STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **INDIANA MICHIGAN POWER COMPANY** for approval of its integrated resource plan under MCL 460.6t, avoided costs and for other relief.	))))))	Case No. U-21189

At the August 30, 2023 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Katherine L. Peretick, Commissioner
Hon. Alessandra R. Carreon, Commissioner

ORDER

I. HISTORY OF PROCEEDINGS

On March 30, 2023, Indiana Michigan Power Company (I&M) filed an application in this case (March 30 application), with supporting testimony and exhibits, requesting *ex parte* approval of its Elkhart County Solar Project Renewable Energy Power Purchase Agreement (PPA), Sculpin Solar Project PPA, Montpelier Capacity Only Purchase Agreement (CPA), and Mayapple Solar Project Purchase and Sale Agreement (PSA) (collectively referred to as the projects).

On February 28, 2022, the company filed its multistate 2021 integrated resource plan (IRP) in Michigan under MCL 460.6t in Case No. U-21189. On March 23, 2022, a protective order was approved for use in this case (2022 protective order). Subsequently, on November 14, 2022, I&M, the Commission Staff (Staff), and the Association of Businesses Advocating Tariff Equity filed a

settlement agreement with Energy Michigan indicating its non-objection to the settlement. This settlement agreement was contested by several intervening parties. On February 2, 2023, the Commission issued an order in Case No. U-21189 (February 2 order) approving the contested settlement agreement for I&M's IRP. March 30 application, pp. 2-3; *see also*, February 2 order, p. 103.

The contested settlement agreement, as approved by the February 2 order, provides that I&M will submit *ex parte* applications in this docket seeking approval of costs associated with specific resources for all projects less than 225 megawatts (MW). *See*, contested settlement agreement, p. 6. The contested settlement agreement also allows for reasonable and prudent costs for resources approved in such *ex parte* proceedings to be recoverable in rates, in accordance with MCL 460.6t for cost recovery of resources smaller than 225 MW, for which construction commences within three years of the date of the February 2 order, and that result from a competitive solicitation that complies with the Commission's Competitive Procurement Guidelines. *Id*.

On April 25, 2023, the Michigan Department of Attorney General (Attorney General) and the Citizens Utility Board of Michigan filed joint objections to *ex parte* approval of the March 30 application in this matter. On May 5, 2023, I&M filed a response to the objections. On May 18, 2023, the Commission issued an order denying *ex parte* approval of the March 30 application and scheduling a prehearing conference.

On June 14, 2023, a prehearing conference was held before Administrative Law Judge Christopher S. Saunders (ALJ).

On June 14, 2023, I&M filed the supplemental testimony of Andrew J. Williamson. On June 21, 2023, I&M filed Timothy B. Gaul's revised direct testimony. On July 7, 2023, the Staff

filed direct testimony. On July 13, 2023, the Attorney General filed the supplemental testimony of Douglas B. Jester. On July 20, 2023, the Staff and I&M filed rebuttal testimony.

On June 23, 2023, the Attorney General filed motions to compel and to unseal the record. On July 30, 2023, I&M filed responses to both motions and the Staff filed a response to the motion to unseal the record. Also, on July 30, 2023, a petition for leave to intervene was filed by Savion, LLC (Savion), and on July 3, 2023, Savion filed responses to the Attorney General's motions. EDF Renewables, Inc., filed a letter pursuant to Mich Admin Code, R 792.10413 in opposition to the Attorney General's motions on July 5, 2023.

A hearing on the motion to compel was held on July 6, 2023, at which the ALJ granted intervention to Savion for the limited purpose of responding to the Attorney General's motions and an amicable resolution was reached regarding the motion to compel. 9 Tr 1592, 1597-1601. On July 11, 2023, a hearing on the motion to unseal the record was held. Also, on July 11, 2023, the ALJ approved a second protective order covering only responses to the fifteenth discovery request made by the Attorney General.

On July 26, 2023, the ALJ issued his ruling on the motion to unseal certain testimony (ruling) granting the motion in part and denying in part, as more specifically discussed in Section III, below. On August 9, 2023, I&M filed an application for leave to appeal the ruling (application for leave) under Mich Admin Code, R 792.10433 (Rule 433). On August 23, 2023, the Attorney General filed a response in opposition to the application for leave to appeal.

An evidentiary hearing was held on July 25, 2023, at which cross-examination was waived and the pre-filed testimony and exhibits were bound into the record.[1] On August 2, 2023, I&M,

[1] On August 4, 2023, the ALJ issued a ruling allowing the reopening of the record for the limited purpose of admitting the supplemental direct testimony of Andrew Williamson on behalf

the Staff, and the Attorney General filed initial briefs. On August 9, 2023, the Staff filed a revised initial brief. On August 9, 2023, the Staff and I&M filed reply briefs. On August 10, 2023, I&M filed a revised initial brief. Portions of the testimony were filed confidentially, and confidential versions of all of the briefs were filed.

II. EVIDENTIARY RECORD

The evidentiary record on the March 30 application for approval of the projects consists of over 250 pages of transcript contained in 5 volumes and 21 exhibits.[2] Unless otherwise noted, all citations to briefing in this order refer to the briefing regarding the March 30 application for approval of the projects and not the contested settlement portion or the underlying record in this case. In addition, transcript citations are to the public, non-redacted transcripts.

A. Direct Testimony

1. Indiana Michigan Power Company

I&M presented the testimony of three witnesses: D. Dean Koujak, Andrew Williamson, and Timothy B. Gaul.

D. Dean Koujak

Mr. Koujak is employed by Charles River Associates (CRA) as a principal in the energy practice. Mr. Koujak testified that CRA served as the independent monitor (IM) in the request for

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of I&M. Therefore, Volume 16-A was added to the docket with Mr. Williamson's supplemental direct testimony.

[2] This is in addition to the 234 pages of transcript and 23 exhibits admitted as part of the contested settlement portion of the proceeding and the 1,340 pages of transcript and nearly 200 exhibits admitted into evidence as part of the underlying record in this case.

proposals (RFP) process at issue in this proceeding. 11 Tr 1656. He indicated that in the role of IM:

> CRA oversaw the design and development of the RFP, conducted the stakeholder engagement process, administered the solicitation including the issuance of the RFP, handled Q&A [questions and answers] process, and the receipt of the proposals. CRA performed the threshold and eligibility analysis on all proposals received, and then oversaw the balance of the evaluation process conducted by I&M. In addition, [CRA] oversaw all bidder communications during the pendency of the solicitation process to shortlisting. CRA was consulted during the negotiation process with regards to negotiated changes to assess whether such changes would impact the integrity of the process and final selection results.

