

153 FERC ¶ 61,053  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

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| Great Lakes Gas Transmission Limited Partnership | Docket Nos. | RP15-138-000<br>RP15-138-001   |
| ANR Pipeline Company                             |             | RP15-139-000<br>RP15-139-001   |
| ANR Pipeline Company                             |             | RP13-743-000<br>RP13-743-001<br>RP13-743-002<br>RP13-743-003<br>(consolidated) |
| ANR Pipeline Company                             | Docket Nos. | RP14-650-000<br>RP14-650-001<br>RP15-785-000<br>(not consolidated)             |

ORDER ON CONTESTED SETTLEMENT, AND CONTINUING HEARING  
PROCEDURES FOR CONTESTING PARTY

(Issued October 15, 2015)

1. On July 13, 2015, Commission Settlement Judge David Coffman submitted a Contested Settlement Report to the Commission.<sup>1</sup> The Contested Settlement Report includes a Stipulation and Agreement (Settlement), which if approved by the Commission, would resolve all issues set for hearing for the Supporting/Non-Contesting parties. For the reasons discussed below, the Commission will accept the Settlement for the Supporting/Non-Contesting parties. The Commission will sever the remaining party,

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<sup>1</sup> *ANR Pipeline Co. and Great Lakes Gas Transmission Ltd. P'ship*, 152 FERC ¶ 63,003 (2015). Docket Nos. RP14-650 and RP15-785 were not before the Settlement Judge but are also resolved by the Settlement.

DTE Gas Company (DTE), and the severed proceeding shall be remanded to the Chief Administrative Law Judge to commence procedures for hearing.

## **I. Background**

2. The extensive background of these consolidated proceedings is described more fully in the Contested Settlement Report and is considerably abbreviated here.

3. In 1998, the Commission approved a Settlement filed by ANR Pipeline Company.<sup>2</sup> The Settlement's Appendix included a tariff provision permitting ANR to annually adjust its rate to recover Qualifying Transportation Costs (QTCs) recorded in FERC Account No. 858 for the prior twelve month period. QTCs are costs incurred by ANR for the transportation and compression of gas by others under (1) contracts listed in Schedule I-4 of ANR's rate filing in Docket No. 94-43, (2) any contract amendment of those listed contracts, and (3) any contract replacement of those listed contracts. QTCs are recovered through a Deferred Transportation Cost Adjustment tracker (DTCA) listed in ANR's current tariff in section 6.26, General Terms and Conditions. Under the tariff, ANR is required to make a DTCA filing each year if the level of QTCs varies more than 10 percent from the level included in ANR's base rates.

4. ANR alleges Contract No. FT17593 is a replacement contract for a 1970 contract between ANR, affiliate Great Lakes Transmission Limited Partnership (Great Lakes), and TransCanada Pipelines Limited (TransCanada) under Rate Schedule X-1 (X-1 Agreement). Other parties have alleged Contract No. FT17593 does not qualify as a replacement contract under the 1998 Settlement.

5. Under the X-1 Agreement, Great Lakes would deliver to ANR up to 506,500 Dth/d of gas provided by TransCanada at Fortune Lake, Michigan. The agreement requires ANR to redeliver an equivalent amount of gas to Great Lakes at Farwell, Michigan. The exchange of gas was formerly achieved by the displacement of the gas TransCanada shipped on Great Lakes. No DTCA costs were incurred under this agreement because ANR and Great Lakes did not charge one another for the gas delivered by displacement and exchange under the X-1 Agreement. ANR states it relied upon this exchange agreement to meet its firm service obligations in Wisconsin and to avoid construction of additional facilities in Michigan and Wisconsin.<sup>3</sup>

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<sup>2</sup> *ANR Pipeline Co.*, 82 FERC ¶ 61,145 (1998).

<sup>3</sup> ANR Reply Comments at 2.

6. In November 2012, TransCanada reduced its contract demand on Great Lakes, reducing the X-1 Agreement's usefulness for the no-cost exchange and displacement arrangement, because TransCanada was no longer flowing sufficient gas to effectuate the exchange by displacement as before. To continue to meet its firm service obligations, ANR then entered into Contract No. FT17593, a new agreement with Great Lakes to transport 506,500 Dth/d to ANR at Fortune Lake under Part 284 of the Commission's regulations. ANR incurred significant DTCA costs under Contract No. FT17593.

7. On March 28, 2013 ANR filed for authority to impose a DTCA surcharge that would recover \$51.4 million in DTCA costs for the period May 1, 2012 – April 30, 2013. ANR argued that Contract No. FT17593 was a replacement contract, and therefore eligible for QTC recovery through the DTCA tracker. In an April 29, 2013 Order,<sup>4</sup> the Commission required ANR to remove the DTCA tracker costs associated with Contract No. FT17593. ANR sought rehearing of the April 29, 2013 Order.

