. MPC-0024 at 13

2. The appropriate total amount of excess ADIT for Panhandle is $139,210,958. Exhibit No. S-0002 at 68, line 1 (Trial Staff Exhibit Containing Adjusted Panhandle Cost of Service Statement and Schedules; Schedule H-3(2)); Exhibit No. S-0015 at 1, lines 26-42 (Trial Staff Exhibit Containing Workpaper #10 (Excess ADIT Adjustment).

3. The excess ADIT attributable to the reduction in the corporate federal income tax rate from 35 percent to 21 percent, as a result of the TCJA, must be amortized in rates over the remaining life of Panhandle's pipeline assets and the unamortized balance must be deducted from rate base. Nichols Answering Testimony, Exhibit No. MPC-0024 at 13:14-21.

4. Panhandle's *internal* ownership change, effective July 1, 2019, has no effect on Panhandle's pre-existing obligation to amortize the excess ADIT balance related to TCJA. Nichols Answering Testimony, Exhibit No. MPC-0024 at at 13:19-21.

5. The Commission's *SFPP, L.P.* precedent and its Revised Policy Statement do not apply here, because the excess ADIT issue in this case involves a circumstance in which a pipeline (i.e., Panhandle) was structured as a corporate taxpaying entity, and then its parent voluntarily changed the internal structure of Panhandle's ownership from a corporate tax-paying entity to an MLP. For this reason, Panhandle is unaffected by D.C. Circuit's *United Airlines* decision, and the Commission's Revised Policy Statement. *SFPP, L.P., v. FERC*, 967 F.3d 788 at 802 (D.C. Cir. 2020) (*quoting* Opinion No. 511-D at P 93); Revised Policy Statement, 162 FERC ¶ 61,227 (2018).

B. What is the appropriate amount and treatment of Panhandle's going-forward ADIT balances?

The Michigan PSC in its Initial Brief explained that the balance of Panhandle's ADIT account (as distinguished from its *excess* ADIT, which is discussed above) as of

June 30, 2019 was $232,904,290.[50] This amount related to Panhandle's obligation, as a corporate entity at that time, to pay a 21 percent corporate federal income tax rate.[51] The Michigan PSC further explained that this $232,904,290 should be deducted from Panhandle's rate base until either: (1) such balance is paid to the taxing authority; (2) such balance is returned to ratepayers; or (3) the book/tax timing differences that resulted in those amounts have reversed.[52]

On brief, Panhandle argues that "the appropriate amount of Panhandle's ADIT balances for purposes of determining Panhandle's rates is zero," and that it is "not required to return the ADIT to ratepayers in any fashion."[53] However Panhandle has failed to meet its burden of proof to demonstrate that its internal change in ownership that occurred on July 1, 2019 justifies Panhandle removing $232.9 million of ADIT from its rate base. Panhandle's argument that the ADIT balance reflects future taxes payable by ETP Holdco, not Panhandle, and that "ETP Holdco has a liability to pay the ADIT balance to the IRS,"[54] does not support the immediate removal of $232.9 million from rate base. Panhandle's argument is flawed for two reasons.

[50] Michigan PSC Initial Brief at 22; Nichols Answering Testimony, Exhibit No. MPC-0024 at 15:13-17.

[51] Nichols Answering Testimony, Exhibit No. MPC-0024 at 15:13-17.

[52] Nichols Answering Testimony, Exhibit No. MPC-0024 at 19:1-5; Exhibit No. MPC-0029 at 2, line 4; Exhibit No. PE-0001 at Schedule B-1, p. 1.

[53] Panhandle Initial Brief at 30, 41.

[54] Panhandle Initial Brief at 33-36.

First, the fact that the ADIT balance represents future taxes "payable by ETP Holdco, *not Panhandle*" is irrelevant.[55] Panhandle has never paid corporate income taxes directly to the IRS. Prior to the internal reorganization on July 1, 2019, Panhandle indirectly paid corporate federal income taxes to the IRS through Panhandle's parent, ETP Holdco, which directly paid corporate income taxes to the IRS based on net income of all of its subsidiaries, including Panhandle. The relevant fact is that even though Panhandle did not directly pay taxes to the IRS, the Commission properly allowed Panhandle to include a corporate federal income tax in its jurisdictional rates because it ""indirectly paid corporate federal income taxes to the IRS.[56] In this respect, it is important to stress that entities such as Panhandle, owned by corporate parents like ETP Holdco, were unaffected by the *United Airlines* decision.[57] Thus, Panhandle's argument that the ADIT balance on Panhandle's books as of June 30, 2019, represents future taxes to be paid by ETP Holdco, "not Panhandle," is a red herring.[58]

The second flaw in Panhandle's argument is its admission that the ADIT balance on Panhandle's books as of the effective date of the internal reorganization reflects a *future* tax obligation, rather than an immediate obligation triggered by the internal transaction. While the sale of an asset with an ADIT balance is usually deemed an immediate taxable

[55] *Id.* at 41 (emphasis added).

[56] Nichols Answering Testimony, Exhibit No. MPC-0024 at 8:8-13; Exhibit No. MPC-0026 at 1.

[57] *See* discussion of *United Airlines*, *supra* at 4-6.

[58] Panhandle Initial Brief at 33-36.

event under IRS rules,[59] Panhandle's July 1, 2019 internal change of ownership is not considered a taxable transaction under Internal Revenue Code (IRC) § 721(a).[60] This means that Panhandle has free use of such ADIT balance at zero cost of capital until it is owed to the IRS.[61] Ratepayers, likewise, should receive a benefit from the ADIT balance in the form of a reduction to rate base until such time that it is paid to the IRS.

The Commission has roundly rejected Panhandle's position that ETP Holdco is entitled to retain the $232.9 million ADIT balance on Panhandle's books as of June 30, 2019. In its Initial Brief, the Michigan PSC explained that in *SFPP, LLP*,[62] the Commission addressed the issue of whether the ADIT balance that existed on December 18, 1988, when the pipeline was transformed from a corporation into a limited partnership, should be retained or eliminated.[63] The Commission rejected SFPP's proposal to exclude the ADIT balances from rates and agreed with the ALJ's conclusion that the ADIT balance existing at the formation of the partnership are available to pay future income taxes and that ratepayers are entitled to the full benefit of the ADIT deduction from rate base.[64]

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[59] ADIT Policy Statement at P 40.