11 Tr 1656.

Mr. Koujak also stated that, in overseeing I&M's competitive solicitation process, he concluded that the shortlisted projects, which included the projects included as part of the immediate application, were reasonable and prudent. He described Exhibit IM-1, the IM's report on the solicitation process, as identifying the scope of oversight and findings regarding fairness and consistency of the process utilized. Mr. Koujak stated that:

> [i]n CRA's review of the RFP documents and evaluation process, [CRA's] assessment of the RFP process concludes that: (i) I&M developed the RFP documentation in a clear and transparent manner; (ii) I&M performed the evaluation on a fair and consistent basis in-line with the process noted in the RFP; (iii) the criteria used in the evaluation is in-line with typical utility practice and reasonable to achieve the goals of the RFP; (iv) the shortlisting of finalists was also performed on a fair and consistent basis with the process published in the RFP; and (v) there is no evidence that the evaluation and selection process caused any unfair advantage or disadvantage to any interested respondent.

11 Tr 1658-1659.

Finally, Mr. Koujak testified that the projects were the result of a competitive process, compliant with the Commission's Competitive Procurement Guidelines, and are reasonable and prudent. Specifically, he stated that I&M's RFP process at issue satisfied the oversight requirements by utilizing CRA as the IM, that CRA "validated the selection results through a

thorough review of both the non-economic and economic criteria as applied to each evaluated proposal," and that "[t]the shortlisted proposals were consistent with the process established as a result of the stakeholder sessions . . . ." 11 Tr 1659.

Andrew J. Williamson

Mr. Williamson is the Director of Regulatory Services for I&M. He testified that the projects are consistent with I&M's approved IRP. Mr. Williamson indicated that I&M utilized an all-source RFP, which allowed "for an open, non-discriminatory, competitive procurement process that considered both third-party (Power Purchase Agreements or PPAs) and utility ownership." 11 Tr 1673. He stated that the company engaged CRA to act as the IM and manage the stakeholder process.

Mr. Williamson further testified that I&M's "IRP identified a significant need for new supply-side resources, beginning in 2025 through 2028, to replace the capacity and energy associated with the Company's Rockport Plant which will retire by the end of 2028." 11 Tr 1674-1675. More specifically, he indicated that the Elkhart County Solar Project Renewable Energy PPA, the Sculpin Solar Project PPA, and the Mayapple Solar Project PSA "represent 504 MW of new solar generation resources that are consistent with the Company's 2,160 MW of carbon-free resources to be added by 2028 in the IRP" and that the Montpelier CPA "is a 7-year capacity-only purchase I&M has entered into with Rockland Capital for 210 MW of firm PJM [Interconnection, L.L.C. (PJM)]-accredited capacity . . . consistent with the 750 MW of fully dispatchable generation resources to be added by 2028 in the IRP." 11 Tr 1675.

With respect to the levelized cost of energy (LCOE), Mr. Williamson stated that comparing the LCOEs of the solar resources in the IRP to the final LCOEs for the projects Figure AJW-2 demonstrates that they are consistent with each other. 11 Tr 1676. With respect to the Montpelier

CPA, Mr. Williamson testified that it "provides a unique opportunity to balance I&M's immediate need for firm long-term capacity with the opportunity in seven years to re-evaluate options for flexible and dispatchable resources." 11 Tr 1678.

Mr. Williamson further indicated that:

> I&M is requesting Commission approval to defer and record as a regulatory asset the incremental costs associated with the Mayapple Solar PSA, until such time as these costs are reflected in I&M's base rates. Beginning upon commercial operation, each month I&M will defer the associated depreciation expense (including net salvage and asset retirement obligation expenses), pretax carrying costs, operation[s] and maintenance (O&M) expenses, Production Tax Credit (PTC) benefits, and property tax expenses. I&M requests deferral accounting continue until the earlier of when the capital investment and associated costs are reflected in I&M's base rates or 30 months from the commercial operation date (COD) of the project, consistent with the Settlement Agreement in Case No. U-21189.

11 Tr 1678. He testified that the plan is to elect PTCs for the Mayapple Solar Project PSA "because, it is expected, PTCs will produce a lower cost of service for the Company's customers due to the magnitude of the tax credits received and how they can be reflected in retail rates." 11 Tr 1679. Further, Mr. Williamson explained that PTC benefits are realized over the first 10 years of the project and deferral accounting is requested to better smooth recognition of benefits over the life of the project; he also explained that Figure AJW-3 depicts how this will result in a less variable cost of service for customers. *See*, 11 Tr 1679-1680.

Mr. Williamson also described I&M's plan to monetize PTCs if it is determined to be beneficial for customers as follows:

> • In the event the Company forecasts the utilization of PTCs earned in a year will be delayed greater than one year, the Company will evaluate monetization of such PTCs based on the expected economics of monetizing them at a discount versus the expected delay in utilization.
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> • To the extent PTCs are monetized, the net realized value will be recognized in I&M's ongoing accounting and ratemaking in the PSCR [power supply cost recovery].

• To the extent PTCs cannot be utilized and have not been monetized, such PTC benefits will be recorded as a deferred tax asset and reflected in rate base.

• I&M will report on the monetization of PTCs in its annual PSCR filings.

11 Tr 1681. In addition, he indicated that the company is requesting authority to use PSCR proceedings "to flow through the net realized value of PTCs as they are being utilized and reducing I&M's annual tax expense" and that this "ratemaking treatment would begin as of the same date the project, and associated revenue requirement, is reflected in I&M's base rates." 11 Tr 1681-1682. Prior to that, he explained that I&M would defer the net realized value of the PTCs with the deferral of the revenue requirement as requested above.

With respect to costs associated with the Elkhart County Solar Project Renewable Energy PPA, Sculpin Solar Project PPA, and the Montpelier CPA, Mr. Williamson indicated that "[t]hese costs represent power supply costs that will be accounted for, in accordance with the Federal Energy Regulatory Commission (FERC) Uniform System of Accounts (USofA), as purchased power expenses and will be included in I&M's PSCR filings beginning upon the year the PPA or CPA commences." 11 Tr 1682.

Mr. Williamson averred that the projects and the Lake Trout Solar Project, pending in Case No. U-21377, are integral to the company's overall generation transition strategy and that this portfolio of projects will fulfill the capacity need created by the transition of Rockport Unit 2. He noted that, in addition, "the portfolio of solar resources is expected to produce energy during peak periods at no incremental fuel cost to I&M's customers and will also provide incremental revenue opportunities by monetizing RECs [renewable energy credits]." 11 Tr 1683.

