

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of	)	
<b>WEST BAY EXPLORATION COMPANY</b>	)	
for authority to construct and operate the	)	Case No. U-11445
State Filer #1-10 Pipeline in Manistee County.	)	
_____	)	

At the December 6, 1999 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. David A. Svanda, Commissioner  
Hon. Robert B. Nelson, Commissioner

**OPINION AND ORDER ON REOPENING**

**I.**

**HISTORY OF PROCEEDINGS**

Pursuant to the Commission's May 15, 1998 order in this docket, West Bay Exploration Company (West Bay) received conditional approval to construct and operate the State Filer #1-10 Pipeline in Filer Township, Manistee County. Following a subsequent request by West Bay to revise the pipeline's route, as well as a response in opposition to that request submitted by Filer Charter Township (the Township), the Commission reopened the record to receive additional evidence and argument from the parties.

A prehearing conference was held on June 3, 1999 before Administrative Law Judge James N. Rigas (ALJ) for the purpose of establishing a schedule for the reopened proceedings. West Bay, the Township, and the Commission Staff (Staff) participated in the proceedings.

Additional evidentiary hearings were subsequently conducted on July 26, 1999, at which time testimony was received from five witnesses. Eleven exhibits were also received into evidence in the course of the reopened proceedings. On that same date, a late petition to intervene was filed by the Packaging Corporation of America (PCA).<sup>1</sup>

In accordance with the schedule established by the ALJ, the parties submitted briefs and reply briefs by August 9 and 23, 1999, respectively.<sup>2</sup> On September 22, 1999, the ALJ issued his Proposal for Decision (PFD) in which he recommended approving West Bay's request. The Township filed exceptions on September 30, 1999. West Bay and the Staff filed replies to exceptions on October 5 and 8, 1999, respectively.

## **II.**

### **BACKGROUND**

On July 1, 1997, West Bay filed an application, pursuant to 1929 PA 9, as amended, MCL 483.101 et seq.; MSA 22.1311 et seq., (Act 9) seeking a certificate of public convenience and necessity to construct and operate the proposed pipeline. According to the application, the pipeline would consist of

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<sup>1</sup>No hearing was ever scheduled for PCA's motion and, as a result, the ALJ never acted on its request to intervene.

<sup>2</sup>Although it had not been granted party status, PCA submitted a filing on August 23, 1999 adopting in their entirety the positions set forth in West Bay's brief and reply brief.

two parts. The first would be a flowline transporting sour gas--which is natural gas containing hydrogen sulfide (H<sub>2</sub>S)--from the State Filer #1-10 Well to a treatment plant,<sup>3</sup> and the second would be a salesline transporting sweetened gas from that plant to a point of interconnection with an existing transmission line owned by Michigan Consolidated Gas Company (Mich Con).

West Bay proposed building the gas treatment plant either adjacent to the Morton Salt Company's brine extraction wells in Section 24 or at an abandoned drop forge site in Section 19, both in Filer Township. West Bay had acquired the rights to use either parcel for its treatment plant. However, the application indicated that it was unclear which site the local zoning authority would ultimately authorize West Bay to use. West Bay's application therefore requested approval of both routes, referred to as the Filer 19 and Filer 24 routes, despite the fact that it would construct its pipeline over only one of the routes.

Following contested case proceedings, the Commission issued its May 15, 1998 order granting West Bay authority to construct and operate the proposed pipeline over either of those two routes. That grant of authority was conditioned upon West Bay's submission of an acceptable operation and maintenance plan and emergency operating procedures.