[60] Stipulated Fact No. 33; Krebs Testimony, Exhibit No. PE-0148 at 41:6-8.

[61] As explained below in Section IV.A to this argument, Panhandle is putting such ADIT balances to good use (for the benefit of its stockholders) by treating the ADIT balances as retained earnings that increase the equity ratio in Panhandle's Capital structure in this case.

[62] *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 (1999), *order on reh'g and compliance*, Opinion No. 435-A, 91 FERC ¶ 61,135 (2000); *order on reh'g and compliance*, Opinion No. 435-B, 96 FERC ¶ 61,281 (2001); *order granting clarif. and reh'g in part*, 97 FERC ¶ 61,138 (2001); *aff'd in part and vacated in part, BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004).

[63] *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 at 61,094 (1999).

[64] *Id.*

Panhandle attempts to distinguish the Commission's holding in Opinion No. 435 from the circumstances in this case by claiming that SFPP "had an income tax as permitted by the then-current Commission policy" as contrasted with the fact that "Panhandle does not have an income tax allowance … and therefore no tax costs are in Panhandle's cost of service."[65] Panhandle fails to recognize that the facts in this case are "on all fours" with Opinion No. 435. Panhandle, like SFPP, had an income tax as permitted by the then-current (1/1/2018) Commission policy. Like the pipeline at issue in Opinion No. 435, Panhandle changed its ownership structure to a partnership that did not have any federal corporate income tax liability. SFPP, like Panhandle in this case, claimed that the ADIT balance in future rates should be zero. The Commission held:

> The deferred taxes accumulated by the pipeline prior to its reorganization remain available to pay future income taxes and consistent with Commission policy, rate payers are entitled to the full benefit of ADIT deductions from rate base until those taxes are paid.[66]

Consistent with the Commission's holding in Opinion No. 435, the appropriate treatment of Panhandle's ADIT balance in this case is to deduct that balance from rate base until either: (1) such balance is paid to the taxing authority; (2) such balance is returned to ratepayers; or (3) the book/tax timing differences that resulted in those amounts have reversed.[67] This will ensure that ratepayers receive the benefit of the regulatory liability

[65] Panhandle Initial Brief at 41.

[66] *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 at 61,094 (1999).

[67] Nichols Answering Testimony, Exhibit No. MPC-0024 at 19:1-5; Exhibit No. MPC-0029 at 2, line 4. The Michigan PSC notes that this position differs from positions taken

for those amounts until they are actually paid to the IRS, or the book/tax timing difference unwinds. And if it is determined that such ADIT balance is not payable to the IRS at some future date, that balance should be amortized in rates over the remaining life of Panhandle's system.[68]

Proposed Findings of Fact and Conclusions of Law:

Michigan PSC renews the following proposed findings of fact and conclusions of law, as outlined in its Initial Brief:

1. Panhandle has failed to meet its burden of proof to demonstrate that its internal change in ownership that occurred on July 1, 2019 justifies Panhandle removing $232.9 million of ADIT from its rate base. *See* Nichols Answering Testimony, Exhibit No. MPC-0024 at 15.

2. The appropriate amount of Panhandle's going-forward ADIT balance as of June 30, 2019 was $232,904,290. Nichols Answering Testimony, Exhibit No. MPC-0024 at 15:13-17.

3. Panhandle's ADIT balance should be deducted from rate base until either: (1) such balance is paid to the taxing authority; (2) such balance is returned to ratepayers; or (3) the book/tax timing differences that resulted in those amounts have reversed. Nichols Answering Testimony, Exhibit No. MPC-0024 at 19:1-5; Exhibit No. MPC-0029 at 2, line 4 (Deferred Income Tax Balances Attachment to Panhandle response to Michigan PSC data request MPSC-PEPL-3.01); Exhibit No. PE-0001 at Schedule B-1, p. 1 (Panhandle Cost of Service, ADIT). Exhibit No. S-0088 at 57 (FERC Trial Staff Adjusted Panhandle Cost of Service Statements and Scheduled, Schedule H-3(2)).

4. The Commission's *SFPP, L.P.* precedent and its Revised Policy Statement were not intended to address the treatment of ADIT balances of pipelines such as Panhandle, i.e., a pipeline with a pre-existing corporate tax-paying structure that subsequently decides to change the internal ownership structure

by FERC Trial Staff and other parties, who have argued that this ADIT balance should be amortized back to ratepayers.

[68] Exhibit No. S-0088 at 57.

of the pipeline into an MLP. *Inquiry Regarding Income Tax Allowances*, Policy Statement on Income Tax Allowances, 111 FERC ¶ 61,139 (2005); *see SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, P 13 (2018).

III. Cost of Service

A. What is the appropriate Cost of Service for Panhandle's interstate transportation and storage services?

The Michigan PSC takes no position on this issue.

B. What is the appropriate level of Operating and Maintenance expenses?

The Michigan PSC takes no position on this issue

C. What is the appropriate level of Administrative and General expenses?

The Michigan PSC takes no position on this issue.

D. What Is the Appropriate Level of Revenue Credits?

The Michigan PSC takes no position on this issue.

IV. Cost of Capital

A. What Is the Appropriate Capital Structure?

In its Initial Brief, Panhandle argues that its actual capital structure of 62.94 percent equity and 37.06 percent debt, as updated through January 31, 2020, is "well within the range of capital structures approved by the Commission," and is just and reasonable.[69] As the Michigan PSC explained in its Initial Brief, using these figures results in an equity-to-debt ratio that is roughly "2 to 1."[70] This highlights that Panhandle is equity heavy as compared to the proxy group supported by the Michigan PSC in this proceeding, which

[69] Panhandle Initial Brief at 43-44.

[70] Michigan PSC Initial Brief at 28.

has an average of 49.8 percent equity and a 50.2 percent debt.[71] Panhandle has failed to adequately support its proposed use of such an equity-rich capital structure.