In summary, Mr. Williamson contended that "the Project costs are reasonable because they are a product of competitive solicitation and arm's length negotiations that was conducted consistent

with the Commission's Competitive Procurement Guidelines" and that "the costs relate to resources that are needed to ensure I&M can continue to meet its customer capacity obligation as determined by PJM Interconnection, LLC and are consistent with the Company's IRP that the Commission approved in Case No. U-21189." 11 Tr 1684. Therefore, Mr. Williamson averred that the Commission should approve the projects as consistent with the company's approved IRP.

Timothy B. Gaul

Mr. Gaul is the Director – Regulated Infrastructure Development of American Electric Power Service Corporation (AEPSC), a subsidiary of American Electric Power Company, Inc. (AEP) which "supplies engineering, financing, accounting, regulatory, and similar planning and advisory services to AEP's regulated electric operating companies, including I&M." 11 Tr 1688. He summarized the projects selected as a result of the 2022 RFP as two PSAs for a total of 469 MW of solar resources, two PPAs for a total of 280 MW of solar resources, and one CPA for 210 MW of natural gas peaking capacity. Mr. Gaul noted that one of the PSAs, the Lake Trout project, is the subject of a separate certificate of need (CON) proceeding in Case No. U-21377. He further indicated that "[a]ll of the projects are connected to the PJM grid, and all are located in Indiana within I&M's service territory except for the Mayapple Project, which will directly connect with an AEP transmission line." 11 Tr 1691.

Mr. Gaul described the 2022 RFP as seeking "approximately 500 MW of solar, 800 MW of wind, and other supplemental capacity resources through either PPAs or PSAs to meet the overall capacity and energy needs of the Company identified in the approved IRP . . . ." 11 Tr 1692. He averred that the RFP was designed to allow open and nondiscriminatory competitive solicitation considering both third-party and utility ownership and a range of resource types to meet I&M's needs. Further, he stated that all projects were required to be "pursuing a PJM interconnection

service agreement or have firm transmission from MISO [Midcontinent Independent System Operator, Inc.] into PJM to be considered eligible for consideration." 11 Tr 1693. He contended that prior to the issuance of the RFP, the company retained an IM, who drafted the RFP based on the company's needs, assessed the pool of projects in the PJM approval process, and engaged with stakeholders. Mr. Gaul described his role in the 2022 RFP process as "to oversee and facilitate the RFP process through its development, administration, evaluation, negotiation, and agreement execution phases for the Project, which is the subject of this proceeding. [He] also served as the primary contact for coordination with the Independent Monitor and I&M throughout the process." 11 Tr 1694. He noted that I&M retained CRA to serve as the IM and that the IM "managed the RFP process and helped support the design and development of the RFP; led the stakeholder engagement process and feedback; conducted the Eligibility and Threshold (E&T) review for all proposals; and monitored the RFP administration from issuance to selection." 11 Tr 1694.

Mr. Gaul testified that I&M developed the RFP to comply with the Commission's Competitive Procurement Guidelines and that it was structured to be "non-discriminatory and flexible with respect to technology, allow for project sizes as small as 5 MW, allow for stakeholder input in the development of the RFP prior to its issuance, and consider both third-party and utility ownership structures." 11 Tr 1695. He indicated that stakeholder communications began in early January 2022 and that the IM facilitated the stakeholder engagement process including hosting an RFP website sharing information about the RFP development and issuance. Mr. Gaul detailed the RFP stakeholder process including the RFP development meeting, and the release of a draft RFP, and noted that stakeholder input "was received, responded to, and where reasonable, incorporated into the Final RFP that was issued on March 10, 2022, via the CRA website." 11 Tr 1696.

Mr. Gaul testified that the proposal review and project selection process had four general steps: (1) bid clarification and E&T review, (2) detailed analysis and due diligence, (3) shortlist identification and negotiations, and (4) final project selection and agreement execution. He noted that, as described in the IM's report, "12 unique respondent submissions were received for wind, solar, and supplemental capacity resources for a total of thirty-two proposed projects." 11 Tr 1696. After receiving proposals, Mr. Gaul stated that they were reviewed for completeness and bidders were provided an opportunity to provide clarifying information, as necessary. He further elaborated that "[a]n initial review of the proposals was conducted by the Independent Monitor to ensure all bids conformed with the E&T requirements listed in the 2022 RFP Section 9.1" and that "[t]he E&T requirements included criteria such as meeting the RFP target commercial operation date, minimum project size, location of proposed resources, interconnection status, and minimum design life." 11 Tr 1697. Mr. Gaul continued, explaining that the E&T review was conducted simultaneously with the bid clarification process and if any proposal did not meet the requirements of the RFP it "was deemed to be ineligible for further evaluation and the bidder notified accordingly." 11 Tr 1698.

Mr. Gaul testified that the projects that passed the E&T review went through a detailed analysis and scoring process from a multidisciplinary team with expertise in each non-price factor. He indicated that the economic analysis accounted for 60% of a proposal's total score while 40% of the total score related to non-price factors. Further, he stated that the IM reviewed all scores for reasonableness and consistency and that the scores allowed I&M "to objectively evaluate and rank

each eligible bid, which informed the decision to move forward with negotiations and further due diligence on the proposals." 11 Tr 1698.

With respect to the economic analysis, Mr. Gaul testified that:

> [t]he analysis included inputs directly from the proposals, such as the bid price, interconnection costs, and term length. It also included various inputs from the interdisciplinary team such as transmission congestion and line loss estimates, estimated operation[s] and maintenance costs, and other operating company specific modeling variables such as applicable federal tax credits and financing assumptions. The Economic Analysis resulted in several key price metrics that were used to determine the ultimate price score for each of the proposals.

11 Tr 1699. He indicated that price comparisons were made in a two-phased process with the first phase focusing on assessment and comparison of projects with similar generation type, and the second phase comparing projects across technology types using a value to cost ratio. In the non-price analysis, Mr. Gaul stated that there were 10 non-price factors considered within four categories. *See*, 11 Tr 1700-1701. He noted that "[t]otal scores for all the eligible bids ranged from roughly 55 to 93 out of 100." 11 Tr 1701. Further, Mr. Gaul testified that "[a] total of seven project proposals were selected for further shortlist contract negotiations" while only "five of the seven projects were successfully negotiated." 11 Tr 1702.