8. On rehearing, the Commission concluded the term "contract replacement" in the 1998 Settlement, and as reflected in the ANR tariff was ambiguous, and set all matters raised by the filing for hearing, including the meaning of the term "contract replacement," and whether Contract No. FT17593 was consistent with that meaning.<sup>5</sup> The Commission also suggested "[t]he circumstances giving rise to the need for the new contract may also be examined, as well as what other remedies were available and considered by ANR to address the impact of TransCanada's decision to reduce its demand charges on ANR and to reduce its flow on Great Lakes."<sup>6</sup>

9. ANR made subsequent annual DTCA filings on March 28, 2014 in Docket No. RP14-650-000, and on March 31, 2015 in Docket No. RP15-785-000. In both instances, ANR submitted a primary and an alternate filing. The primary filing included DTCA costs from the disputed replacement contract, while the alternate filing excluded such DTCA costs. In both instances, the Commission accepted the alternate tariff filings, rejecting the primary proposals, subject to the outcome of the consolidated proceedings in Docket No. RP13-743, *et al.*<sup>7</sup>

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<sup>4</sup> *ANR Pipeline Co.*, 143 FERC ¶ 61,073 (2013).

<sup>5</sup> *ANR Pipeline Co.*, 147 FERC ¶ 61,124 (2014) (ANR Rehearing Order).

<sup>6</sup> *Id.*

<sup>7</sup> *ANR Pipeline Co.*, 147 FERC ¶ 61,077 (2014); *ANR Pipeline Co.*, 151 FERC ¶ 61,077 (2015).

10. Subsequently, on November 3, 2014, Great Lakes and ANR filed revised tariff sheets removing references to certain transportation contracts (T-Agreements) from their rate schedules on November 3, 2014 in an effort to convert the T-Agreements to Part 284 service (Successor T-Agreements). Great Lakes and ANR had entered into the T-Agreements under Part 157 of the Commission's regulations<sup>8</sup> in 1979 and 1980. Multiple parties protested, arguing that the conversion of these T-Agreements to the Part 284 service was not a routine transaction in the context of the ongoing proceedings over the disputed DTCA replacement contract. On December 3, 2014, the Commission accepted and suspended the proposed tariff filings to convert the T-Agreements, established hearing procedures, and consolidated the proceeding, (Docket No. RP14-650), with the DTCA contract proceedings (Dockets Nos. RP15-138, RP15-139, and RP13-743). Specifically, the Commission set the matter for hearing because "the costs arising from the conversion may well flow through to shippers under the same DTCA mechanism already subject to hearing and review."<sup>9</sup> ANR and Great Lakes each requested clarification and rehearing of the December 3, 2014 Order.

11. After several settlement conferences and accompanying settlement negotiations, by February 6, 2015, all parties but one reached an agreement in principle, with the Commission's Trial Staff in support. ANR filed the Settlement on April 20, 2015. Parties in support filed Supporting/Non-Contesting comments and reply comments in favor of the Settlement, and DTE filed comments and an answer opposing the Settlement. On July 13, 2015, the Settlement Judge issued a Contested Settlement Report for the Commission to consider. On July 14, 2015, the Chief Judge terminated Settlement Judge proceedings, subject to the Commission's action on the Contested Settlement Report.

## **II. The Proposed Settlement Agreement**

12. The Settlement filed by ANR on April 20, 2015 would resolve all issues set for hearing in Docket Nos. RP13-743, RP14-650, RP15-138, RP15-139, and RP15-785. Such issues include (1) the level of costs eligible for recovery under ANR's DTCA mechanism for the period commencing in May 2013 through the Settlement termination, and (2) the abandonment of the T-Agreements, subject to certain reservations relating to cost issues that may arise after the Settlement expires.<sup>10</sup>

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<sup>8</sup> 18 C.F.R. pt. 157 (2015).

<sup>9</sup> *Great Lakes Gas Transmission Limited Partnership*, 149 FERC ¶ 61,200, at P 14 (2014) (Conversion Order).

<sup>10</sup> *Id.*

13. The major features of the Settlement are as follows:
- A. Article I provides background and the procedural history of the proceedings.
  - B. Article II of the Settlement describes the agreed-upon recovery of DTCA costs for four cost recovery periods.<sup>11</sup> For the two earlier recovery periods, the Settlement reflects a specific amount of QTCs eligible for recovery through the DTCA tracker. For the May 2015 through April 2016 period, the Settlement provides for recovery of the lower of a stated amount or actual QTC. For the last period, which includes future periods, the Settlement provides for the recovery of the lower of a stated amount or actual QTC, provided that if the actual QTC is lower than the stated amount, the cost reduction will be shared, with eighty percent of the difference between the two amounts assigned to ANR's customers and twenty percent of the difference assigned to ANR.
  - C. Article III allows for the abandonment of the T-Agreements, effective May 3, 2015, and provides that services previously offered under the T-Agreements will be provided pursuant to contracts authorized under Part 284. Supporting/Non-Contesting parties agree not to oppose the payments ANR will make to Great Lakes for service during the suspension period, November 1, 2014 – May 3, 2015, as stated in the Conversion Order, provided that the payments do not change the QTC eligible recovery by ANR.
  - D. Article IV establishes a rate moratorium that prohibits ANR from placing new base rates resulting from a Natural Gas Act (NGA) general section 4 rate case into effect before May 1, 2016.
  - E. Article V provides that if inclusion of DTCA costs from contract replacements, amendments, or conversions, results in an increase in total QTC from the prior year, those costs should not be recoverable through the DTCA mechanism unless the costs of the contract replacement, amendment, or conversion associated with the increase is