PMDG Witness Elizabeth Crowe further demonstrated that Panhandle's thick equity ratio is attributable to overcapitalization caused by the addition to equity capital of $346 million of "tax reversals" and $276 million of "Excess ADIT Reg Assets/Liab."[72] Removal of these two items would yield a capital structure for Panhandle consisting of 49.7 percent equity and 50.3 percent debt.[73]

The Michigan PSC supports the use of PMDG's recommended capital structure as the just and reasonable capital structure for Panhandle, and agrees with Ms. Crowe that preventing Panhandle from including in its equity capitalization funds associated with transfer of its ADIT and excess ADIT balances from a regulatory liability to a regulatory asset is the only way to prevent the use of funds provided by ratepayers – which should be used to decrease rate base – to increase the overall return on rate base to the harm of the ratepayers who contributed the capital in the first place.[74] Panhandle's contention that PMDG's proposed capital structure "is an attempt to return past collected ADIT to future ratepayers and therefore is prohibited retroactive ratemaking,"[75] demonstrates that Panhandle's increased equity ratio is directly attributable to its scheme, discussed above in

[71] Megginson Answering Testimony, Exhibit No. MPC-0021 at 6:1-7.

[72] Crowe Answering Testimony, Exhibit No. PMG-0001 (rev) at 33:7-17.

[73] *Id*. at 36.

[74] *Id*. at 36:10-12.

[75] Panhandle Initial Brief at 44.

Section II.A and II.B, of transferring its excess ADIT regulatory liability and its ADIT balances related to future tax liabilities into retained earnings. The Michigan PSC's argument set forth in Sections II.A and II.B demonstrates why the amortization of excess ADIT and ADIT balances does not constitute retroactive ratemaking.[76] The Michigan PSC's position is that the excess ADIT has been transferred to Account 254 as a regulatory liability that must be returned to ratepayers, and that the ADIT balance related to the going-forward 21 percent federal corporate income tax rate should be deducted from rate base until it is either paid to the IRS, returned to ratepayers, or until the book/tax timing differences that resulted in those amounts are reversed/unwound.[77] Adoption of that position would also require removal of such ADIT balances from retained earnings in Panhandle's equity balance and a revision to its capital structure.

Proposed Findings of Fact and Conclusions of Law:

Michigan PSC renews the following proposed findings of fact and conclusions of law, as outlined in its Initial Brief:

1. Panhandle has failed to satisfy its burden of proof with respect to its proposed capital structure. *See* Megginson Answering Testimony, Exhibit No. MPC-0021 at 6.

2. Panhandle's proposed 63.29 percent equity/36.71 percent debt ratio results in a capital structure for Panhandle that is equity heavy as compared to the proxy group supported by the Michigan PSC, which has an average of 49.8 percent equity and a 50.2 percent debt. Megginson Answering Testimony, Exhibit No. MPC-0021 at 6:1-7. Crowe Answering Testimony, Exhibit No. PMG-0001 (rev) at 33:7-17.

[76] *See supra* at 3-17.

[77] Nichols Answering Testimony, Exhibit No. MPC-0024 at 19:1-5; Exhibit No. MPC-0029 at 2, line 4.

3. Panhandle's equity capitalization for this rate proceeding includes the funds associated with its ADIT and excess ADIT balances that Panhandle transferred to retained earnings. Crowe Answering Testimony, Exhibit No. PMG-0001 (rev) at 36:10-12.

4. A just and reasonable capital structure for Panhandle should exclude the ADIT and Excess ADIT transferred to retained earnings. *Id*.

5. The resulting just and reasonable capital structure for Panhandle consists of 49.7 percent equity and 50.35 percent debt. Crowe Answering Testimony, Exhibit No. PMG-0001 (rev) at 36.

B. What Is the Appropriate Cost of Debt?

Panhandle's as-filed cost of debt is 6.17 percent,[78] which it has failed to sufficiently support. The Michigan PSC in its Initial Brief stated that it believes the appropriate cost of debt for Panhandle is 5.75 percent for the reasons stated in PMDG Witness Crowe's testimony.[79] PMDG in its Initial Brief noted that Panhandle, on rebuttal, updated its debt balances and interest expenses, and acknowledged that its actual cost of debt, updated through January 31, 2020, was 5.76 percent.[80] PMDG states that "[c]onsistent with Ms. Crowe's recommendation that Panhandle's cost of debt be based on 'end of test period' actual debt balances and interest rates, PMDG can accept the use

[78] Langston Rebuttal Testimony, Exhibit No. PE-0102 at 10:9-16.

[79] Crowe Answering Testimony, Exhibit No. PMG-0001 (rev) at 37.

[80] PMDG Initial Brief at 27; Langston Rebuttal Testimony, Exhibit No. PE-0102 at 10:16; Exhibit No. PE-0104 (Response to Staff-ROR 20.01_Attachment_Supplemental.xlsx) (showing debt cost of 5.76%).

of Panhandle's admitted debt cost of 5.76%."[81] For similar reasons, the Michigan PSC also can accept the use of Panhandle's admitted debt cost of 5.76 percent.

Proposed Findings of Fact and Conclusions of Law:

1. Panhandle has failed to satisfy its burden of proof with respect to its proposed cost of debt. *See* Crowe Answering Testimony, Exhibit No. PMG-0001 (rev) at 37.

2. Panhandle's cost of service should reflect a 5.76 percent cost of debt. Langston Rebuttal Testimony, Exhibit No. PE-0102 at 10:16; Exhibit No. PE-0104 (Response to Staff-ROR 20.01_Attachment_Supplemental.xlsx) (showing debt cost of 5.76%).

C. What Is the Appropriate Cost of Equity?

The Michigan PSC in its Initial Brief explained that Panhandle has failed to satisfy its burden of proof to demonstrate that its proposed 14.67 percent ROE recommended by Panhandle Witness Bulkley is just and reasonable, because its proposed ROE is based on outdated data from an inappropriate proxy group.[82] The Michigan PSC demonstrated that the just and reasonable ROE for Panhandle is 11.17 percent, which represents the averaging of the two-step DCF and the CAPM analyses performed by Michigan PSC Witness Kirk D. Megginson.[83]

The difference between Witness Bulkley's recommended 14.67% ROE and Witness Megginson's 11.17% is attributable to three issues: (1) what is the appropriate proxy group;

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[81] PMDG Initial Brief at 27.

[82] Michigan PSC Initial Brief at 31; *see* Janssen Answering Testimony, Exhibit No. MPC-0015; *see* Megginson Answering Testimony, Exhibit No. MPC-0021.

[83] Michigan PSC Initial Brief at 35; Exhibit No. MPC-0035 at 1 (Michigan PSC Witness Kirk D. Megginson, MPC ROE Recommendation).