Mr. Gaul described contract negotiations as beginning once bidders were notified that they had been selected for shortlist negotiations and that "[d]ue diligence efforts contained in this phase focused on further review and assessment of each project's site development plans, land agreements, and local approval status, grid interconnection studies and status, as well as continual refinement of the engineering studies, design expectations, and construction scope of work to support negotiations." 11 Tr 1702. He indicated that four solar project agreements and one capacity-only contract were successfully executed after shortlist negotiations.

Mr. Gaul stated that a range of market pressures influenced the bid and negotiation process including:

> the Uyghur Forced Labor Prevention Act (UFLPA) and subsequent detainment of module deliveries by US Customs and Border Protection, Russia's invasion of Ukraine, the initiation of the Antidumping Duty and Countervailing Duty (AD/CVD) investigation by the U.S. Department of Commerce (Commerce), the enactment of the Inflation Reduction Act (IRA), the release of guidance around the IRA's Prevailing Wage and Apprenticeship (PWA) requirements, PJM interconnection queue reform, and the rise in inflation and interest rates.

11 Tr 1703. He further noted that ongoing supply chain issues and delays in the interconnection process had the most impact on project schedules. *See*, 11 Tr 1704. Mr. Gaul described additional market pressures such as the cost in raw materials, equipment costs, interest rates, and labor, which impacted bid pricing and the contract negotiation process. 11 Tr 1705-1707.

Mr. Gaul explained that the Mayapple Solar Project "is located in Indiana and will produce 224 MWs of solar generation using single axis tracking design" and "is expected to be capable of producing enough energy to power approximately 67,200 homes." 11 Tr 1710. He stated that the developer is Lightsource bp, which is an established developer of renewable energy projects. Further, he indicated that the project is expected to be operational in May 2026. Mr. Gaul described the customer protections built into the PSA and noted that "[t]he Mayapple project will be developed in a manner that is compliant with the PWA requirements under the IRA to ensure that I&M's customers will benefit from the full value of the PTCs." 11 Tr 1711.

Mr. Gaul stated that the Elkhart County Solar Project will also be located in Indiana, will produce 100 MW of solar generation, and is expected to be able to produce enough energy for approximately 30,000 homes. 11 Tr 1713. The developer for this project is Savion, which Mr. Gaul indicated has vast experience in operation, construction, and contracting of solar energy

projects. 11 Tr 1714. The Elkhart County Solar Project has a projected operational goal prior to December 31, 2025.

He stated that the Sculpin Solar Project will also be located in Indiana, able to produce 180 MW of solar generation using single axis tracking design, and capable of producing enough energy to power about 54,000 homes. 11 Tr 1715-1716. The developer for the Sculpin Solar Project is EDF Renewables North America, which has 35 years of experience in renewable energy. 11 Tr 1716. Mr. Gaul testified that the Sculpin Solar Project is expected to be in operation by December 15, 2025.

Mr. Gaul stated that "[t]he Montpelier CPA is a capacity-only contract I&M has entered into with Rockland Capital for 210 MW of PJM accredited capacity" and that "[t]he CPA is for a seven-year term starting in PJM capacity year 2027/2028 and ending in 2033/2034." 11 Tr 1717-1718. He described the benefit of contracting with an existing asset as providing the "necessary and timely capacity without any of the development risks currently impacting new generation builds." 11 Tr 1719.

Mr. Gaul testified regarding the project costs, opining that the costs are aligned with the costs as projected in the approved IRP. He further indicated that the RFP process was a competitive procurement process consistent with the Commission's Competitive Procurement Guidelines. *See*, 11 Tr 1720-1721.

2. Commission Staff

The Staff presented the testimony of Naomi J. Simpson, Marceline A. Champion, and Zachary C. Heidemann.

Naomi J. Simpson

Ms. Simpson is the manager of the Resource Optimization and Certification Section of the Commission. Ms. Simpson testified regarding the Staff's recommendation on I&M's March 30 application. She described the contracts at issue before setting forth the Staff's recommendation to approve the contracts. Ms. Simpson indicated that "[t]hese resources support and fully comply with the Company's recently approved IRP." 11 Tr 1765. Moreover, Ms. Simpson testified that the contract selection process was reasonable, that the costs are within the range modeled in the resource tiers of the IRP, and that the resources are necessary to serve customers given the upcoming closure of the Rockport Power Plant.

Ms. Simpson also testified that when evaluating the projects under consideration in this case, as well as the Lake Trout PSA pending in Case No. U-21377, I&M "has collectively achieved a 51% PPA / 49% Company-owned split, rounded to the nearest whole percentage." 11 Tr 1765. She noted that the company is seeking deferral accounting authority for the Mayapple Solar Project PSA, which the Staff generally finds to be "reasonable, provided the deferral accounting treatment will be limited to 30 months from the month a project is placed into service, as detailed in term 4d of the Settlement Agreement approved in the underlying IRP proceeding." 11 Tr 1766 (citing 11 Tr 1679-1681). Ms. Simpson also testified that I&M's plan to extend the PTC benefits for the Mayapple Solar Project PSA over 20 years is reasonable as it would provide a smoother rate transition. 11 Tr 1766 (citing 11 Tr 1679-1681).

Marceline A. Champion

Ms. Champion is a Public Utilities Engineer in the Resource Optimization and Certification Section of the Commission. She provided testimony with respect to the RFP process, utilization of an IM, and adherence to the Commission's Competitive Procurement Guidelines. Ms. Champion

first described the projects and indicated that the RFP was issued on March 10, 2022, to satisfy the needs identified in I&M's IRP.

Regarding the RFP, Ms. Champion stated that I&M worked with AEPSC and the IM to develop the RFP based upon capacity needs in the 2021 IRP and that the IM engaged with stakeholders beginning in January 2022. In response to the RFP, Ms. Champion testified that I&M received 32 proposals from 12 bidders. She noted that, of the 32 projects submitted, some were additional configurations of the same project. Ms. Champion stated that the IM "conducted an initial Eligibility and Threshold (E&T) Review to determine if the proposals received conformed to the RFP requirements." 11 Tr 1771-1772. She continued, stating that "[t]he projects that made it through the E&T Review were then subject to an Economic Analysis, which accounted for 60% of the point total, and Non-Price Analysis, which accounted for 40% of the point total, to determine the projects' final scores." 11 Tr 1772. Ms. Champion stated that a total of seven projects were selected, with five being successfully negotiated, four of which are the subject of this case.

Ms. Champion testified that I&M used CRA as the IM for the development of the RFP, to complete the E&T review, and to lead the stakeholder engagement process. She further stated that the E&T review was independent of I&M. Ms. Champion stated that "[t]he IM determined that the E&T Review was typical and reasonable of similar RFPs. CRA further found that using the economic and non-price factors was reasonable as compared to standard utility procurement practices." 11 Tr 1773.