On February 19, 1999, West Bay filed an application (the February 19 application) seeking approval of an amendment to the pipeline's route. Specifically, West Bay sought to change slightly the proposed location of the gas treatment plant (and, correspondingly, the locations of the flowline and salesline that will be connected to the plant) for the Filer 19 route. The February 19 application indicated that the new site for the gas treatment plant and the revised portion of the pipeline's route would be located exclusively

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<sup>3</sup>Generally, before sour gas can be used, the H<sub>2</sub>S must be removed at a processing plant through a process called "sweetening."

on property owned by PCA<sup>4</sup> and directly adjacent to its manufacturing plant. It further indicated that, among other things, the requested change in the pipeline's route (1) reflected West Bay's continuing efforts to place the treatment plant in a location that a majority of the Township's residents would find acceptable and (2) resulted in the pipeline and treatment plant being located further away from populated areas.

On March 22, 1999, the Commission issued an order stating that although the February 19 application was presented as a request for ex parte approval of a pipeline, it more accurately constituted a request for modification of a Commission order pursuant to Section 24 of 1909 PA 300, MCL 462.24; MSA 22.43. As a result, the Commission concluded, all other parties to the contested case proceeding must be given notice of West Bay's application and provided at least 10 days to respond.

On April 14, 1999, the Township filed a response in opposition to the February 19 application. Based on its belief that all gas transported through the proposed pipeline would now be sold to PCA, the Township asserted that the Commission lacked jurisdiction to approve West Bay's request. On April 21, 1999, West Bay filed a reply in which it contended that the Township's opposition was based on various mistakes of fact and law.

The Commission concluded, in its May 11, 1999 order in this case, that these parties' filings raised several issues of fact that needed to be resolved before it could take action on the February 19 application. The Commission therefore ordered that the record be reopened and that the parties be allowed to present additional evidence and argument regarding those issues. However, prior to the start of the

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<sup>4</sup>PCA is the successor in interest to Tenneco Packaging, Inc., (Tenneco). Thus, although testimony and exhibits received in this case occasionally refer to Tenneco, today's order will refer to this entity solely as PCA.

reopened proceedings, West Bay amended the February 19 application. That amendment, filed on June 10, 1999, identified a new point of interconnection between the proposed salesline and Mich Con's transmission system. According to that filing, use of the new point of interconnection (which, like the proposed treatment plant, lies within the property surrounding PCA's plant) would shorten the pipeline by approximately 10,000 feet.

### III.

#### **TESTIMONY AND POSITIONS OF THE PARTIES**

##### West Bay

In the course of the reopened proceedings, West Bay offered testimony from three witnesses. The first, Dennis W. Dunlap, a Senior Engineer with Westshore Engineering & Surveying, Inc., presented an environmental assessment of the pipeline's revised route. Mr. Dunlap testified that, as was the case with both of the proposed routes approved by the Commission's May 15, 1998 order, construction of the pipeline over the route currently proposed by West Bay would produce "no long-term environmental consequences." 4 Tr. 195.

The second witness, Donald D. Schuster, Vice President of Hydrocarbon Technology Engineering, Inc., evaluated the design, cost, and operating plan for West Bay's most recent proposal. According to Mr. Schuster, the pipeline's design is "far in excess of that required by the Michigan Gas Safety Code." 4 Tr. 201. Consistent with testimony offered earlier in these proceedings, he reiterated that to better ensure against a sour gas leak: (1) the pipeline will be buried 12 inches deeper than required by the Gas Safety Code, (2) a warning tape will be placed along the pipeline's route to alert future excavators to the line's existence, (3) the pipe used by West Bay will be unusually thick and will have a special metallurgical

structure, (4) the amount of cold bending during construction will be restricted, special welding procedures will be followed, and 100% of the pipeline's circumferential welds will be tested, (5) corrosion inhibitors will be injected into the pipeline, a liquids removal system will be implemented, and the line will be "pigged" on a regular basis to reduce corrosion, (6) corrosion spools will be installed to monitor the degree of any corrosion that might occur, (7) in-line safety isolation valves and double safety shutdown valves will be installed, and (8) a Supervisory Control and Data Acquisition system will be implemented which, among other things, can automatically activate the safety shutdown valves in the event of a pipeline rupture. Tr. 200-201; Exhibit A-15, p. 4.