(2) whether to use the most recently available financial data; and (3) whether the GDP growth rate needs to be adjusted in light of current conditions in the market. Each of these issues is discussed below.

1. What Is the Appropriate Proxy Group?

Panhandle derives its proposed ROE using a proxy group consisting of (i) Enbridge Energy Company, Inc.; (ii) Kinder Morgan, Inc.; (iii) TC Pipelines; (iv) TC Energy; and (v) The Williams Companies, Inc., using data through the end of the Test Period (January 31, 2020).[84]

Contrary to Panhandle's assertions, TC Pipelines is not a suitable candidate for inclusion in the proxy group.[85] TC Pipelines was among the group of companies examined, but ultimately excluded, by Michigan PSC Witness Janssen in her proxy group analysis.[86] As noted by Witness Janssen, TC Pipelines is included within the ownership structure of the TC Energy Corporation, which was selected by Witness Janssen for inclusion in the proxy group.[87] It is not appropriate to include two affiliated entities as separate members of the proxy group. PMDG Witness Crowe concurred on this point, explaining that TC Energy, the operator of all of TC Pipelines' interstate gas pipeline assets (and the general partner of the MLP), is already a member of her proxy group. As PMDG Witness Crowe explained, "it would be somewhat redundant to include both TC Pipelines and TC Energy

[84] Panhandle Initial Brief at 45-46

[85] *Id.* at 56.

[86] Janssen Answering Testimony, Exhibit No. MPC-0015 at 10:15-18.

[87] *Id.* at 10:17-18; 19:13-15.

in the same proxy group."[88] In light of this, and because TC Energy is the larger of the two affiliated entities, with the more significant domestic interstate gas pipeline footprint, TC Energy is more appropriately suited for inclusion in the proxy group, and TC Pipelines should therefore be excluded.

But even assuming TC Pipelines was not an affiliate of TC Energy, TC Pipelines nonetheless should be excluded from the proxy group because of its organization as an MLP. In her testimony, Witness Janssen explained that the recent decisions in *United Airlines*[89] and *SFPP*,[90] coupled with the related trend of MLPs being converted into corporate entities, "raise questions about whether MLPs should be included in a proxy group under the current Commission guidelines."[91] The court in *United Airlines* concluded that an MLP proxy group reflects distributions which have not been reduced for federal income taxes and that the separate federal income tax allowance in rates could result in a double recovery of taxes.[92] In addition, MLP distributions include return *of* investment, which is depreciation expense.[93] As a result, Witness Janssen eliminated from her proxy group recommendation any MLPs and LPs, such as TC Pipelines. For similar reasons, PMDG Witness Crowe did not include TC Pipelines in her proxy group recommendation.

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[88] Ex. No. PMG-001 (rev) (Prepared Direct and Answering Testimony of Elizabeth H. Crowe) at 46, lines 4-5.

[89] *United Airlines* v. *FERC*, 827 F.3d 122 (D.C. Cir. 2016).

[90] *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228 (2018) at P 25 (*SFPP*).

[91] Janssen Answering Testimony, Exhibit No. MPC-0015 at 13:11-14.

[92] *Id.* at 13:14-17.

[93] *Id.* at 13:17-18.

Witness Crowe explained that because of its status as an MLP, TC Pipelines is "subject to the same uncertainties as other gas and oil MLPs since the issuance of the Commission's determination that pipelines owned by MLPs are no longer eligible to receive an income tax allowance in their regulated cost of service."[94]

Witness Crowe further noted that TC Pipelines' 35 percent reduction to its quarterly distribution to unitholders effective first quarter, 2018 was instructive. This, she explained, historically has been used by the Commission to deem the MLP ineligible for a period of time to be included in the proxy group.[95] Similarly, Trial Staff Witness Johnson recommended that TC Pipelines be eliminated because there was a negative growth rate for TC Pipelines as of February 2020.[96]

For all of the above-stated reasons, a just and reasonable proxy group for Panhandle must exclude TC Pipelines. The elimination of TC Pipelines reduces Witness Bulkley's recommended proxy group to four members, which is below the preferred five member proxy companies under Commission policy.[97] In its recent ROE Policy Statement, the Commission noted the difficulty associated with developing a suitable five member proxy

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[94] Ex. No. PMG-0001 (rev) (Prepared Direct and Answering Testimony of Elizabeth H. Crowe) at 44:17 – 45:2.

[95] *See* Ex. No. PMG-0001 (rev) (Prepared Direct and Answering Testimony of Elizabeth H. Crowe) at 45, lines 11-13.

[96] Exhibit No. S-0106 at 19 and Exhibit No. S-0107 at 12.

[97] *See, e.g., El Paso Natural Gas Co.*, 154 FERC ¶ 61,120, at PP 227, 232-35 (2016) (upholding order on initial decision, and affirming Presiding Judge's decision to relax the Commission's 50 percent standard in order to establish a proxy group of at least five companies); *Portland Nat. Gas Transmission Sys.*, Opinion No. 510, 134 FERC ¶ 61,129 at P 167 (2011).

group, and therefore made it clear that the Commission no longer automatically disqualifies a company from proxy group member status due to the 50 percent standard.[98] Panhandle's arguments to the contrary are meritless.

Consistent with Commission policy, Michigan PSC supported a six-member proxy group for determining a just and reasonable ROE for Panhandle (just in case one member is eliminated): 1) Kinder Morgan, Inc.; (2) TC Energy Corporation; (3) The Williams Companies, Inc.; (4) Enbridge Energy Company, Inc.; (5) Dominion Energy; and (6) National Fuel Gas Supply Corp.[99] Michigan PSC Witness Janssen's decision to include six members in her recommended proxy group turned out to be prudent in light of the potential elimination of Kinder Morgan because of a negative growth forecast in March of 2020.[100]

Panhandle attempts to discredit inclusion in the proxy group of Dominion Energy and National Fuel Gas Company. But there is no basis for Panhandle's position.[101] Michigan PSC witness Bonnie Janssen, in demonstrating the appropriateness of including Dominion in the proxy group, explained that Dominion is a corporation that produces and transports energy and is comprised of five sections: Dominion Energy (Virginia and South Carolina), Gas Transmission and Storage, Gas Distribution, Contracted Generation and

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[98] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 171 FERC ¶ 61,155 at P 65 (2020) (*ROE Policy Statement*).