Next, Ms. Champion described the Commission's Competitive Procurement Guidelines as established in the September 9, 2021 order in Case No. U-20852 (September 9 order). She noted that the Competitive Procurement Guidelines are not legislatively mandated or required but are

guidelines to help determine the reasonableness and prudence of resource procurement. Ms. Champion averred that I&M's RFP followed the Commission's Competitive Procurement Guidelines. 11 Tr 1774.

Ms. Champion indicated that compared to an IM, an Independent Administrator (IA) offers "a more optically transparent approach that satisfies the recommendations of the Competitive Procurement Guidelines" but that it comes "at the cost of the Company not being able to engage in contract modifications, due to the more mechanical nature of the process, or to see other shortlisted bids, if the originally selected project becomes no longer viable." 11 Tr 1774. She further stated that the Staff prefers that an IA conduct all aspects of the competitive procurement process; however, she noted that given the guidelines are not mandated because a utility has leeway in how to run its own competitive procurement process. Given this, Ms. Champion testified that the Staff:

> suggests the Company investigate the possibility of combining the two roles of the IA and the IM to allow for independent oversight that is transparently optimal, while giving the Company the ability to negotiate contracts with bidders to hedge against current market volatility. This hybrid approach is centered around the idea of combining the pros of both the IM and the IA.

11 Tr 1776.

Citing the Staff's testimony in the underlying direct case in this docket, Ms. Champion stated that the "Staff has seen and continues to see value in a 50%-owned and 50%-PPA model. This 50/50 model worked well to drive costs down pursuant to 2008 PA 295, with annual renewable energy cost decreases over the years." 11 Tr 1776. She further noted that I&M was able to reach this goal in this RFP.

Zachary C. Heidemann

Mr. Heidemann is a Public Utilities Engineer in the Resource Optimization and Certification Section of the Commission. Mr. Heidemann testified regarding technical aspects surrounding the project contracts and how they align with I&M's IRP and the subsequently approved settlement agreement.

Mr. Heidemann stated that the Montpelier CPA is a capacity-only contract consistent with the company's approved IRP and settlement agreement as part of the 750 MW of dispatchable resources without run-time limits. He continued to describe that I&M assumed two tiers of solar in its IRP with Tier 1 having a lower LCOE and Tier 2 having a higher LCOE. 11 Tr 1790. Mr. Heidemann indicated that the company ultimately selected four solar projects and that these projects are consistent with the approved settlement agreement and IRP. 11 Tr 1791. He further stated that only three of the solar projects are under review in this proceeding and that the Lake Trout project is subject to review in Case No. U-21377. 11 Tr 1793. With respect to the type of renewables selected, Mr. Heidemann indicated that the settlement agreement did not specify resource type and allows I&M to "to procure additional carbon free resources if it so chooses." 11 Tr 1793.

Mr. Heidemann also contended that it is important to note that I&M included all costs in its calculation of the LCOE of the projects but that some of the costs included may not be incurred and that "[t]he number presented by the Company for the two [PSAs] are essentially the worst-case scenarios that still result in project completion." 11 Tr 1794. With respect to the LCOEs of the Mayapple Solar Project PSA and the Lake Trout project, he contended that:

> [m]uch of what Staff sees about solar pricing is confidential due to the fact that it is market sensitive material, so it can only be spoken about in generalities. That being said, both Mayapple and Lake Trout are not outside what Staff has seen recently in terms of market prices for solar. Other utilities are seeing a general rise in solar

> prices. Staff does not speculate if this is a long-term trend or a short-term blip in the market reflecting a high level of uncertainty regarding pricing of components, component shortages, and a labor shortage, all exacerbated by increased demand with the passage of the Inflation Reduction Act (IRA) in 2022.

11 Tr 1795. With respect to O&M expenses, the Staff concluded "the resource type, timing and O&M of these solar projects to be consistent with what was presented in the IRP when taken as a portfolio." 11 Tr 1796.

Mr. Heidemann also testified regarding project management, milestones, and timelines of the projects. *See*, 11 Tr 1796-1798. He indicated that the Montpelier CPA already has an existing interconnection and that interconnection costs for the Elkhart County Solar Project Renewable Energy PPA and Sculpin Solar Project PPA are unknown, but "[a]ny risk of increase in interconnection costs is born by the seller." 11 Tr 1799. Mr. Heidemann stated that the Mayapple Solar Project has an interconnection queue number of AG1-349 and that the interconnection costs are most likely already reflected in the PSA. 11 Tr 1800-1801.

With respect to contingency, Mr. Heidemann compared this case to DTE Electric's CON case, Case No. U-18419, before recommending that "these costs be approved as part of the total cost of the project." 11 Tr 1806. However, he avers that the costs should not be allowed to be recovered in rates until:

- The costs have been incurred.
- The Company can provide evidence that these expenses have been incurred.
- The Company provides an explanation of what event or events lead to these costs being necessary. This evidence should be provided in the CON update that is to be filed in this docket, as well as the rate case docket in which I&M is proposing to recover these costs.
- The costs have been reviewed and the Commission finds the costs included to be reasonable and prudent.

11 Tr 1807.

B. Supplemental Testimony

1. Indiana Michigan Power Company

I&M presented the supplemental testimony of Mr. Williamson pursuant to the ALJ's ruling at the July 6, 2023 motion hearing.[3] Mr. Williamson indicated that the purpose of his supplemental direct testimony was to provide additional support regarding the costs of the projects under review in this proceeding. 16-A Tr 1947. He again opined that the projects "are consistent with the IRP in terms of the type and amount of resources, operational characteristics, and cost" as well as noted that the projects "fall within the parameters of the IRP as three of the projects are solar resources and one project is a capacity-only purchase which satisfies a portion of the 750 MW of fully dispatchable resources." 16-A Tr 1948.

Mr. Williamson testified that he has provided a comparison of the LCOEs of the solar projects the company is requesting approval for in this proceeding to the LCOEs of comparable solar resources modeled in the approved IRP. He stated that "Figure AJW-2 presents a narrower view specific to this case and shows that the LCOE of these three solar projects is *less than* the average LCOE initially approved by the Commission in I&M's IRP." 16-A Tr 1948 (emphasis in original). Mr. Williamson contended that the lower LCOE of the projects is consistent with that approved in the company's IRP and is not "significantly higher" as the Attorney General asserted. He continued that "[i]t is important to note that these project costs reflect the final, negotiated pricing for each project and significant market developments that in total have caused resource prices to increase – and yet, they compare favorably with the IRP cost assumptions." 16-A Tr 1949-1950. In addition, after comparing each individual solar project to the IRP

[3] Pursuant to the ALJ's August 4, 2023 ruling, Mr. Williamson's supplemental testimony was added as Volume 16-A, Public Record Addendum at transcript pages 1946 to 1954. As stated above, transcript citations provided in this order are to the public, non-redacted transcripts.

assumptions, Mr. Williamson averred that the final negotiated costs are consistent with the approved IRP. 16-A Tr 1950.

