

MEMORANDUM

CONFIDENTIAL CORRESPONDENCE ATTORNEY-CLIENT PRIVILEGE

TO: Mayor Gatt
Novi City Council

FROM: Thomas R. Schultz, Esq.

RE: DTE and Storm Clean-up and DTE Issues

DATE: March 9, 2023

This memo is in response to the discussion at the end of the Council meeting on Monday night, during which the Council tasked the City administration with coming back to it with information about storm clean-up options (primarily downed trees/tree limb removal) and DTE outages/failures/accountability. Mr. Cardenas and his staff are putting together information regarding these issues as well, but there are some aspects that require response from our office, so we appreciate the opportunity given at the end of the meeting for the administration and our office to “look into” some of the issues raised and report back.

This memo will address two things that were raised at the Monday night meeting—what kinds of things can the City do to assist private property owners with clean-up outside of publicly-owned areas (e.g., beyond the street rights-of-way) and what avenues are *realistically* available to the City to express concern regarding DTE’s performance during the recent storm events. Mayor Gatt in particular inquired about some sort of formal response to DTE, the MPSC, and/or others. The third issue addressed in this memo is one requested by Councilmember Fischer at the second meeting in February regarding the burying of DTE lines.

It will likely come as no surprise that what follows might not be completely satisfactory, but that’s primarily due to the nature of what’s at issue here: the limits on spending public funds for essentially private purposes, and the limits on local governments to affect a state-regulated entity like DTE.

1. City assistance to private homeowners/business owners for storm-related clean-up.

It’s certainly laudable to want to help private homeowners (and business owners) who find themselves in a bad situation through no fault of their own, faced sometimes with extremely expensive clean-up obligations. But the limitations in Michigan law on spending public funds for private purposes, or on things that are not clearly public purposes, are very intentional and robust. They find their roots in the Michigan Constitution at Art. VII, Sec. 26, and in Art. IX, Sec. 18. These constitutional provisions have been applied by Michigan court rulings and Attorney General

opinions over the years to prohibit local and state governmental expenditures for private purposes and to ensure that governmental expenditures are a “public value for value” exchange. Put simply, the City can expend funds over which it is the public steward only for a public purpose and only if the Constitution or a statute provides authorization (or necessarily implies authorization) for that expenditure. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005).

We think it’s fairly clear that the City has the right and authority to spend public dollars to clean up its own properties and to clean up its own rights-of-ways—hence the idea that if a property owner is able to bring storm damaged tree limbs and materials to the curbside, the City has the ability to take whatever action is necessary to remove those materials.

Where the concern starts is once the discussion turns to leaving that public property and entering onto private property to perform a service. There may be the rare or occasional situation where the public safety is at risk by virtue of a condition on private property. In that case, there might be a possibility of entering onto private property to secure the *public* health, safety and welfare. That would likely not extend, however, to a situation where the public entity would simply be cleaning up or assisting in the clean-up of a non-emergency situation on that private property. (In this same vein, the City has a contract with GFL under which GFL agrees—but only in very limited circumstances—to enter onto private parcels to access trash that the homeowner cannot get to the curb.)

Given the limitations noted here, the information that Council will be receiving from the City administration about storm response will not include significant planned actions on *private* property outside the City’s rights-of-way in most circumstances.¹

2. *Formal reaction to DTE’s performance.*

Mayor Gatt asked us to address the possibility of a formal engagement of DTE and/or its regulators on the latest performance issues. Recently, another community that we represent, the City of Farmington, raised similar concerns following a series of storm events and outages in that city this past summer. After reviewing the possibility of some sort of formal litigation with the Michigan Public Services Commission (MPSC), as well as other options, we ended up working with Farmington on a filing that was made in a pending “Contested Case” that the MPSC itself opened up against DTE and Consumers. The case is U-21305, and it was opened by the MPSC on October 5, 2022, under the title “In the Matter, on the Commission’s Own Motion, to Investigate, Audit and Review the Methods Employed by Consumers Energy Company and DT Electric