[99] Michigan PSC Initial Brief at 32-33a; Janssen Answering Testimony, Exhibit No. MPC-0015 at 19:10-15.

[100] Michigan PSC Initial Brief at 35-36.

[101] Panhandle Initial Brief at 47.

Corporate/Other.[102] On brief, Panhandle argues that "Value Line classifies Dominion as an electric utility, not a natural gas company."[103] Panhandle also argues that inclusion of Dominion is defective, because it "had less than 25% of its operating income from natural gas pipelines and storage operations."[104] Panhandle's position on brief is contradicted by Panhandle Witness Bulkley's testimony recommending inclusion of Enbridge, Inc. in her proxy group with only 23% of its operating income attributable to its gas pipeline transportation business.[105]

There is no validity to excluding either Dominion or Enbridge on this basis. As explained above, the Commission has updated its ROE policy and relaxed its historic rule that members of a proxy group for pipelines must derive at least 50 percent of their net operating income from pipeline operations.[106] Relaxing the 50 percent rule is appropriate under the totality of Dominion's operations. As Witness Janssen explained, under the gas transmission and storage section of its business, Dominion operated over 8,000 miles of interstate natural gas transmission pipelines in ten states, possessed one of the nation's largest natural gas storage systems with 1.058 trillion cubic feet (Tcf) capacity, and owned interests in seven Commission-regulated interstate natural gas pipelines.[107] For these

[102] Janssen Answering Testimony, Exhibit No. MPC-0015 at 16:18-21.

[103] Panhandle Initial Brief at 47.

[104] *Id.* at 47.

[105] Exhibit No. PE-0037, Schedule 3 page 1 of 1 (Revised August 24, 2020).

[106] *ROE Policy Statement* PP 58, 64.

[107] Janssen Answering Testimony, Exhibit No. MPC-0015 at 17:1-4.

reasons Witness Janssen concluded that it is appropriate to include Dominion in the proxy group in light of its substantial FERC-regulated pipeline assets and other energy assets.[108]

Panhandle further argues that Trial Staff, PMDG, and the Michigan PSC "improperly included National Fuel in their respective proxy groups because it fails to meet the Commission requirements."[109] Specifically, Panhandle argues that "National Fuel does not have at least 50 percent of its operating income derived from, or assets devoted to, U.S. interstate natural gas pipelines and storage operations and therefore fails the fundamental proxy screening criteria."[110] Panhandle goes on to argue that National Fuel "is not risk comparable to Panhandle."[111]

Panhandle's attempt to disqualify National Fuel based on the argument that it does not meet the Commission's 50 percent threshold, is without merit. Indeed, as noted above, the Commission has relaxed its historic rule that members of a proxy group must derive at least 50 percent of their net operating income from pipeline operations.[112] Michigan PSC Witness Janssen explained that National Fuel operates in the exploration and production, gathering, pipeline and storage, energy marketing and utility segments, and owns interest in two U.S. interstate natural gas pipeline systems.[113] National Fuel provides interstate

[108] *Id.* at 17:4-6.

[109] Panhandle Initial Brief at 48.

[110] Panhandle Initial Brief at 48.

[111] *Id.* at 50.

[112] *ROE Policy Statement* PP 58, 64.

[113] Janssen Answering Testimony, Exhibit No. MPC-0015 at 17:10-12.

natural gas transmission in excess of 5,300 miles,[114] and owns and operates two FERC-regulated pipeline assets, accounting for 29 percent of its total assets and 24 percent of its total income in 2019.[115] In addition, most of its other business is related to the exploration, production and distribution of natural gas.[116] In fact, according to PMDG Witness Crowe, "National Fuel is one of the few publicly-traded entities focusing almost entirely on the natural gas industry, specifically on the production, gathering, storage and transportation of natural gas."[117] Similarly, Witness Janssen explained, it is appropriate to include National Fuel in the proxy group in light of its substantial FERC-regulated pipeline assets and other energy assets.[118]

Finally, it bears mentioning that the Commission previously expressly accepted the inclusion of National Fuel as a proxy group member in Opinion No. 486-B,[119] where it included National Fuel in the proxy group despite it not meeting the 50 percent criterion when viewed from an earnings percentage total. In that order, the Commission stated that National Fuel's net income profile in 2004 was "approximately 28 percent distribution, 28 percent natural gas transportation, 32 percent exploration and production, 3 percent trading

[114] *See* Exhibit No. MPC-0017.

[115] Exhibit No. MPC-0020, page 5 of 7.

[116] Janssen Answering Testimony, Exhibit No. MPC-0015 at 17:17-18.

[117] Ex. No. PMG-0001 (rev) (Prepared Direct and Answering Testimony of Elizabeth H. Crowe) at 40:12-14.

[118] Janssen Answering Testimony, Exhibit No. MPC-0015 at 17:18-19.

[119] *Kern River Gas Transmission Co.*, Opinion No. 486-B, 126 FERC ¶ 61,034, at P 140 (2009) (*Kern River*).

and marketing, and 8 percent other."[120] Nevertheless, the Commission concluded that National Fuel's transportation and distribution components "exceed 50 percent, are quite well balanced and the 35 percent total of the exploration and production and marketing and trading functions is similar in proportion to the transportation and distribution components."[121] The Commission stated that "National Fuel's natural gas transmission function is not outweighed by its distribution function and that the greater risk exploration and production function reasonably offsets a somewhat less risky distribution function in this case. National Fuel may be included in the proxy group because it is not a predominately LDC diversified natural gas company."[122] The Commission added that while it "would prefer to have a sample that consists of firms having at least a 50 percent gas transmission component, National Fuel meets the standards that would support its inclusion in the proxy group if this is necessary to provide an adequate sample size."[123]

FERC's rationale for allowing inclusion in the proxy group of National Fuel in *Kern River* applies here. As explained by FERC Trial Staff Witness Johnson, National Fuel's business risk profile today, using assets as a measure of operations, is similar to what it was when the Commission issued its decision in *Kern River*: using asset percentage totals for 2019, National Fuel's operations were spread out between distribution (30.51 percent of total assets), exploration and production (30.22 percent of total assets), gathering (8.39

[120] *Id.* at 94.

[121] *Id.*

[122] *Kern River*, 126 FERC ¶ 61,034, at 96.