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<sup>11</sup> The four periods are (1) the May 2013 through April 2014 period covered by Docket No. RP13-743-000; (2) the May 2014 through April 2015 period covered by Docket No. RP14-650-000; (3) the May 2015 through April 2016 period covered by Docket No. RP15-785-000; and (4) all periods subsequent to April 2016 for the term of the Settlement.

lower than any functionally comparable alternative within agreed-upon costs levels in Article II.

- F.** Article VI explains how DTCA costs will be recovered, and how ANR shall calculate the surcharges used to recover the QTCs eligible for recovery under the Settlement. Section 6.1 explains how ANR shall calculate surcharges to be used for May 2013 – April 2015, and how the amounts shall be invoiced and paid. Section 6.2 explains how ANR shall calculate the surcharge and collect amounts due for the period May 1, 2015- the effective date of the Settlement. Section 6.3 states that ANR shall calculate the DTCA surcharges in accordance with Article II.
- G.** Article VII allows for ANR and parties to meet annually to discuss a long-term plan for the services needed to meet ANR’s service obligations and for ANR to provide the Supporting/Non-Contesting Parties a cost and revenue report.
- H.** Article VIII addresses the Settlement’s duration, which will continue until a general rate case is filed under section 4 of the NGA or a complaint or the Commission’s initiation of an investigation of ANR’s rates under section 5 of the NGA occurs. Section 8.2 provides ANR the option to propose Account No. 858 costs in an NGA section 4 rate case, and stipulates that parties retain the right to protest or comment on such a proposal. ANR agrees not to argue the Account 858 tracker mechanism is a settled practice on its system.
- I.** Article IX defines and describes Supporting/Non-Contesting entities. Section 9.2 provides that all parties agreed to be bound by the Settlement and outcome of Commission action. Section 9.3 describes that an ANR or Great Lakes shipper that is not a party or a contesting party to the Settlement is deemed to support or not oppose the Settlement. Section 9.4 expressly permits the Commission to approve the Settlement over the objection of a contesting party or to sever the contesting party. Moreover, Section 9.4 states if a party is severed, that party cannot join the Settlement without ANR’s agreement and the rights and obligations of Supporting/Non-Contesting Parties shall not be affected by the outcome of litigation between ANR and the contesting party.
- J.** Article X describes the Settlement’s effective date and prerequisites for the Settlement to become effective.
- K.** Article XI establishes that the Settlement does not resolve or make any determination whether the Successor T-Agreements or Contract No.

FT17593 are contract replacements within the meaning of ANR's tariff, that the change in contract status of the T-Agreements to Part 284 Agreements may not be cited or relied upon by ANR for the proposition that the conversion requirements have been complied with, or that the legal requirements associated with Part 157 abandonment have been met, and nothing in the Settlement shall preclude or adversely affect the ability of the Commission to challenge the level of costs incurred by ANR or the prudence of ANR's incurring such costs in ANR's next general NGA section 4 or section 5 rate case from the date the rate takes effect.

- L. Article XII lists general reservations, including that nothing in the Settlement shall be deemed to create a settled practice within the meaning of *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (1980).
- M. Article XIII contains miscellaneous provisions addressing conditions for requests for rehearing and clarification, termination of proceedings, the non-severability of the Settlement's provisions, the standard of review for requested changes (which states the most stringent standard of review should apply), that no party should be construed as the Settlement's drafter, that the Settlement is the entire agreement, that waivers and amendments to the Settlement must be in writing, that the Settlement discussions are privileged in nature, that the Settlement is binding on the Settlement's successors and assigns, and details the authorized actions through the approval of the Settlement.

14. Since the Settlement provides that the standard of review for changes to the Settlement considered by the Commission shall be "the most stringent standard permissible under applicable law," we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement.

15. The *Mobile-Sierra*<sup>12</sup> "public interest" presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally

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<sup>12</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (collectively, *Mobile-Sierra*).

applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Ass'n, Inc. v. FERC*,<sup>13</sup> however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory "just and reasonable" standard of review on future changes to agreements that fall within the second category described above.