Mr. Williamson reviewed each solar project for which the company is requesting approval in this proceeding and reiterated that each is consistent with and not significantly higher than the initially approved costs in the approved IRP settlement agreement in this docket. *See*, 16-A Tr 1950-1952. He also contended that "[t]he cost for the Montpelier CPA falls within the range for CT [combustion turbine] resource pricing approved in the IRP and is therefore consistent with and not significantly higher than the initially approved costs in the Commission's Order Approving Settlement Agreement in Case No. U-21189." 16-A Tr 1953.

Mr. Williamson stated that, in addition to being consistent with the approved IRP, the record in this proceeding also demonstrates that the costs are reasonable and prudent. He testified that:

> [t]he costs of the Projects are reasonable and prudent because they are the result of competitive solicitation and arm's length negotiations that were conducted consistent with the Commission's Competitive Procurement Guidelines. Their prices reflect the actual cost of procuring new resources in current market conditions and are the product of well-defined, reasonable and prudent negotiations. Further, the costs relate to resources that are needed to ensure I&M can continue to meet its customer capacity obligation as determined by PJM Interconnection, LLC, and are consistent with the Company's IRP that the Commission approved in Case No. U-21189.

16-A Tr 1953. Therefore, he concluded that the record demonstrates that "the Mayapple PSA, Elkhart County PPA, Sculpin PPA and Montpelier CPA are the most reasonable and prudent means of meeting I&M's capacity and energy needs, and the Commission should approve these Projects and associated relief . . . ." 16-A Tr 1954.

2. Michigan Department of Attorney General

The Attorney General provided the supplemental testimony of Douglas B. Jester pursuant to the ALJ's ruling at the July 6, 2023 motion hearing. Mr. Jester testified regarding confidential

documents provided by I&M regarding the LCOE of the projects. He opined that the final contracts were not the result of competitive solicitation and must be considered to be the result of bilateral negotiations. 11 Tr 1752.

Notwithstanding the above, Mr. Jester noted that the Elkhart County Solar Project Renewable Energy PPA could reasonably be considered competitively priced based upon the final price. Similarly, he indicated that the Sculpin Solar Project PPA could also be considered competitively priced, albeit with less certainty. In addition, he testified that the Montpelier CPA could also be reasonably considered to be the result of competitive solicitation. *See*, 11 Tr 1752-1753. With respect to the Mayapple Solar Project PSA, however, Mr. Jester contended that the price after negotiations must be considered as resulting from bilateral negotiations rather than competitive solicitation.

Mr. Jester argued that had the final contracts for the projects been similar to the shortlist bids they may have been considered the result of competitive solicitation and be a reasonable outcome. Given they were not, Mr. Jester suggested that I&M had the option of "asking all of the viable projects for revised offers, so as to obtain competitive prices." 11 Tr 1753. Mr. Jester indicated that while some of the same issues that affected the selected projects may have also affected others dropped from the shortlist, some bidders may have been able to manage costs better than others. Therefore, Mr. Jester recommended that the Commission conclude that I&M failed to demonstrate on this record that its project selection was reasonable. 11 Tr 1754.

C. Rebuttal Testimony

1. Indiana Michigan Power Company

I&M filed rebuttal testimony of Mr. Koujak and Mr. Gaul responding to the Attorney General's supplemental testimony of Mr. Jester.

D. Dean Koujak

I&M presented the rebuttal testimony of Mr. Koujak responding to the Attorney General's testimony regarding the "competitiveness of the final negotiated agreements and whether they were a product of the competitive solicitation." 11 Tr 1661. Mr. Koujak testified that he agreed with the Attorney General that the Elkhart County Solar Project Renewable Energy PPA, Sculpin Solar Project PPA, and the Montpelier CPA should be approved as reasonable and prudent.

With respect to the Mayapple Solar Project PSA, he concluded that it was also the result of proper competitive solicitation. Responding to the Attorney General's position regarding negotiations, Mr. Koujak stated that, "[i]n order to finalize the commercial terms following an RFP, it is standard industry practice to conduct post-solicitation contract negotiations to produce a final form, execution-ready agreement" and that often "changes in pricing occur in this phase to reflect changes in the market and other changes, as needed, to optimize the project's attributes for the benefit of the company and its customers." 11 Tr 1662-1663. Thus, Mr. Koujak testified that he disagreed with the Attorney General that the resulting price for the Mayapple Solar Project PSA was not the result of competitive solicitation.

In addition, Mr. Koujak contended that "had all the remaining non-shortlisted projects been given the opportunity to reprice, the outcome would have, with a high degree of certainty, resulted in the same selection at the final negotiated prices given consideration of both non-price and price factors." 11 Tr 1664. Therefore, Mr. Koujak stated, as the IM, the competitive procurement process to select the Mayapple Solar Project PSA and the subsequent contract negotiations occurring after the short-listing were reasonable. 11 Tr 1665.

Timothy B. Gaul

Mr. Gaul testified that he disagrees with the Attorney General's assessment. More specifically, he stated that the comparison of LCOEs is inaccurate given "the two LCOE values result from different calculations that are used for different purposes and use different inputs based on the information available at the time (bid selection assumptions vs. inputs from the executed contract)" and the "LCOE score is used to calculate a price score for each proposal based on an array of market assumptions and the best information available to the Company for each project at the time." 11 Tr 1725. Mr. Gaul further stated that a qualitative analysis of risk is done at bid review but noted that additional due diligence is conducted during contract negotiations which allows I&M to develop and continuously refine "a risk register that converts the qualitative risks identified during initial bid reviews into a quantitative analysis." 11 Tr 1726.

Mr. Gaul disputed that the final costs are the result of "bilateral negotiations" as the Attorney General contends. Rather, he described bilateral negotiations as a process outside of the competitive procurement process whereas the final contract negotiations are a normal step in the competitive procurement process. 11 Tr 1727. Mr. Gaul indicated that the contract negotiation is a vital step considering the current dynamics of the renewable energy market. He further disagreed with the Attorney General's position that the Mayapple Solar Project final price cannot be reasonably considered to be the result of competitive solicitation. Mr. Gaul testified that I&M:

> as verified by the Independent Monitor, conducted the competitive procurement process in accordance with the Michigan competitive procurement guidelines. As witness Koujak discusses in his rebuttal testimony, RFPs are typically used to identify projects and bidders with whom the company then engages in negotiations. Those negotiations do not invalidate the competitive procurement process.