[123] *Id.* at 94.

percent of total assets), and pipelines and storage (29.01 percent of total assets).[124] It is appropriate, then, to include National Fuel in the proxy group for purposes of deriving a just and reasonable ROE for Panhandle.

2. Commission Precedent Requires the Use of The Most Recently Available Financial Data.

Panhandle on brief takes issue with the use by FERC Trial Staff, PMDG and the Michigan PSC of up-to-date data in establishment of their proxy group and performing their ROE analysis. Commission policy, Panhandle avers, "requires the exclusion of the significantly skewed data from after January 31, 2020 because it would produce unreasonable results based on non-representative costs."[125]

Panhandle's position has been squarely rejected by the Commission. In *Portland Natural Gas Transmission System*, 142 FERC ¶ 61,198 at P 55 (2013), the Commission found that, "on balance it was better to use the updated record data . . . because the more recent data captured both increases in dividend yields resulting from the [2008/2009] crisis and offsetting downward adjustments to other DCF components." And in *SFPP*, the Commission made it clear that it "uses the most recent data, even if such data is from outside the test period, 'because the market is always changing and later figures more accurately reflect current investor needs.'"[126] It is precisely for this reason that it is

[124] Ex. S-0106 at 35 (citing Ex. S-0108 at 26); Trial Staff Initial Brief at 32-33.

[125] Panhandle Initial Brief at 46 (*citing SFPP, LP*, 134 FERC ¶ 61,121 at P 208 (2011)).

[126] *SFPP, LP*, 134 FERC ¶ 61,121 at P 208 (*quoting Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,117 (2000)); *Williston Basin Interstate Pipeline Co.*, 72 FERC ¶ 61,074 at 61,373 and 61,375 (1995).

appropriate to include the most up-to-date data for an ROE analysis. The Commission in *SFPP* explained that "[u]nlike cost of service and capital structure data, the Commission prefers the most recent financial data in the record for calculating a pipeline's ROE, recognizing that updates are not permitted once the record has been closed and the hearing has concluded."[127] While the Commission added that "any updating of the record is subject to the more fundamental principle of ratemaking that that cost of service adopted in rate proceeding be a reasonable forecast of the pipeline's future cost of service,"[128] Panhandle has failed to make a showing that using stale data is reasonably reflective of Panhandle's future cost of equity.

Panhandle also argues that FERC Trial Staff, PMDG and the Michigan PSC are relying on "skewed growth data in their DCF analyses" that have been "greatly influenced by significant short-term market conditions" from "the temporary upheaval" caused by the steep decline in oil prices and the drastic worldwide economic downturn caused by the COVID-19 pandemic."[129] While the future is difficult to predict under current circumstances, record evidence in this proceeding suggests that the more recent data relied on in the analysis of the Michigan PSC, FERC Trial Staff and PMDG are not "skewed" or overly "influenced by significant *short-term* market conditions." To the contrary, FERC Trial Staff Witness Johnson testified that the market conditions as of May 31, 2020 may be "the new normal" and that the pandemic may have a material impact on the economy

[127] *SFPP, LP*, 134 FERC ¶ 61,121 at P 208.

[128] *Id.*

[129] Panhandle Initial Brief at 53-54.

for the foreseeable future.[130] As FERC Trial Staff explains in its Initial Brief,[131] the Congressional Budget Office's (CBO) economic forecast released in July 2020 revealed that "[t]he economic outlook for 2020 to 2030 has deteriorated significantly since the agency last published its full baseline economic projections in January [2020]."[132] The CBO noted that its forecast was "surrounded by an unusually high degree of uncertainty" for several reasons, including significant uncertainty concerning "[t]he severity and duration of the pandemic;" "the behavioral and policy responses intended to contain its spread," "how effective monetary and fiscal policy will be, and how global financial markets will respond to the substantial increases in public deficits and debt."[133] Panhandle Witness Bulkley acknowledged as much in the course of cross examination, stating that the CBO report introduced by FERC Trial Staff "[c]ertainly demonstrates some extraordinary times,"[134] and adding "the volatility index. . . has been off the charts during this time period. . .",[135] and the "market. . . literally went into free fall until March 23."[136] As FERC Trial Staff points out, while stock prices generally recovered from their substantial decline by May and August 2020, much of that growth has been driven by

[130] Tr. 2141-42 (Johnson).

[131] FERC Trial Staff Initial Brief at 37.

[132] Exhibit No. S-0222 at 5.

[133] *Id*. at 2, 5.

[134] Tr. at 1406:5-16; 1407:17-18.

[135] Tr. 1426:9-10.

[136] Tr. 1426:14-15.

technology stocks. Natural gas pipeline company stocks, among other segments, had largely not recovered by August 2020.[137]

3. The GDP Growth Rate Needs to be Adjusted to Reflect the Impact of Current Market Conditions on Long-Term Economic Growth.

Michigan PSC Witness Megginson explained that "[t]he recent turmoil and activities in the capital market cannot be ignored."[138] He added that "while we cannot predict where the market will go from here, the impact to the market long-term may be material."[139] To support his concern, Witness Megginson pointed out that in the first two weeks of March, investment analysts lowered their 5-year growth rate forecast for two common members of his and Witness Bulkley's proxy group: Kinder Morgan and TC Energy Corporation.[140] While Witness Megginson adjusted his DCF analysis for these two changes,[141] he remained concerned that these two revisions in March did not capture the full extent of changing investor expectations.[142] Thus, Witness Megginson included in his testimony a separate two-step DCF analysis that reduces the long term GDP growth rate by 50 percent.[143] The need to reduce the average GDP growth rate in effect as of March

[137] FERC Trial Staff Initial Brief at 37.

[138] Megginson Answering Testimony, Exhibit No. MPC-0021 at 8:15-18.

[139] *Id*.

[140] *Id*. at 8:18-20; Exhibit No. MPC-0023 Rev at 3.

[141] Megginson Answering Testimony, Exhibit No. MPC-0021 at 8-9.

[142] *Id*. at 9:1-14.

[143] *Id*.

2020 is underscored by the fact that the GDP growth rate for the second quarter of 2020 experienced the largest decline in history on an annualized basis.[144]

Panhandle's response to Witness Megginson's recommended adjustment to the GDP growth rate is limited to the bare claim that it is "contrary to Commission policy."[145] Panhandle's position ignores the fact that Commission policy requires use of the most recent data and that the GDP growth rate for the second quarter of 2020 experienced the largest decline in history on an annualized basis.[146] Current Commission policy makes clear that parties are entitled to explain how the current volatility in the market will affect growth rates going forward on both a short term and long term basis.[147] Witness Megginson has done that.