West Bay's third witness, its Vice President, Gary L. Gottschalk, testified about the pipeline's proposed operation. According to Mr. Gottschalk, each of the 21 entities that is either a working interest owner or a royalty owner of the State Filer #1-10 Well has agreed to rely exclusively on this pipeline to transport its proportionate share of the natural gas and other hydrocarbon condensate (i.e., butane, propane, etc.) to market. With regard to the natural gas produced from this well, Mr. Gottschalk testified that West Bay--as the operator of the proposed pipeline--entered into "an agreement with PCA whereby PCA has the right, but not the obligation, to purchase gas transported on the pipeline." 4 Tr. 209. He further stated that West Bay obtained permission to connect its salesline to a Mich Con transmission line located near PCA's manufacturing plant, thus making any gas not purchased by PCA "available for ultimate use by anyone with a connection to the Mich Con system." Id. As for the well's condensate, Mr. Gottschalk stated that it would be transported to the gas treatment plant, where it would then be offered for sale to any customer with an interest in purchasing it.

Mr. Gottschalk went on to testify that West Bay decided to further enhance the safety of its pipeline by using an H<sub>2</sub>S scavenger chemical that will bond with the H<sub>2</sub>S and render it inert. Specifically, he stated

that the chemical would be added at the wellhead and would reduce the H<sub>2</sub>S content of all gas in the flowline to levels below 10 parts per million. 4 Tr. 210.

Based on the testimony discussed above, West Bay claimed that the Commission should approve the February 19, 1999 application, as amended on June 10, 1999. According to West Bay, Messrs. Dunlap and Schuster confirmed that (consistent with the previously approved plan for the State Filer #1-10 Pipeline) the current proposal is environmentally acceptable and exceeds the requirements set forth in the Michigan Gas Safety Code. It further asserted that, as noted by Mr. Gottschalk, the proposed pipeline will serve the public convenience and necessity. West Bay thus concluded that the Township's continued arguments in opposition to the pipeline should be rejected and that Act 9 approval again should be granted.

### The Township

The first of two witnesses offered by the Township was its Supervisor, James Espvik. Mr. Espvik stated that, on March 9, 1999, he received a letter from West Bay's attorney (admitted as Exhibit I-21) that contradicts Mr. Gottschalk's testimony on one important issue. According to Mr. Espvik, the letter indicated that "the entire supply of gas mined from the well at issue in this case" would be sold to PCA, rather than being made available for public purchase as asserted by Mr. Gottschalk. 4 Tr. 257.

The final witness offered during reopening was Shirley Ball, the Township's Clerk. Ms. Ball testified that, on April 27, 1999, she received a letter signed by representatives of both West Bay and PCA, as well as a copy of an informational pamphlet entitled "A Report to Our Community on the Filer 1-10 Natural Gas Well." Ms. Ball further testified that based on her reading of the pamphlet, which was received into evidence as Exhibit I-22, "West Bay asserted that the processing plant would serve no one

other than [PCA].” 4 Tr. 260. Thus, like Mr. Espvik, she concluded that Mr. Gottschalk’s testimony was inconsistent with West Bay’s own statements regarding who would benefit from the proposed pipeline.

Based on the information provided by its two witnesses, the Township asserted that (notwithstanding Mr. Gottschalk’s statements to the contrary) the proposed pipeline will be used exclusively to transport gas to PCA. Thus, because the pipeline is intended to serve a private--as opposed to a public--purpose, the Township argued, the Commission lacks jurisdiction to approve West Bay’s request.

### Staff

Although it sponsored no witnesses of its own, the Staff concluded that the evidence offered on reopening does not diminish its support for West Bay’s application. According to the Staff, West Bay consistently and effectively demonstrated an intent to make available for public purchase natural gas and condensate produced by the State Filer #1-10 Well. This, the Staff continued, is consistent with “engaging in the business of buying and selling or transporting natural gas” and thus falls within the scope of Act 9. See, MCL 483.101; MSA 22.1311.

