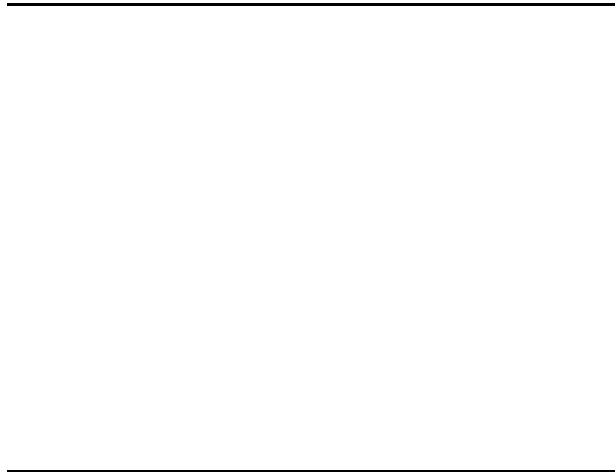


**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

Commissioners: **Robert Pitofsky, Chairman**
 Sheila F. Anthrstaiaia^ •



and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent DTE Energy Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 2000 2nd Avenue, Detroit, Michigan 48226.

2. Respondent MCN Energy Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 500 Griswold Street, Detroit, Michigan 48226.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “DTE” means DTE Energy Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by DTE (including, but not limited to,

- F. “Auditor Agreement” means the Amended and Restated Auditor Agreement made as of the 8th day of February, 2001, between Michigan Consolidated Gas Company, Exelon Energy Company, and Navigant Consulting, Inc., which is contained in Confidential Appendix B to this Order.
- G. “Divested Assets” means all rights, title, and interest acquired by DTE from MCN pursuant to the Merger in all assets and businesses relating to the transportation, distribution and storage of natural gas, and the marketing and sale of natural gas distribution services, for Electric Displacement Load in the Overlap Area, including, without limitation, the following:
1. transportation and distribution capacity, storage capacity, and all other rights and assets used for, associated with, or necessary for the transportation and distribution of natural gas to any and all Electric Displacement Load customers in the Overlap Area;
 2. all customer lists, customer data, vendor lists, sales promotion literature, advertising materials, marketing studies, engineering studies, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;
 3. all rights, title and interest in and to owned or leased real property, together with easements, rights-of-way, appurtenances, licenses, and permits;
 4. all rights, title, and interest in and to contracts (together with associated bids) entered into with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
 5. all rights under warranties and guarantees, express or implied;
 6. all separately maintained, as well as relevant portions of not separately maintained, books, records and files;
 7. all federal, state, and local regulatory agency registrations, permits, licenses, easements, authorizations, franchises, and applications, and all documents related thereto; and

8. all items of prepaid expense;

Provided, however, if Respondents divest to Exelon under the terms set forth in the Divestiture Agreement pursuant to Paragraph II.A. of this Order, “Divested Assets” means the easement and all rights and other assets conveyed by the Divestiture Agreement.

- H. “Divestiture Agreement” means both of the following agreements, if approved by the Commission: (1) the Easement Agreement, and (2) the Auditor Agreement.
- I. “Easement Agreement” means the Amended and Restated Easement Agreement made and entered into as of the 8th day of February, 2001, between Michigan Consolidated Gas Company and Exelon, which is contained in Appendix A to this Order.
- J. “Electric Displacement Equipment” means any natural gas powered equipment

- N. “Generation Equipment” means power generation equipment, including, but not limited to, engines, turbines, or fuel cells.
- O. “MCN Distribution System” means the natural gas distribution system operated by MCN in the Overlap Area, including, but not limited to, the gas pipelines and all related equipment, systems, components, rights and other assets used for, associated with, or necessary for the transportation, distribution or storage of natural gas within the Overlap Area.
- P. “Merger” means the merger of DTE and MCN described in the Agreement and Plan of Merger Among DTE Energy Company, MCN Energy Group Inc., and DTE Enterprises, Inc., dated October 4, 1999, as amended November 12, 1999, and February 28, 2001.
- Q. “New Divestiture Agreement” means any agreement, other than the Divestiture Agreement between the Respondents and Exelon, for the sale of the Divested Assets that has been approved by the Commission to accomplish the requirements of this Order, including any agreement(s) entered into by a trustee pursuant to Paragraph III of this Order.
- R. “Non-EDL” means natural gas consumption for applications or uses that are not Electric Displacement Load.
- S. “Non-Utility Entity” means an entity that has no obligation under state or local law to provide utility service (*i.e.*, the local distribution of electricity or natural gas) to the public in the Overlap Area.
- T. “On-Site Power Generation” means electrical generation from Generation Equipment to the extent that the electrical conductors between the Generation Equipment and facility consuming output from the Generation Equipment: (1) are owned or operated either by a Non-Utility Entity that owns or operates the Generation Equipment, or by the entity that owns or operates the facility consuming output from the Generation Equipment, or both such entities, or (2) are owned or operated by a municipal entity, including a city, village, township or county.
- U. “Overlap Area” means the geographic areas in Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties, Michigan, in which both DTE distributes electricity and MCN distributes natural gas.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the Divested Assets:
1. to Exelon pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), no later than five (5) days after the date on which the Merger is consummated.
 2. *Provided, however,* that if the Commission determines to make the Order final, but notifies the Respondents either that Exelon is not an acceptable acquirer of the Divested Assets, or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondents shall divest the Divested Assets, absolutely and in good faith, and at no minimum price, pursuant to a New Divestiture Agreement within ninety (90) days of the date on which this Order becomes final to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- B. Respondents shall:
1. Maintain, repair, and replace all components and other aspects of the MCN Distribution System:
 - a. necessary for the proper or safe operation of that system; and
 - b. in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.
 2. Operate the MCN Distribution System in a reasonable and non-discriminatory manner, and in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.
 3. Appoint an independent Auditor, subject to the approval of the Commission, that will perform such services as are necessary to effectuate the Divestiture Agreement, including, but not limited to, arbitration of disputes between Respondents and the Acquirer and all other duties and responsibilities set forth in the Divestiture Agreement. The Auditor shall