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[144] *See* U.S. Department of Commerce, Bureau of Economic Analysis, Gross Domestic Product, 2nd Quarter 2020 (Advance Estimate) and Annual Update, *available at* https://www.bea.gov/data/gdp/gross-domestic-product. The advance estimate released by BEA on July 30, 2020 indicates that real GDP decreased at an annual rate of 32.9 percent in the second quarter of 2020; in the first quarter of 2020, real GDP decreased 5.0 percent. *See* U.S. Bureau of Economic Analysis, *Real GDP: Percentage change from preceding quarter* (Q3 2016 – Q2 2020, seasonally adjusted at annual rates), *available at* https://www.bea.gov/system/files/gdp2q20_adv_chart.png.

[145] Panhandle Initial Brief at 55, n. 233.

[146] Michigan PSC Initial Brief at 41; *see supra*, n. 142.

[147] *Ass'n of Business Advocating Tariff Equity, et al v. Midcontinent Independent Sys. Operator, Inc., et al.,* Opinion No. 569, 169 FERC ¶ 61,129 at PP 153, 460 (2019) ("sophisticated investors do in fact consider long-term economic trends…when estimating the future growth in earnings or dividends."; "the Commission bases its decisions concerning just and reasonable ROEs for public utilities on the most recent information in the record regarding market cost of equity…").

4. The Presiding Judge Should Reject Panhandle's Claim that FERC Trial Staff Witness Johnson's Testimony Is "Plagiarized" And "Should Be Given No Weight".

Panhandle echoes claims it advanced some months ago,[148] in a persistent effort to target FERC Trial Staff Witness Johnson, accusing him of "extensive plagiarism" and "false statements" with respect to his prepared testimony.[149] These charges are now, as they were then, a distraction, and Panhandle's request that the Presiding Judge give no weight to Witness Johnson's testimony should be rejected.

As FERC Trial Staff explained in its Answer to Panhandle's Motion to Strike, "the testimonies of Trial Staff's ROE witness contain the opinions and beliefs of the witness," "Trial Staff's ROE witness filed four separate testimonies in this consolidated proceeding, including three separate, independent, and comprehensive analyses of the appropriate cost of capital for Panhandle," and "Panhandle's various declarations that Trial Staff's ROE witness is not the author of his testimonies is unsupported by the record."[150] Witness Johnson prepared his testimony, represented at the hearing that he agreed with his pre-filed testimony, and capably defended such testimony in the face of more than two days of cross-examination by Panhandle.[151]

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[148] *See* Motion Of Panhandle To Strike Testimony, Suspend Procedural Schedule, Institute Investigation Into The Filing Of Blatantly Plagiarized And False Testimony, And Request Necessary Authority From The Chief Judge For Such Suspension Of The Procedural Schedule And Investigation, filed September 18, 2020 ("Motion to Strike").

[149] Panhandle Initial Brief at 57-62.

[150] Answer of the Commission Trial Staff to Motion of Panhandle Eastern Pipeline Company, LP Motion to Strike Testimony, Suspend Procedural Schedule, and Institute Investigation, at 7 (filed September 23, 2020) ("FERC Trial Staff Answer").

[151] FERC Trial Staff Answer at 7-8.

Trial Staff's retort to Panhandle's baseless accusations bear repeating. Namely, "[a]bsent a change in Commission policy, Trial Staff takes a consistent approach in its interpretation of Commission precedent and in its methodology used to develop cost of capital analyses," and allegations by Panhandle that Witness Johnson's testimony is not his own, are false.[152] Occam's razor instructs the simplest answer – that is, the answer that requires the fewest assumptions – is generally the correct one. As it pertains to Witness Johnson's ROE testimony, Trial Staff explains the "obvious alternative explanation" is that Witness Johnson "reviewed the materials filed by other Trial Staff witnesses and agreed with their conclusions and interpretations," and that it is hardly uncommon for FERC Trial Staff ROE witnesses to share in a "consistent understanding of the ROE methodology set forth in the Commission's precedents."[153] Simply put -- notwithstanding Panhandle's accusations – this is makes sense, and the testimony prepared by FERC Trial Staff's ROE in this case is "no less analytically sound or persuasive because he employed language used by previous Trial Staff ROE witnesses in instances in which he intended to convey the same background information."[154]

Moreover, whether Witness Johnson employed language used by previous Trial Staff ROE witnesses had no impact on Panhandle's ability to discredit this witness with respect to the substance of his testimony via cross-examination. Witness Johnson is the witness defending the ROE testimony submitted by FERC Trial Staff in this case, and

[152] *Id.* at 9.

[153] *Id.*

[154] *Id.*

Panhandle had ample opportunity to cross-examine Mr. Johnson on the substance of that testimony. Panhandle, in fact, had Witness Johnson on the stand for over two days. Unfortunately, Panhandle devoted much of that time to personal attacking Witness Johnson, rather than probing the substance of the opinions expressed in his testimony. Notwithstanding its lengthy cross-examination of this witness, Panhandle failed to discredit Witness Johnson as to the substance of his ROE analysis, and Panhandle to date has failed to put forth any plausible basis for the Presiding Judge to place no weight in such ROE testimony. Panhandle's argument that Witness Johnson's alleged "extensive plagiarism" undermines his credibility and requires that his testimony be given no weight, should be rejected.

Proposed Findings of Fact and Conclusions of Law:

Michigan PSC renews the following proposed findings of fact and conclusions of law, as outlined in its Initial Brief:

1. Panhandle has failed to satisfy its burden of proof to demonstrate that its proposed 14.67 percent ROE is just and reasonable. *See* Janssen Answering Testimony, Exhibit No. MPC-0015; *see* Megginson Answering Testimony, Exhibit No. MPC-0021.

2. Panhandle's proposed ROE is based on outdated data. Bulkley Rebuttal Testimony, Exhibit No. PE-0228 at 26:1-4; Megginson Answering Testimony, Exhibit No. MPC-0021 at 8-9.