The Staff went on to argue that, contrary to the belief expressed by the Township, Act 9 does not automatically exclude from its jurisdiction pipelines that--for whatever length of time--may transport gas for use by a single end user. Rather, the Staff asserted, Act 9 provides producers the option of consenting to Act 9 jurisdiction if they intend to sell or transport gas for public use either now or in the future. As long as there are adequate reserves to justify building the pipeline and the applicant expresses an intent to make the gas available for public use at some point in the future, the Staff concluded, a finding of public convenience and necessity can be issued.

#### IV.

#### DISCUSSION

##### Existence of Act 9 Jurisdiction

In his PFD, the ALJ noted that no dispute was raised on reopening regarding whether the proposed pipeline (1) is supported by adequate gas reserves, (2) is designed in an environmentally acceptable manner, and (3) will be constructed and operated in a way that satisfies all requirements of the Michigan Gas Safety Code. The only outstanding issue, the ALJ continued, concerned whether West Bay's current proposal "falls within the Commission's Act 9 jurisdiction." PFD, p. 9. With regard to that issue, the ALJ concluded that:

West Bay has evidenced an intent to sell gas to third parties and this is sufficient to create jurisdiction under Act 9. This intent is manifested in the gas purchase agreement between West Bay and PCA. Although PCA may take and pay for all of the natural gas produced by the State Filer #1-10 Well, it is not obligated to take any gas. As a result, West Bay has retained the right to sell gas not taken by PCA to third parties. This intent to sell gas to third parties is sufficient to create jurisdiction under Act 9.

PFD, pp. 9-10. Having concluded that the Commission has jurisdiction to approve the February 19 application, and ruling that the construction and operation of the pipeline would be in the public interest, the ALJ recommended granting West Bay's request.

The Township excepts to that recommendation on the grounds that West Bay does not propose to make natural gas from the State Filer #1-10 Well available for public sale. Among other things, the Township cites the following three factors in support of its argument. First, it contends that the letter from West Bay's attorney to Mr. Espvik clearly shows that all of the gas produced by this well will be sold to PCA. Second, it asserts that statements in the pamphlet received by Ms. Ball indicate that the gas treatment plant will serve no one other than PCA. Third, it relies on statements by Mr. Gottschalk to the

effect that West Bay has entered into “no written agreements” regarding the sale of gas from the State Filer #1-10 Well beyond the one signed with PCA and that PCA has given numerous indications that it intends to “exercise the full right” to purchase that well’s gas. 4 Tr. 228 and 237-38.

Taken together, the Township argues, these factors confirm that the proposed pipeline (at least as it is currently configured) is not intended to serve a public purpose. Rather, the Township continues, West Bay merely intends to use the pipeline to transport its own gas for sale to a single contract purchaser. The Township therefore asserts that the Commission lacks jurisdiction to approve West Bay’s request. In support of this assertion, the Township cites Mich Con v Sohio Petroleum Co, 321 Mich 102; 32 NW2d 33 (1948) for the proposition that the Commission’s jurisdiction does not extend to sales between a single producer and one end-use customer.

In response, West Bay contends that the Township’s position is based on various mistakes of fact and law. For example, West Bay notes that the letter referred to by Mr. Espvik in no way states that all of the well’s natural gas will be sold to PCA. To the contrary, West Bay continues, its attorney took great pains in that letter to dispel any erroneous belief by the Township that the proposed pipeline and its associated gas treatment plant only could be used to provide natural gas to PCA.