### **III. Comments**

16. As detailed below, supporting comments on the Settlement were filed by Wisconsin Distributor Group, ANR, the Commission Trial Staff, and opposing comments were filed by DTE. ANR, the Commission Trial Staff, Northern States Power – Minnesota and Northern States Power Company – Wisconsin (jointly, Northern States) filed reply comments. DTE filed a motion for leave to answer and an answer to the reply comments.

#### **A. Initial Comments – Supporting/Non-Contesting Parties**

17. WDG explains the Settlement is the "best resolution of the issues that could be achieved short of litigation," and represents months of "give-and-take negotiations" which is the culmination of a lengthy and extensive negotiation process.<sup>14</sup> WDG states that the Settlement is a comprehensive resolution that would "avoid costly and protracted litigation on complicated issues that involve, among other things, the interpretation of a settlement agreement entered into nearly twenty years ago."<sup>15</sup>

18. ANR contends that the Settlement provides operational certainty, rate certainty (until at least until May 2016), and will allow ANR to continue to meet its firm service obligations. ANR further states the Settlement will remove uncertainty created by the suspension of the ANR's and Great Lakes' tariff filings in Docket Nos. RP15-138 and RP15-139, and will promote the Commission's objective of converting individually certificated Part 157 Service to Part 284 Service.<sup>16</sup>

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<sup>13</sup> 707 F.3d 364, 370-71 (D.C. Cir. 2013).

<sup>14</sup> WDG Initial Comments at 3-4 (filed May 11, 2015).

<sup>15</sup> *Id.* at 4-5.

<sup>16</sup> ANR Initial Comments at 4-5.

19. The Commission Trial Staff do not oppose the certification of the Settlement. The Commission Trial Staff contend, “[t]he settlement provides a fair and reasonable resolution of the issues raised in this proceeding. The public interest is well served by a negotiated compromise that balances the interest of ANR with those of [the other parties] and resolves the contested issues.”<sup>17</sup>

**B. Initial Comments – Contesting Party**

20. DTE filed comments opposing the Settlement. DTE asserts the Settlement fails to establish just and reasonable rates, and that the Settlement would result in substantial costs passed through to DTE and its consumers by the DTCA tracker, under which DTE will not receive any incremental benefit.

21. DTE explains that its interests are different from other shippers in the proceeding which support the Settlement because DTE does not use ANR’s storage services, and consequently, does not use ANR’s firm transportation capacity to transport gas to and from storage. DTE argues that approval of the Settlement would require it to pay a share of costs for a service it does not use.<sup>18</sup>

22. DTE argues that it is irrelevant that it is the only opposing party of the proceedings and that the Commission cannot overlook its objections simply because it is outnumbered.<sup>19</sup> DTE argues the Settlement allows ANR to recover amounts in excess of ANR’s actual costs, and is contrary to the FERC policy that disfavors tracker mechanisms. DTE contends ANR has not shown that Contract No. FT17593 and the Successor T-Agreements are contract amendments or replacements, and those terms remain undefined in the Settlement.<sup>20</sup>

23. DTE also argues that the Settlement will continue indefinitely because the Settlement does not place term limits on the expanded DTCA tracker since the DTCA tracker expires only if ANR files a general rate case under section 4 of the NGA, or if a proceeding investigating ANR’s rates under section 5 of the NGA is commenced.<sup>21</sup>

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<sup>17</sup> Commission Trial Staff Initial Comments at 9.

<sup>18</sup> *Id.* P 7.

<sup>19</sup> DTE Comments at 11-12, citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 50 (D.C. Cir. 1999).

<sup>20</sup> *Id.* at 12.

<sup>21</sup> *Id.*

24. DTE contends the Settlement allows ANR to favor affiliate contracts over lower-cost options, and that it has offered ANR a contract for long-term firm transportation service that would reduce the required volumes on Contract No. FT17593 and transport the volumes at a lower cost.<sup>22</sup>

25. DTE states further that the Settlement's QTC caps for future periods do not obligate or adequately incentivize ANR to accept the lowest cost options from unaffiliated third parties, and therefore ANR's customers have additional costs that ANR could have avoided with lower cost alternatives.<sup>23</sup>

### C. Reply Comments – Supporting/Non-Contesting Parties

#### 1. ANR Reply Comments

26. ANR responds that DTE only represents five percent of ANR's revenues, and that the alternative presented by DTE would have resulted in increased costs to ANR and its shippers.<sup>24</sup>

27. ANR contends that implementation of the Settlement in conjunction with the DTCA will not result in over-recovery of ANR's costs, contrary to DTE's assertions.<sup>25</sup> ANR states that due to the caps on the qualifying DTCA costs in the Settlement, it can recover at most 44 percent of the amount in controversy.<sup>26</sup>

28. ANR explains that DTE is both a shipper on ANR as well as a transportation service provider that was unable to sell additional service to ANR.<sup>27</sup> ANR claims that DTE's intent is to leverage the Settlement proceedings into a vehicle to sell its own services, and such an intent is apparent when viewed in conjunction with DTE's lack of

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<sup>22</sup> *Id.* at 14.