¹ Some of the comments at the City Council meeting made reference to senior citizens. The CDBG Funds were noted as an example of funds that are used on private properties for home maintenance and the like. But those are legislatively authorized uses, and there is no similar general authorization for the context that the City is now faced with. There is one state statute relating to “Activities or Services for Older Persons,” MCL 400.571, *et seq.*, that does generally state that “it is a valid public purpose to provide services to older persons.” But when read as a whole it is clear that it contemplates a process (including newspaper notice and public hearings) by which a local unit of government appropriates funds *to another public or private non-profit corporation* for use in providing services to older persons. This is likely not an appropriate vehicle for the particular problems facing private homeowners in this context.

Company to Secure Good Electric Service and Ensure the Safety of the Public Pursuant to MCL 460.55 and MCL 460.56.”

We drafted on behalf of the City a brief comment that was formally submitted to the MPSC. (See attached.) Each of the Councilmembers authorized their signatures to be attached to it. A copy was also sent to various state legislators, at the Council’s request.

The Mayor has asked us to prepare a similar document for Council’s consideration, which we hope to have for circulation to City Council next week.

3. Burying of DTE lines.

As part of the discussions leading up to the ultimate determination to send the comment described above to the MPSC, we also answered the question for Farmington regarding the possibility for burying existing overhead lines and whose expense that would generally be at. This topic is governed by administrative rules published by the MPSC, specifically R 460.516 and R 460.517, which read together say, yes, you can ask DTE to bury existing lines, but the City would bear all the cost of doing so, with the sole exception of a heavily congested business district if it has an ordinance that says DTE should pay.

R 460.516 Replacement of existing overhead lines.

Rule 6. (1) Existing overhead residential, commercial and industrial electric distribution and service lines anywhere in the state shall be replaced with underground facilities at the option of the affected customer or customers.

(2) Before construction is started, the customer shall be required to pay the utility the depreciated cost (net cost) of the existing overhead facilities plus the cost of removal less the salvage value thereof and, also, make a contribution in aid of construction in an amount equal to the estimated difference in cost between new underground and new overhead facilities including, but not limited to, the costs of breaking and repairing streets, walks, parking lots and driveways, and of repairing lawns and replacing grass, shrubs and flowers.

R 460.517 Underground facilities for convenience of utilities or where required by ordinances.

Rule 7. The utility shall bear the cost of construction where electric facilities are placed underground at the option of the utility for its own convenience or where underground construction is required by ordinance in heavily congested business districts.

Having recently researched the cases relating to what constitutes a “heavily congested business district,” it’s unlikely that there are any such areas in Novi (though we’d be happy to address that by separate letter if the Council has an area in mind).

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The City Administration has separately put together information for the Council about how the City would go about including burial of DTE lines in connection with a project. The bottom line, legally, is that in most instances here in Novi, the cost of that would not be borne by DTE.

TRS:jah

Attachment

cc: Victor Cardenas, Interim City Manager
Cortney Hanson, City Clerk

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December 28, 2022

Lisa Felice, Executive Secretary
Michigan Public Services Commission
7109 West Saginaw Highway
Lansing, MI 48197

RE: MPSC Case U-21305: In the Matter, on the Commission's Own Motion, to Investigate, Audit and Review the Methods Employed by Consumers Energy Company and DTE Electric Company to Secure Good Electric Service and Ensure the Safety of the Public Pursuant to MCL 460.555 and MCL 460.556

Public Comment on Behalf of the City of Farmington, Michigan

Dear Ms. Felice:

Please accept and file this letter as a public comment in the above-referenced matter. The City of Farmington ("City" or "Farmington") thanks the Commission for opening this case and providing an opportunity to comment on issues that the City—and more specifically its residents and businesses—are experiencing with DTE's services. The Commission's Order of October 5, 2022, directs DTE (a) to provide updates on its compliance with prior directives of the Commission and commitments made by DTE, and (b) to report on various other issues outlined in the Order. The Order also directs the Commission Staff to begin the process for an independent third-party audit of both DTE's physical infrastructure and its programs and processes. As a basis for its actions, the Commission notes that it has reached "the inescapable conclusion that a series of directives contained in orders following significant storms over the past decade and more has not led to a significant improvement in outage prevention and restoration when compared to peer utilities...." (Order, pg. 14.) The City wholeheartedly agrees.