have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Divestiture Agreement, including the right to propose changes to the Divestiture

- C. If Respondents or a trustee, as appropriate, divest the Divested Assets pursuant to Paragraph II.A.2. or Paragraph III. of this Order, as applicable, Respondents shall execute a New Divestiture Agreement with the Acquirer (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order). Such New Divestiture Agreement shall divest the Divested Assets to the Acquirer pursuant to terms and conditions that receive the prior approval of the

- a. required by rules and regulations adopted by any federal, state or political subdivision, or any agency of any federal, state or political subdivision, having jurisdiction over any aspect of the MCN Distribution System; or
 - b. required for the efficient, non-discriminatory operation of the MCN Distribution System.
5. Provide that the New Divestiture Agreement shall not be modified or assigned without the prior approval of the Commission.
6. Require the Acquirer to agree to the exercise of powers by the independent Auditor as provided in Paragraph II.B.3. of this Order.
7. Permit the Acquirer to sell, lease, or otherwise convey to other persons a portion of any capacity to transport or store natural gas in or through

Provided, however, that with respect to the assets that are to be divested and the contracts that are to be entered into pursuant to this Paragraph II.C, Respondents need not divest such assets or enter into such contracts if: (a) the Acquirer chooses not to acquire such assets or enter into such contracts; and (b) the Commission approves the New Divestiture Agreement without such assets or contracts.

- D. Respondents shall comply with the terms of the Divestiture Agreement or the New Divestiture Agreement, as applicable, which agreement, if approved by the Commission, is incorporated by reference into this Order and made a part hereof. Any failure by Respondents to comply with the terms of the Divestiture Agreement or the New Divestiture Agreement, as applicable, shall constitute a failure to comply with this Order. Further, nothing in the Divestiture Agreement or New Divestiture Agreement shall preclude, or be deemed to preclude, the Commission from bringing any action as may be appropriate under the Federal Trade Commission Act or any other statute enforced by the Commission for any failure by Respondents to comply with this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement or the New Divestiture Agreement, as applicable, any failure to comply with any condition precedent to closing (whether or not waived), or any modification or assignment of the Divestiture Agreement or the New Divestiture Agreement, as applicable, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- E. Pending divestiture of the Divested Assets pursuant to the Divestiture Agreement or the New Divestiture Agreement, as applicable, Respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets.
- F. The purpose of the divestiture of the Divested Assets is to ensure the continuation of a viable and competitive alternative supplier of natural gas transportation and distribution services to EDL customers in the Overlap Area after the Merger, and to remedy any lessening of competition resulting from the Merger as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. The Commission may appoint a trustee to divest the Divested Assets (“Divestiture Trustee”) to an Acquirer and to execute a New Divestiture Agreement that satisfies the requirements of Paragraph II of this Order if:

1. Respondents fail to complete the divestitures required by Paragraph II. of this Order within the time periods specified therein;
 2. Exelon terminates the Divestiture Agreement; or
 3. The Divestiture Agreement is otherwise terminated.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the decision of the Commission to appoint a Divestiture Trustee nor the decision of the Commission not to appoint a Divestiture Trustee shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph III. of this Order to divest the Divested Assets to an Acquirer, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
 2. Subject to the prior approval of the Commission, the Divestiture Trustee

of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Divested Assets to an Acquirer and to enter into a New Divestiture Agreement with the Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III. of this Order to divest the Divested Assets and to enter into a New Divestiture Agreement with an Acquirer in a manner that satisfies the requirements of Paragraph II. of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend such divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondents related to the Divested Assets, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture or other responsibilities. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made to an Acquirer and pursuant to a New Divestiture Agreement in the manner as set forth in Paragraph II. of this Order; *provided, however*, that if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission, *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, engineers, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's divesting the Divested Assets to an Acquirer and entering into a New Divestiture Agreement in a manner that satisfies the requirements of Paragraph II. of this Order.
8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph III. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divested Assets.
12. The Divestiture Trustee shall report in writing to Respondents and to the Commission every two (2) months concerning his or her efforts to divest the Divested Assets.

IV.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the divestiture provisions of Paragraphs II or III of this Order, as applicable, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II or III of this Order, as applicable. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II or III of the Order, as applicable, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.
- B. One year (1) from the date this Order becomes final, annually for the next nineteen (19) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

V.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, subject to any legally recognized privilege and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence,

memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 15, 2021.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: May 15, 2001