<sup>23</sup> *Id.*

<sup>24</sup> ANR Reply Comments at 5.

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 5-6.

<sup>27</sup> *Id.* at 6.

participation in the proceedings prior to the Commission's order establishing the subject Settlement proceedings.<sup>28</sup>

29. ANR argues that the Settlement's cost-sharing mechanism is consistent with the Commission precedent and reasonably balances the interests of ANR and shippers.<sup>29</sup> ANR claims the Settlement does not violate the Commission policy on trackers, or cost allocation principles.<sup>30</sup> ANR further claims that DTE has not shown how a contract between DTE and ANR would be more cost-effective than Contract No. FT17593.

30. ANR contends that the Commission can approve the contested settlement under any one of the four *Trailblazer*<sup>31</sup> approaches for assessing contested settlements.<sup>32</sup>

31. Under *Trailblazer I*, ANR argues that no issues of material fact exist since DTE failed to include an affidavit, which is a prerequisite under the Commission's rules for establishing a genuine issue of material fact. However, if the Commission were to conclude that DTE has raised genuine issues of material fact, ANR contends that the Commission can still find that the Settlement is just and reasonable based on uncontested evidence in the proceeding.<sup>33</sup>

32. ANR explains why DTE's offer for long-term firm transportation service would not transport the volumes at a lower cost, as DTE contends.<sup>34</sup> ANR explains DTE's offer would not have reduced ANR's costs because Contract No. FT17593 provides sufficient flexibility for ANR to meet its seasonal needs at several primary receipt and delivery points.<sup>35</sup> Moreover, ANR argues that all parties are better off with the Settlement, as ANR reduced DTCA costs by approximately 56 percent, and even DTE does not argue

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<sup>28</sup> *Id.* at 6-7.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> ANR Reply Comments at 10-11.

<sup>31</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

<sup>32</sup> ANR Reply Comments to 9-10.

<sup>33</sup> *Id.* at 28.

<sup>34</sup> *Id.* at 29.

<sup>35</sup> *Id.* at 29.

that ANR's acceptance of the DTE offer would result in a reduction of costs below the agreed-upon rate in the Settlement.<sup>36</sup>

33. ANR argues the Commission can approve the contested settlement under the *Trailblazer II* approach if it views the Settlement as a package and determines whether the overall result of the Settlement falls within a zone of reasonableness. ANR contends the Settlement is just and reasonable and that DTE would be in no worse position than if the matter were litigated. ANR states the Settlement results in recovery of only 44 percent of tracker costs ANR would otherwise receive if it prevailed in litigation.<sup>37</sup> ANR also maintains that service provided by Great Lakes to ANR would be more reliable under Part 284 than under the Part 157 Agreements.<sup>38</sup>

34. ANR argues the Commission can also approve the Settlement under the *Trailblazer III* approach. Under this approach, the Commission can approve the Settlement if the benefits outweigh the nature of the objections and the interest causing the party to contest the Settlement is too attenuated. ANR argues that the Settlement's benefits clearly outweigh DTE's attenuated interests as a competitor.<sup>39</sup>

35. ANR argues that severance of DTE, the Settlement's contesting party, under the *Trailblazer IV* approach is a last resort and should not be necessary insofar as the Commission may utilize one of the other three *Trailblazer* approaches.<sup>40</sup> However ANR states if the Commission finds it necessary to sever DTE because the Commission finds it cannot use any of the other three options under *Trailblazer*, severance should be limited to the issues that DTE's Initial Comments contest.<sup>41</sup>

## 2. Northern States Reply Comments

36. Northern States filed joint reply comments in favor of the Settlement. Specifically, they argue if the Commission finds that DTE should not be bound by the

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<sup>36</sup> *Id.* at 31.

<sup>37</sup> *Id.* at 32.

<sup>38</sup> *Id.* at 32-33.

<sup>39</sup> *Id.* at 34.

<sup>40</sup> *Id.* at 35.

<sup>41</sup> *Id.*

Settlement, that the Commission should sever DTE, allowing the Supporting/Non-Contesting parties to preserve the agreement.<sup>42</sup>

37. Northern States suggests that DTE never asserted that the rates proposed by ANR in the DTCA filings were not just and reasonable, or that the contract costs are not QTCs. Further, Northern States contends that DTE's failure to provide an affidavit stating there is a genuine issue of material fact as to whether the costs of the Contract No. FT17593 qualify as QTC costs recoverable under the DTCA demonstrates it did not intend for its comments to be interpreted as alleging a dispute as to genuine issue of material fact.

38. Northern States finds that the Settlement is a "negotiated compromise that dramatically reduces the rate increased proposed by ANR in the DTCA filings and establishes a cap on the amount of QTC that ANR may claim in future DTCA filings."<sup>43</sup> Northern States argues that DTE never took a position on whether Contract No. FT17593 qualify as QTC recoverable through the DTCA tracker.