11 Tr 1731. He further indicated that the projects in the 2022 RFP process are complex and intensive projects and that modifications are common throughout the development lifecycle. He

stated that "because of this reality, I&M changed its bid selection process . . . to place more weight on the evaluation of an array of non-price factors that serve as indicators of each project's ability to achieve commercial operation in the timeframe needed by the Company." 11 Tr 1732.

Mr. Gaul further replied that the modifications in price were not the result of a project's ability or inability to control costs. He explained that "the market is currently exposed to a range of dynamic forces, each of which have a different impact on project development" and that "each project in the 2022 All Source RFP has different levels of exposure to each of these market dynamics as a result of having different project configurations, different suppliers, different contract structures, different local approval processes, different interconnections, etc." 11 Tr 1733. Therefore, Mr. Gaul concluded that varied costs do not indicate that projects are not competitive or have poor cost management, rather it showed that projects are unique.

In response to the Attorney General's assertion that I&M could have solicited revised offers from all viable projects, Mr. Gaul responded that this option was considered but was determined unnecessary or unreasonable for various reasons including delays and non-price factors, as well as risk of losing competitive projects to other companies. *See*, 11 Tr 1734-1739.

2. Commission Staff

The Staff presented rebuttal testimony of Ms. Champion and Mr. Heidemann in response to the Attorney General's supplemental testimony.

Marceline A. Champion

Ms. Champion stated that I&M procured the projects at issue utilizing an IM and that the IM's report states that the evaluation process was reasonable and demonstrated that I&M made efforts to ensure competitive solicitation. Further, she contended that the resulting price has no bearing on whether the projects were procured through competitive solicitation. 11 Tr 1780.

Ms. Champion refuted the Attorney General's position that I&M should have asked the bidders who provided viable projects for revised offers, noting that:

> [t]hroughout the RFP process, bidders were given the opportunity to cure bids and correct issues preventing them from being shortlisted. The Company and [the] IM do what they can to bring as many projects into compliance as possible, but issues are often incurable within the limited timeframe of a single RFP, although the IM did work with developers to bring projects into compliance. The Company pursued contract negotiations with all seven of the shortlisted projects.

11 Tr 1780. She further indicated that the Attorney General focuses entirely on the final price, which is not the only factor in evaluating bids. Specifically, for the RFP at issue, Ms. Champion testified that non-price factors account for 40% of the total score of the projects including "important factors like land control, interconnection, and permitting; looking at pricing alone does not tell the full story of a project's viability." 11 Tr 1781. Requiring revised bids to be submitted after negotiations had begun would increase the amount of time to complete an RFP, by several months to one year. Moreover, Ms. Champion testified that similar price fluctuations could have occurred with other bidders, as admitted by the Attorney General.

Ms. Champion also indicated that the Staff spent several hours reviewing every bid submitted and verifying the scoring given for each category. After the in-person audit, she stated that the "Staff concluded that the Company conducted its 2022 RFP fairly and in accordance with the Commission's Competitive Procurement Guidelines" and that "CRA, the Company's IM, expressed the same conclusion as Staff, as expounded upon in its Report, Company Exhibit IM-1." 11 Tr 1783. Therefore, Ms. Champion indicated that the Staff recommends that the Commission find that the projects submitted for approval in this proceeding were the result of competitive solicitation.

Zachary C. Heidemann

Mr. Heidemann provided rebuttal testimony in response to the Attorney General. Mr. Heidemann disputed that the Mayapple Solar Project PSA was not determined through competitive solicitation and noted that the Attorney General did not provide testimony regarding contingency relating to the contract. *See*, 11 Tr 1809-1810.

III. APPLICATION FOR LEAVE TO APPEAL

In his ruling, the ALJ found that in determining whether information should be protected, the Commission requires the moving party to make a "'particularized showing (1) that the information at issue is a trade secret or otherwise confidential, and (2) that disclosure would work a clearly defined and serious injury.'" Ruling, p. 11 (quoting the June 30, 1994 order in Case No. U-10282 (1994 order), p. 8). The ALJ granted the Attorney General's motion with respect to information characterized as "Category 1" in the motion to unseal. Specifically, the ALJ held that Category 1 "refers to general market conditions and does not constitute a trade secret or otherwise confidential information" and "does not meet the definition of a trade secret or otherwise confidential information in the Protective Order." Ruling, p. 13. The ALJ also noted that I&M failed to show "that a clearly defined and serious injury would result from the public dissemination of the information labeled" as Category 1. *Id*. Therefore, he granted the motion to unseal with respect to Mr. Gaul's revised direct testimony, page 20, lines 3-11. *Id*.

With respect to information characterized as "Category 2" in the Attorney General's motion to unseal, the ALJ held that "I&M has not shown that a clearly defined and serious injury would result [from] the public dissemination of the information identified as category 2" and that the motion should be granted with respect to Category 2. Ruling, p. 14. Therefore, the ALJ granted the motion to unseal Mr. Gaul's revised direct testimony, page 16, lines 4-8 and 21-33.

For the information characterized as "Category 3" in the Attorney General's motion to unseal, the ALJ found that this category "contains specific price terms and other contract-specific information, including information pertaining to the LCOE's of the projects" and that "the Commission has previously found that disclosure of third-party information, especially related to specific price terms, should be exempt from public disclosure." Ruling, p. 15 (footnote omitted). The ALJ noted that the testimony in Category 3 also includes information regarding third-party developers who are not parties to the proceeding. He concluded that this information meets the definition of protected material covered by the 2022 protective order, and "that I&M would suffer a clearly defined and serious injury in that its ability to negotiate favorable terms during the continuing process of securing resources would be hampered." Ruling, p. 15. Therefore, the ALJ denied the Attorney General's motion to unseal with respect to Category 3 information. Finally, the ALJ noted that, per the terms of the 2022 protective order the ruling is stayed for 14 days to allow for the filing of applications for leave to appeal.