The Order does not request specific comments from members of the public or from public entities. But because the Commission's conclusions mirror the lived experience of the City of Farmington and its residents over the past many years, the City offers the following.

The decision to file this correspondence with the Commission results in part from the latest round of outages affecting significant portions of the City in the fall of this year—particularly a significant storm in late August 2022, and the failures of DTE during the days that followed. But that storm and related outages were just one instance among many for some areas of the City. While Farmington does not specifically track and document each outage experienced by either the City in its public facilities or residents and property owners in their homes and businesses, the City regularly receives information and complaints from affected residents and property owners and can confidently state that over the past few years there have been dozens of power outages and

interruptions throughout the City. A significant number of those were experienced in the southernmost area of the City, which seems to suffer interruptions and outages not only during storm events, but when none of the surrounding areas—both in the City of Farmington and neighboring communities like Farmington Hills and Livonia—are experiencing outage events.

The City provides a wide variety of municipal services to its citizens, including critical services such as police and fire, and is responsible for maintaining hundreds of miles of local roads, water and sewer lines, and stormwater facilities as well as parks and other public facilities. Service interruptions and power outages affect the City directly because they impair the City's ability to serve the community and increase health and safety risks to the public, which in turn greatly tax the City's resources—impacting everything from municipal employees potentially guarding downed power lines to increased traffic control requirements and emergency response obligations.

As problematic as the loss of power is to a local government entity like Farmington, it can be devastating to residents and businesses, particularly those who experience greater-than-typical interruptions, and to the most vulnerable individuals—our elderly and medically compromised. The frequent interruptions over the past few years have negatively impacted both the safety and the quality of life for Farmington residents—to the point where residents have sold their houses and left Farmington, citing unreliable power as a primary reason.

The City reads the October 5, 2022, Order to be a broad expression of dissatisfaction by the Commission with DTE's efforts to improve its service levels over the past several years and as an attempt to bring a greater sense of urgency and focus on DTE's part. The City supports any such efforts. The Commission, obviously, knows better what information it has asked of DTE and certainly better understands the business of providing electrical service—both technically and practically—than does the City. However, the City suggests that among the myriad issues the Commission will likely get information about, the following deserve particular attention by both the Commission and DTE:

1. *Requiring electric utilities like DTE to do a better job reporting outage causes, frequency, and duration.* One of the things that makes it hard for the City to understand the true extent of the problem of service interruptions within its borders is the lack of detailed information about them—at any time, let alone as they are actually occurring. The City and its residents are often left to their own devices to try to keep track of and to understand what happened and when.

Or even why outages or events have happened—certainly anecdotally it appears that some areas of the City experience a far greater number of outages, and for greater frequency, than others. System-wide metrics and information have value, of course, but detailed information that allows DTE to assess individual area vulnerabilities and needs is ultimately required. Utilities like DTE should be required to track that information and use it to act accordingly to ensure that there is equity and fairness in the level of response by the utility and that comparable levels of attention are being paid to fixing problems that have been identified.

2. *Encouraging even more investment in tree-trimming and vegetation management.* While the City understands from DTE that efforts within the City have been stepped up—

particularly since the storms that swept through the City back in July 2021—it does not appear that all areas of the City have yet been addressed. Despite its awareness of continual service interruptions and complaints by citizens in particular areas of the City, DTE has failed to sufficiently escalate its tree trimming program to address the continual outages in targeted areas.

3. *Focusing on distribution system reliability.* Much of the distribution system infrastructure throughout the City is dated—old or near end of life—and while DTE assures the City that upgrades, replacements, and maintenance will continue to occur, as noted above some areas of the community are simply not benefiting from whatever those efforts are right now.