39. Northern States argues the case to sever DTE is particularly strong.<sup>44</sup> Specifically, Northern States argues that the Settlement is supported by all parties that actively protested ANR's filings. Further, Northern States argues that the Settlement provides for significant reductions from ANR's initial filed rates, and includes an incentive for ANR to control future DTCA costs, to the benefit of shippers. Further, the Settlement allows parties to avoid a lengthy, complex, and costly litigation process to determine the application of a mechanism established in a Settlement over 17 years ago.<sup>45</sup>

### **3. Commission Staff Reply Comments**

40. The Commission Trial Staff suggest that *Trailblazer I* offers the most appropriate legal standard<sup>46</sup> and that the Settlement represents a fair resolution of the issues in this complex proceeding and will provide much needed certainty for ANR and its shippers.<sup>47</sup>

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<sup>42</sup> Northern States Joint Reply Comments at 1-2.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> *Id.* at 10.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> Commission Trial Staff Reply Comments at 1.

<sup>47</sup> *Id.* at 14.

41. Specifically, the Commission Trial Staff state that DTE's comments only raise policy issues since DTE did not submit an affidavit in support of its opposition to the Settlement, pursuant to the requirements in Rule 602 of the Commission's regulations.<sup>48</sup> The Commission Trial Staff claim the absence of the supporting DTE affidavit materially impedes the ability to evaluate the accuracy of DTE's claims.<sup>49</sup>

42. The Commission Trial Staff contend that DTE's issues are without foundation on the merits. Specifically, the Commission Trial Staff state the cost-sharing mechanism in section 2.4 of the Settlement is consistent with Commission precedent and reasonably balances the interests of ANR and its shippers. Further, the Commission Trial Staff contend the Settlement does not violate the Commission policy on trackers, as the issue of whether the tracker should continue to exist was never at issue in the proceeding.<sup>50</sup>

43. The Commission Trial Staff state, moreover, that the Settlement does not violate cost allocation principles, as DTE alleges when it states that it should not have to pay for storage services which it does not utilize. The Commission Trial Staff maintain the allocation and rate design of ANR's system is not at issue in the proceeding. The Commission Trial Staff further assert that DTE has not shown how a contract between DTE and ANR would be more cost effective than Contract No. FT17593, and there is no basis upon which to evaluate this claim.

44. The Commission Trial Staff state if the Commission disagrees with its suggested approach, (approving the contested settlement using the *Trailblazer I* approach), then severance may be an appropriate option under the *Trailblazer IV* approach. The Commission Trial Staff acknowledges that there are "no bright line rules to determine whether severance is appropriate, and the Commission must analyze the nature of the objections and determine whether they can be resolved on the basis of policy, or substantial evidence in the record, or whether additional evidence is needed."<sup>51</sup>

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<sup>48</sup> 18 C.F.R. § 385.602(f)(4) (2015) ("Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact . . .").

<sup>49</sup> Commission Trial Staff Reply Comments at 6.

<sup>50</sup> *Id.* at 10-11.

<sup>51</sup> Commission Trial Staff Reply Comments at 15, citing *Trailblazer Pipeline Co.*, 87 FERC ¶ 61,110 at 61,447 (1999).

**D. Reply/Answer to Answer – Opposing Party**

45. On June 2, 2015, DTE filed for leave to answer the reply comments, and its answer. DTE argues that the record contains no evidence to support pass-through of the costs incurred under Contract FT17593, or the costs of the T-Agreements as QTCs under the DTCA tracker.<sup>52</sup> DTE contends that whether such costs are eligible to be QTCs under the DTCA tracker is the central issue the Commission set for hearing.<sup>53</sup>

46. DTE states the ANR Rehearing Order did find issues of material fact associated with the eligibility for pass-through of the costs of Contract No. FT17593. DTE asserts that it is not relevant that it did not submit a supporting affidavit, because the Commission itself found that there were issues of material fact.

47. DTE argues it is ANR's burden to justify the Settlement's resolution of these issues. DTE also argues that it has not been demonstrated the contracts at issue qualify as "replacement contracts" under the prior Settlement and ANR's tariff, and points out the May 14 Order found sufficient ambiguity as to what the term 'contract replacement' means.<sup>54</sup>

48. DTE also argues it raises policy-based and fact-based arguments that have merit, and the Settlement cannot be approved as just and reasonable without examining them. DTE argues it is a full party to the proceeding and that it has a legitimate and significant interest in the outcome of this proceeding.<sup>55</sup> DTE explains that it did not collaterally attack the existence of the DTCA tracker or the ANR rate design, but rather it challenged the Settlement, as expanding the scope of the costs to be passed through to the DTCA tracker.<sup>56</sup>

**IV. Commission Analysis**

49. We have broad latitude under section 385.602(h) of our regulations to address contested settlements. In reviewing the Settlement, we must determine whether the

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<sup>52</sup> DTE Answer to Answer at 2.