With regard to the informational pamphlet discussed by Ms. Ball, West Bay concedes that it states that “the processing plant will serve no one but PCA.” See, Exhibit I-22. Nevertheless, West Bay notes, Mr. Gottschalk specifically testified that “that is not an accurate statement” and should not have been included in the pamphlet because any gas not purchased by PCA will be tendered to Mich Con for transportation and sale to other end-users. 4 Tr. 212. According to him, the mistaken language was prepared by a public relations firm hired by PCA and was intended to dispel unfounded rumors regarding

the possible use of West Bay's plant to treat gas from other wells (some of which produce gas with a much higher H<sub>2</sub>S content than that produced by the State Filer #1-10 Well). See, 4 Tr. 232-35.<sup>5</sup>

Finally, West Bay contends that the Sohio decision relied upon by the Township does not apply to the facts of the present case. As a result, West Bay continues, the February 19 application falls well outside the narrow exception to the Commission's Act 9 jurisdiction established in Sohio. For these reasons, West Bay argues that the Commission should reject the Township's exceptions regarding jurisdiction, adopt the ALJ's recommendation, and grant the February 19 application.

The Commission agrees with West Bay and finds that it should approve the February 19 application, as recommended by the ALJ. It reaches this conclusion for the following three reasons.

First, it appears that Mr. Espvik misinterpreted the letter he received from West Bay's attorney. Specifically, the record reflects that (in his role as Township Supervisor) Mr. Espvik wrote to West Bay on March 4, 1999 directing it to sign a document acknowledging that the proposed pipeline and gas treatment plant "will be strictly and solely used to transport and process product from the Filer #1-10 Well for use by PCA." Exhibit A-20. On March 9, 1999, West Bay's attorney responded with a letter stating, in pertinent part:

Thank you for your March 4, 1999 letter. I am enclosing an acknowledgment form that has been fully executed by [West Bay]. I have rewritten the acknowledgment form to make it technically consistent with the lease agreement between [PCA] and [West Bay]. Our goal, however, is to confirm for the Township that the only gas that may be processed through the proposed facilities is gas which comes from the reservoir currently penetrated by the State Filer #1-10 Well.

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<sup>5</sup>According to West Bay, the more accurate way for the public relations firm to have made its intended point would have been to reaffirm that the proposed pipeline and treatment plant will be used solely to transport and process gas coming from the State Filer #1-10 Well and that PCA has the right to use as much of the well's natural gas as it desires.

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Once the gas has been processed, technically there is no requirement that the processed gas be used by [PCA] at its mill, or even, under limited circumstances where [PCA] does not wish to acquire the gas, that [PCA] be the purchaser.

Exhibit I-21. As can be seen from the last line quoted above, the March 9, 1999 letter from West Bay's attorney to Mr. Espvik clearly states that PCA is under no obligation to use or purchase any natural gas from West Bay. Therefore, the Commission finds that the Township's reliance on that letter is misplaced.

Second, the Township's reliance on a single statement in the information pamphlet received by Ms. Ball (to the effect that West Bay's treatment plant will only be used to treat gas for use by PCA) is likewise misplaced. As repeatedly noted by Mr. Gottschalk, PCA possesses nothing more than a right of first refusal with regard to the gas transported over the pipeline and processed in West Bay's treatment plant. See, e.g., 4 Tr. 209 and 216. Moreover, as asserted by Mr. Gottschalk and confirmed by Section 1.3 of the gas purchase agreement between these two companies, any failure on PCA's part to purchase certain minimum quantities of gas coming out of the treatment plant gives West Bay the right to sell that gas to third parties. See, 4 Tr. 236 and Exhibit A-19, p. 20. The fact that West Bay and Mich Con have formally agreed to establish a point of interconnection just beyond the outlet of the treatment plant (as reflected on Exhibit A-18) provides further proof that West Bay plans to exercise that right when given the opportunity. The Commission therefore finds that the statement set forth in the information pamphlet is against the great weight of the evidence and provides no reasonable support for the Township's position.