3. In proceedings before the Commission, ROE determinations generally use the most recent data in the record, even if such data is outside the test period, "because the market is always changing and later figures more accurately reflect current investor needs." *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228 at P 35 (2018) (*citing Portland Natural Gas Transmission Sys.*, Opinion No. 510, 134 FERC ¶ 61,129 at P 242 (2011) (*quoting Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,117 (2000)).

4. The Expected Earnings and Risk Premium models used by Panhandle to calculate its ROE have been rejected by the Commission, and are inappropriate and should be rejected here. *Ass'n of Business Advocating Tariff Equity, et al v. Midcontinent Independent Sys. Operator, Inc., et al.*, 169 FERC ¶ 61,129 (2019).

5. An appropriate proxy group for purposes of determining a just and reasonable ROE for Panhandle consists of: (1) Kinder Morgan, Inc.; (2) TC Energy Corporation; (3) The Williams Companies, Inc.; (4) Enbridge Energy Company, Inc.; (5) Dominion Energy; and (6) National Fuel Gas Supply Corp. Janssen Answering Testimony, Exhibit No. MPC-0015 at 19:10-15.

6. For purposes of conducting a two-step DCF analysis, it is appropriate to reduce by 50 percent the average GDP growth rate in effect as of March 2020 in light of volatile market conditions and changing investor expectations. Megginson Answering Testimony, Exhibit No. MPC-0021 at 9.

7. The just and reasonable ROE for Panhandle is 11.17 percent, which represents the averaging of the two-step DCF and the CAPM analyses performed by Michigan PSC Witness Kirk D. Megginson. Exhibit No. MPC-0035 at 1 (Michigan PSC Witness Kirk D. Megginson, MPC ROE Recommendation).

V. Depreciation

A. What Is the Appropriate Depreciation Expense?

The Michigan PSC takes no position on this issue.

B. What Are the Appropriate Depreciation Rates?

The Michigan PSC takes no position on this issue.

C. What Is the Appropriate Negative Salvage Depreciation Rate?

The Michigan PSC takes no position on this issue.

D. What Is the Appropriate Terminal Decommissioning Rate?

The Michigan PSC takes no position on this issue.

VI. Billing Determinants

The Michigan PSC takes no position on this issue.

VII. Cost Classification, Cost Allocation and Rate Design

A. Does Panhandle Have Gathering Facilities, and If So, What Is the Appropriate Level of Costs to Classify to the Gathering Function?

The Michigan PSC takes no position on this issue.

B. What Is the Appropriate Classification of Costs Between the Field Zone and Market Zone?

The Michigan PSC takes no position on this issue.

C. What Is the Appropriate Classification of Costs Between Fixed and Variable?

The Michigan PSC takes no position on this issue.

D. What Is the Appropriate Classification of Costs within the Market Zone Between the Categories of Mileage Related and Non-Mileage Related?

Panhandle proposes to classify $266,139,409 of the proposed as-filed transmission cost of service of $338,999,514 as Market Zone fixed costs.[155] Panhandle Witness Sherbenou proceeds to divides $266,139,409 of Market Zone fixed costs into mileage costs of $232,625,784 and non-mileage costs of $33,513,625.[156]

As discussed in its Initial Brief,[157] the Michigan PSC supports the position taken in this proceeding by Vonda K. Seckler on behalf of the Ameren Operating Companies

[155] Exhibit No. PE-0001, Schedule I-2 at 7, Column (e).

[156] *Id*., Schedule I-2 at 8, Columns (c) and (d). *See* Direct Testimony of Panhandle Witness Bradley J. Sherbenou, Exhibit No. PE-0009 at 9.

[157] Michigan PSC Initial Brief at 46-47.

(Ameren), who has demonstrated that Panhandle's total as-filed Market Zone costs of $266,139,409 should be split between mileage-based costs of $121,625,275 and non-mileage costs of $144,514,134, which is an approximate 46 percent/54 percent split.[158]

Proposed Findings of Fact and Conclusions of Law:

Michigan PSC renews the following proposed finding of fact and conclusion of law, as outlined in its Initial Brief:

1. Panhandle's total as-filed Market Zone costs of $266,139,409 should be split between mileage-based costs of $121,625,275 and non-mileage costs of $144,514,134, which is an approximate 46 percent/54 percent split. Direct and Answering Testimony of Ameren Operating Companies Witness Vonda K. Seckler, Exhibit No. AOC-0001 at 19.

E. What is the appropriate method to allocate A&G expenses between transmission and storage?

The Michigan PSC takes no position on this issue.

F. What is the appropriate method to allocate system storage costs to Rate Schedule FT and EFT?

The Michigan PSC takes no position on this issue.

G. Should revenue from Rate Schedule GPS be credited to the cost o*f service or should specific costs be allocated to Rate Schedule GPS?

The Michigan PSC takes no position on this issue.

H. What is the appropriate minimum rate for Rate Schedule GPS?

The Michigan PSC takes no position on this issue.

[158] Direct and Answering Testimony of Ameren Operating Companies Witness Vonda K. Seckler, Exhibit No. AOC-0001 at 19:1-4.

I. How should lost and unaccounted for fuel (LAUF) be calculated for inclusion in Panhandle's rates?

The Michigan PSC takes no position on this issue.

J. What is the appropriate imputed load factor for deriving the Rate Schedule SCT rates?

The Michigan PSC takes no position on this issue.

VIII. Storage

The Michigan PSC takes no position on the storage issues.

IX. NGA Section 5 Issues

The Michigan PSC takes no position on any of the NGA Section 5 issues.

CONCLUSION

Based on the foregoing, the Michigan PSC respectfully requests that Panhandle's cost-of-service and underlying rates be reduced in accordance with resolution of the contested issues in this case.

Respectfully submitted,

Michigan Public Service Commission

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December 7, 2020

TABLE OF ACRONYMS

Accumulated Deferred Income Taxes	ADIT
Capital Asset Pricing Model	CAPM
Discounted Cash Flow	DCF
Internal Revenue Service	IRS
Master Limited Partnership	MLP
Michigan Public Service Commission	Michigan PSC
Natural Gas Act	NGA
Panhandle Eastern Pipe Line Company, LP	Panhandle
Panhandle Municipal Defense Group	PMDG
Return on Equity (ROE)	ROE
Tax Cuts and Jobs Act of 2017	TCJA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic mail or first class mail, upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, D.C., this 7th day of December, 2020.

/s/ Jonathan P. Trotta
Jonathan P. Trotta