<sup>53</sup> *Id.*, citing ANR Rehearing Order, 147 FERC ¶ 61,124 at P 27; *see also* Conversion Order, 149 FERC ¶ 61,200 at P 14.

<sup>54</sup> *Id.* P 5.

<sup>55</sup> DTE Answer to Answer at 6-8.

<sup>56</sup> *Id.* at 9.

Settlement presents an acceptable outcome for the case that is consistent with the public interests we represent. We must also find that the record is sufficient to support such a determination for all parties, unless we find it necessary to use the *Trailblazer IV* option to ensure the acceptable outcome.

50. Under *Trailblazer*, we can approve a contested settlement through four different approaches: (1) we can render a binding merits decision on each contested issue if there is an adequate record on the case, (2) we can approve the Settlement over the objections of the contesting party if it finds that the overall Settlement as a package is just and reasonable, (3) we can approve the contested settlement over the contesting party's objections if it is found that the contesting party's interest are sufficiently attenuated and that the Settlement can be found to be fair and reasonable, and (4) we can approve the Settlement as to the consenting and unopposed parties, while severing the contesting parties to allow them to litigate the issues raised.

51. We find the fourth *Trailblazer* approach applicable to the circumstances of this proceeding, as discussed below.

**A. Trailblazer I**

52. We find we cannot approve the Settlement under the first *Trailblazer* approach. *Trailblazer I* permits us to approve a contested settlement by rendering a decision on the merits of each contested issue.

53. We conclude the record does not contain substantial evidence that would permit the Commission to make a merits decision as to the justness and reasonableness of the Settlement's pass through of part of the costs incurred under Contract No. FT17593, or the Successor T-Agreements as QTCs under the DTCA tracker. The matters we set for hearing were not fully litigated before a hearing judge. Rather, discussions were held and pleadings were filed in the context of Settlement Judge proceedings. No evidence was proffered that would allow us to determine whether such costs are eligible for recovery. Since this case has not been set for hearing, there has been no opportunity for discovery, reply evidence or cross-examination of witnesses. In such circumstances, we find it inappropriate to decide the merits without the benefit of a further developed record before an Administrative Law Judge. This determination does not imply the Settlement appears unreasonable to us; it only suggests that we will not foreclose the opportunity for DTE to litigate the issues further, as it remains dissatisfied with the outcome of the Settlement.

54. The Settlement appears to fairly share among the settling parties the costs that arose when the exchange by displacement with TransCanada no longer was possible because TransCanada reduced the eastward flow of gas on its system. Many pipelines have found that new sources of gas supply, now accessible with new drilling techniques, have disrupted some pipelines' traditional business models, and forced them to adapt to

these market changes. Absent the Settlement, the new contract costs on ANR and Great Lakes would not be shared, but, depending on resolution of the litigation, would likely either all fall on the pipelines, or all fall on the shippers. The issues set for hearing, including the meaning of “replacement contract,” the intent of the parties to the prior Settlement to determine that meaning and intent, and to determine whether the new Contract No. FT17593 was a reasonable resolution of the disappearance of the TransCanada exchange volumes, would all be part of the litigation. It should also be mentioned that although the prior orders in this case discussed the pipelines’ affiliate relationships as worthy of examination, and whether other remedies were available in lieu of Contract No. FT17593, the orders should not be read as prejudging any issue. Simply put, all the above issues were worthy of examination, and sufficient to support a finding that the relevant filings had not yet been shown to be just and reasonable, but there was no prejudgment as to outcome. Thus, we approve the Settlement resolution for the majority of the parties. Since no actual hearing was held on the issues, however, and DTE is unsatisfied with the Settlement outcome, we find the *Trailblazer IV* approach is the most appropriate approach in this circumstance.

55. Consistent with the above discussion, it was unnecessary for DTE to include a supporting affidavit to establish an issue of material fact because we set the matter of the parties’ intent in creating the DTCA and the resulting tariff language, as well as the facts surrounding the pipelines determination to enter into the disputed “replacement contract” and convert the T-Agreements for hearing.

56. In order to afford DTE a full opportunity to litigate these issues, we decline to approve the Settlement under the *Trailblazer I* approach, although on balance the Settlement appears to fairly and equitably share, among the settling shippers and pipelines, the costs of changing sources of supply on the pipeline systems.

## **B. Trailblazer II**

57. Under the *Trailblazer II* approach, we can approve a contested settlement if it is determined that (1) balancing the Settlement’s benefits against the costs and potential impact of litigation supports the conclusion that the Settlement’s overall result is just and reasonable; (2) the Settlement rates fall within a range of reasonableness; and (3) the Settlement will leave DTE in no worse position than it would be in if the case were litigated.