Some recent conversations with DTE have focused on the potential for undergrounding distribution lines in areas of frequent outages. DTE has proved unwilling to engage in that kind of discussion to date. Unfortunately, that results in a situation where certain sections of the community have fared much worse and will apparently, if DTE has its way, continue to fare worse, with more outages and for greater periods of time than others. This is inherently unfair.

The Commission should do whatever is necessary to achieve a consistent outage rate for all circuits in Farmington by 2024—including opening a case for corrective action specific to Farmington if deemed appropriate. No household in Farmington should experience more outage time than any other household in the City.

4. *But also exploring and utilizing system-wide resiliency.* It is not enough to just upgrade what infrastructure DTE now has in older cities like Farmington. DTE needs to find new ways to harden infrastructure from the increasing frequency and severity of storm events with different kinds of delivery systems or components. DTE should also be required to assess threats to its distribution system that exist outside of DTE's rights-of-ways—e.g., trees on private property.
5. *Considering some rule changes.* Following up on the plan immediately above, it may be time for the Commission to consider some significant rule changes. Two in particular seem relevant to the City's issues. R460.517 sets forth the requirement for the utility to bear the cost of construction only where the utility decides to bury the electric facilities for its own convenience or where underground construction is required by ordinance "in heavily congested business districts." It is time to reconsider that limiting language, because it allows utilities like DTE to avoid having to look at the obvious solution of undergrounding electric facilities in communities, or areas of communities, where frequent outages are occurring. Cities like Farmington cannot typically pay for such things out-of-pocket (nor can affected residents or businesses). But, in some cases, that solution might in fact be the appropriate solution.

R460.516 provides only that a customer may request burying of lines. The Commission should consider amending that rule so that it also allows burying to be required either by ordinance, or where existing overhead distribution and service lines are due for replacement based on maintenance or asset planning requirements, or where existing overhead distribution and service lines are at the end of their useful life.

Finally, the City suggests that the Commission include in its rules an annual outage frequency metric that limits the number of frequencies for an individual circuit to a certain number not to be exceeded within a calendar year. R460.721 or R460.724 seem like likely candidates for inclusion of such a requirement.

6. *Devising and implementing programs that protect the most vulnerable among us.* DTE should have better plans for addressing the true public health and safety issues caused by frequent outages and outages of extended duration for those whose medication requires refrigeration, for example. It should expand and update its billing credit programs to address loss of food and other goods, costs for alternative accommodations during events and/or generator service, etc. Whether these are system-wide improvements or solutions targeted to older or lower-income areas/customers, more needs to be done.

In early 2019, the Commission approved a rate increase of roughly \$273.3 million dollars for DTE. This increase included up to \$282 million dollars for tree trimming through 2021 and \$195.3 million in “capital investments” for DTE’s distribution system. (Case No. U-20162). In May of 2020, the Commission approved a \$183.3 million rate increase for DTE to include new investments in critical infrastructure. The Commission also authorized an extension on of the multi-year tree trimming program through 2020. (Case No. U-20561). These increases were given *on top of* several years and millions of dollars of rate increases granted to DTE by the Commission.

The City and its residents have paid for these rate increases without receiving any measurable gains from them. The tree trimming program in particular has not been implemented effectively within the City. DTE has requested a \$388 million dollar rate increase for 2022 which is currently being reviewed and commented on by MPSC Staff and numerous interested parties. (Case U-20836). The residents of Farmington are continually asked to fund rate increases for DTE—but they never seem to receive the tangible benefit of reliable electric service from doing so.

The City of Farmington hopes that the opening of this case will lead somewhere that the Commission’s efforts to date frankly have not—to the implementation of identifiable and measurable benefits to the captive customers of DTE within the City that have no viable alternative to DTE as an electrical service supplier.

/s/ Sara Bowman
Sara Bowman, Mayor

/s/ Joe LaRussa
Joe LaRussa, Mayor Pro Tem

/s/ Johnna Balk
Johnna Balk, Council Member

/s/ Steven Schneeman
Steven Schneeman, Council Member

/s/ Maria Taylor
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