Third and finally, the Commission finds the present dispute to be readily distinguishable from Sohio, supra. In that case, the Sohio Petroleum Company sought to build a pipeline for the exclusive purpose of transporting its own gas for sale to a single contract purchaser. In contrast, and pursuant to the joint operating agreement set forth on Exhibit A-17, West Bay will be transporting gas for each of the 21

entities that have an ownership interest in the State Filer #1-10 Well. In addition, gas transported over West Bay's proposed system may be sold to a large number of end-users, instead of the single contract purchaser served by the pipeline in Sohio. This is shown by the fact that (1) PCA possesses nothing more than a right of first refusal regarding the purchase of gas from the State Filer #1-10 Well, (2) any failure by PCA to purchase minimum quantities of gas from this well authorizes West Bay to supply gas to any customer or customers that it desires, and (3) the interconnection of this pipeline with Mich Con's transmission system will enable any end-user that is likewise connected to Mich Con's system to purchase gas from West Bay. See, 4 Tr. 209 and Exhibit A-19, p. 20. Moreover, unlike the producer in Sohio (who steadfastly denied that it would transport gas to anyone other than its single contract customer), West Bay has repeatedly expressed its desire for authority to provide natural gas and other hydrocarbon products to the public at large. The Commission therefore agrees with the ALJ and finds that the facts of the present case fall well beyond the narrow exception to Act 9 jurisdiction established in Sohio. The potential for sales to the public, as has been shown to exist in this case, is sufficient to trigger Act 9 jurisdiction.

This finding, when coupled with the absence of any current dispute regarding the existence of adequate gas reserves and West Bay's proposed satisfaction of all requirements imposed by the Michigan Gas Safety Code, leads the Commission to conclude that the February 19 application should be granted.

#### Leave to Intervene

As noted earlier, PCA filed a late petition to intervene on July 26, 1999. However, as noted in the footnotes on page 1 of this order, no hearing was ever scheduled for PCA's motion, the ALJ never acted

on that request, and PCA's only other participation in these proceedings was to file a statement adopting as its own all positions set forth in West Bay's brief and reply brief.

Because today's order adopts those positions and grants West Bay's application, the Commission finds that PCA's petition to intervene is moot.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1929 PA 9, as amended, MCL 483.101 et seq.; MSA 22.1311 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 165, as amended, MCL 483.151 et seq.; MSA 22.1332(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.
- b. The February 19 application, as revised by West Bay's June 10, 1999 amendment, should be granted.
- c. The Commission's May 15, 1998 order in this case should be modified to allow West Bay to construct its proposed pipeline along the revised Filer 19 route described in the documents attached to the February 19 application and West Bay's June 10, 1999 amendment.

THEREFORE, IT IS ORDERED that:

- A. The Commission's May 15, 1998 order is modified as set forth in this order.
- B. West Bay Exploration Company's certificate of public convenience and necessity to construct and operate the State Filer #1-10 Pipeline is amended to allow construction of that pipeline along the revised Filer 19 route described in the documents attached to West Bay Exploration Company's February 19, 1999 application and its June 10, 1999 amendment.

C. Within 60 days after construction, West Bay Exploration Company shall file a completion report including pressure test data and a map of the State Filer #1-10 Pipeline as constructed.

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

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand  
Chairman

( S E A L )

/s/ David A. Svanda  
Commissioner

/s/ Robert B. Nelson  
Commissioner

By its action of December 6, 1999.

/s/ Dorothy Wideman  
Its Executive Secretary

C. Within 60 days after construction, West Bay Exploration Company shall file a completion report including pressure test data and a map of the State Filer #1-10 Pipeline as constructed.

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MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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By its action of December 6, 1999.

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\_\_\_\_\_ )

Case No. U-11445

Suggested Minute:

“Adopt and issue order dated December 6, 1999 modifying the Commission’s May 15, 1998 order and authorizing West Bay Exploration Company to construct and operate the State Filer #1-10 Pipeline over its revised route in Manistee County, as set forth in the order.”