58. We decline to employ the *Trailblazer II* approach as well, since it is conceivable, though not certain, that DTE might find itself in a better position if it litigates the issues and prevails on all counts. It is entirely unclear whether DTE would be in a worse or better position under the terms of the contested settlement than if the case were litigated. Since DTE has not been afforded the opportunity to avail itself of the discovery and evidentiary process, we do not have a hearing record with discovery-tested evidence or

testimony subject to cross-examination, on which to evaluate the validity of DTE's argument that it would be in a better position to litigate its case; thus we will afford DTE opportunity to pursue its interests through further litigation.

**C. Trailblazer III**

59. Since we have determined that the *Trailblazer I* and *II* approaches are not appropriate in the present instance, we will next consider whether to utilize the *Trailblazer III* approach. We may approve a contested settlement under *Trailblazer III* if (1) DTE's interest is sufficiently attenuated to permit an analysis of the Settlement under the fair and reasonable standard applicable to uncontested settlements; (2) if so, whether the Settlement directly benefits the directly affected settling parties; and (3) if so, whether DTE will have another forum in which to raise its contentions.

60. We find that DTE's interests are not so attenuated from the settling parties to employ the *Trailblazer III* approach. Although ANR contends that DTE's opposition to the Settlement stems from its interest as a competing transmission service with Great Lakes, and not as a firm shipper on ANR's system, DTE is one of the largest firm shippers on the ANR system. Consequently, we decline to utilize the *Trailblazer III* approach in the present circumstance.

**D. Trailblazer IV**

61. Under the *Trailblazer IV* approach, we may approve a contested settlement by severing the contested party. The *Trailblazer IV* approach is appropriate where the benefits of the Settlement support finding that the Settlement is fair, reasonable, and in the public interest as to the Supporting/Non-Contesting parties, and where severing a contesting party, and permitting it to litigate the issues set for hearing, will protect its interests. Although typically a measure of last resort, the severance of DTE from the Settlement is appropriate here, as discussed above. Moreover, though not their preferred *Trailblazer* option, the Commission Trial Staff and the affected pipeline have acquiesced to the *Trailblazer IV* approach here, and it is contemplated by the Settlement.<sup>57</sup>

62. In the instant proceeding, the majority of parties have achieved a Settlement that represents a compromise for all Supporting/Non-Contesting parties, while avoiding litigation, an expensive and time-consuming endeavor. The Settlement allows ANR some cost recovery for services provided through Contract No. FT17593 and the T-Agreements at QTC levels found acceptable by the Supporting/Non-Contesting Parties, at significant reductions from ANR's initial filed rates. The Settlement also resolves the

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<sup>57</sup> The Settlement permits severance in section 9.4.

dispute over prior QTC costs, provides rate certainty to Supporting/Non-Contesting parties, and includes an incentive for ANR to control future DTCA costs, to the benefit of shippers. The Settlement also permits ANR to abandon certain Part 157 contracts while preserving all parties' rights to litigate related cost issues once the Settlement expires. Thus, our acceptance of the Settlement as to the settling parties supports an overall outcome that appears to be fair, reasonable, and in the public interest, and it is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

63. By approving the Settlement for the Supporting/Non-Contesting parties and severing DTE, we allow DTE the opportunity to fully litigate the matters set for hearing while preserving the benefits of the Settlement for the Supporting/Non-Contesting parties.

64. The Settlement resolves the outstanding issues in Docket Nos. RP14-650 and RP15-785, which were not consolidated, but subject to the outcome of the consolidated proceedings in Docket Nos. RP13-743, RP15-138, and RP15-139. Notably, section 9.3 of the Settlement provides that any ANR or Great Lakes shipper that is neither a party nor contesting party to the Settlement is deemed to support or not oppose the Settlement. We note that several parties to those proceedings have not intervened in the consolidated dockets, but find that those parties were adequately notified their interests could be affected by the outcome of the consolidated proceedings<sup>58</sup> since the orders were subject to the outcome of the consolidated proceedings and interested parties had the opportunity to participate if desired.

65. Finally, the Settlement resolves the requests for rehearing or clarification filed in Docket Nos. RP15-138, RP15-139, RP13-743, and RP14-650, with respect to the December 3, 2014 Order in these dockets.<sup>59</sup> Accordingly, the requests for rehearing or clarification are dismissed as moot.

The Commission orders:

- (A) The Settlement is approved as to the Supporting/Non-Contesting parties.
- (B) DTE is severed from the Settlement, and the severed proceeding is remanded to the Chief Administrative Law Judge to establish appropriate hearing procedures.

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<sup>58</sup> *ANR Pipeline Co.*, 147 FERC ¶ 61,077 at P 11; *ANR Pipeline Co.*, 151 FERC ¶ 61,077.

<sup>59</sup> *See* Conversion Order, 149 FERC ¶ 61,200.

(C) ANR's and Great Lakes' respective requests for rehearing and clarification of the December 3, 2014 Order in Docket Nos. RP13-743-003, RP15-138-001, RP15-139-001, and RP14-650-001 are dismissed as moot.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.