In the application for leave to appeal, I&M contends that the ruling may result in an increase in the cost of future solar projects for I&M's customers within and outside Michigan because the unsealed testimony reflects the company's thinking with respect to market conditions. I&M states that the public harm arising from disclosure of the testimony outweighs any possible public benefit, and disclosure poses a threat to the ongoing contract negotiations related to the four projects at issue here, as well as to the future competitive procurement process and the cost-effectiveness of future contract pricing. I&M asserts that the ruling will not benefit the public but "will cause immediate and substantial harm" and will "undoubtedly result in other developers using the specific components of this information to negotiate more favorable, developer-friendly terms during contract negotiations." Application for leave, p. 4.

I&M contends that the application for leave should be granted because a decision on the application will advance the timely resolution of this proceeding and will prevent substantial harm to I&M and the other parties. *See*, Rule 433(2); application for leave, p. 8. I&M states that MCR 2.302(B) provides that a court may issue a protective order to protect confidential commercial information and trade secrets from disclosure and that confidential commercial information and trade secrets are broad concepts, which include any compilation of information that could give an advantage over a competitor. I&M states that the ALJ applied the correct test from the 1994 order and that Commission precedent supports the need to keep commercially sensitive information confidential, particularly price terms. I&M argues that customers benefit when their utility maintains a competitive advantage.

I&M contends that the Attorney General's motion, in separating the testimony into three categories, mischaracterizes the information that is contained in the testimony. I&M states that Category 1 can properly be described as "I&M's experience in negotiating contracts in the current market" and Category 2 can properly be described as "I&M's actual negotiations[.]" Application for leave, p. 11. I&M contends that all three categories contain information that is specific to the four projects at issue and specific to the resulting agreements that were arrived at with developers. I&M argues that the ALJ should not have accepted the Attorney General's description of Category 1 as "general" because Mr. Gaul's testimony contains specific information. I&M asserts that allowing disclosure of the Category 1 testimony will undercut the company's position in future negotiations and will provide future bidders with an advantage.

Regarding Category 2, I&M also asserts that the Attorney General's description was inaccurate because this testimony, too, is not general but rather specific to the contract negotiation process based on market pressures occurring during negotiations for the four projects. I&M states

that Mr. Gaul's answer to the question posed in the testimony contains information specific to I&M and to its parent company AEP. I&M posits that the testimony contains contract-specific information that will affect the company's ability to negotiate favorable terms in future procurement scenarios. I&M asserts that:

> this information will provide future developers insight into the contract negotiation process that occurred for these specific Projects, based on the specific market events that occurred during negotiations, and could result in future developers seeking post-solicitation changes to pricing, schedules, or contract terms that are not well-supported or warranted.

Application for leave, pp. 14-15.

I&M contends that the testimony at issue is commercially sensitive and will allow future counterparties to cherry-pick favorable terms. I&M refers to the affidavit of Mr. Gaul attached to the company's original response to the Attorney General's motion to unseal, stating that the affidavit describes the sensitivity of the information. I&M argues that simply establishing a precedent for this type of public disclosure may drive developers to increase their prices beyond what a purely competitive process would produce. I&M asserts that disclosure will hurt AEP's customers, including customers both in and outside of Michigan. I&M maintains that the ALJ ignored Mr. Gaul's affidavit and that the ALJ failed to recognize that the company is actively engaged in other competitive solicitations and in negotiations related to the four projects at issue in this case. Recognizing that it must make a particularized showing, I&M asserts that it has shown "that a clearly defined and serious injury would result if the subject testimony becomes public and the Ruling to the contrary should be reversed." Application for leave, p. 16.

I&M notes that, referring to all three categories of testimony, Mr. Gaul states that the confidential information "is demonstrative of I&M's assessment of and decision making strategies regarding supply-side resources that I&M may use to cost-effectively meet the electricity service

needs of I&M's customers" and is "not available or ascertainable by other entities through normal or proper means." *Id*., p. 17 (quoting Mr. Gaul's affidavit, ¶¶ 3 and 5, filing #U-21189-0372). I&M contends that the affidavit makes the required particularized showing with specificity for all three categories of information and defines the serious injury that would result to I&M's ability to negotiate should the ruling be affirmed. I&M adds that the ruling will "signal[] to developers which market factors I&M has deemed legitimate bargaining terms." Application for leave, p. 20. I&M refers to the three categories as the Designated Information and concludes that:

> [u]nsealing the Designated Information for even one of the Projects could trigger a developer of another project to request a specific contract term that that developer does not have and the Company views as favorable for customers. This could increase the finalized cost, risk I&M's ability to acquire the projects needed to maintain resource adequacy and reliability for its customers and cause unnecessary delay.

Id., p. 21.

In response, the Attorney General contends that I&M failed to provide specific evidence to support its arguments and offers only "general speculation about what could happen rather than a particularized showing of harm." Attorney General's response to application for leave, p. 9. The Attorney General argues that Mr. Gaul's affidavit is self-serving and conclusory, and fails to demonstrate any specific or particularized harm. She also notes that the affidavit addresses risks associated with information that was not the subject of her motion to unseal or this appeal, and maintains that "none of the testimony that the ALJ unsealed contains bidder- or project-specific information." *Id*., p. 11.

Rule 433 establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

(a) A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.

(b) A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

(c) A decision on the ruling before submission of the full case to the Commission for final decision is consistent with other criteria that the Commission may establish by order.

Rule 433(2)(a)-(c). If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate. June 5, 1996 order in Case No. U-11057, p. 2. Because this case is ripe for decision and the application for leave addresses an evidentiary issue, the Commission finds that the application for leave merits immediate review under Rule 433(2)(a).

As the Commission has noted, the best approach to discovery:

> is to provide full disclosure of all information that is relevant, or reasonably calculated to lead to the discovery of admissible evidence, or simply evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. MCR 2.302(B); [Mich Admin Code, R 792.10423, 792.10427]. Assertions of confidentiality should be made infrequently and only in the clearest situations.

July 26, 2008 order in Case No. U-14716-R, p. 9. While Mr. Gaul's testimony was not provided via discovery, the same principles apply with respect to testimony and exhibits, and these principles dovetail with the Commission's long-standing policy favoring disclosure. The parties correctly note that the Commission applies the following standard when evaluating the potential need for confidential treatment:

> [T]he party moving for a protective order must satisfy a stringent burden by making a particularized showing (1) that the information at issue is a trade secret or otherwise confidential, and (2) that disclosure would work a clearly defined and serious injury. Vague and unsupported contentions that public disclosure would harm a party's competitive position are inadequate.

1994 order, p. 8; March 17, 2022 order in Case No. U-21090 (March 17 order), p. 8. The Commission has also recognized that evidentiary and discovery standards in administrative proceedings are more favorable to disclosure than the standards applied in civil proceedings. 1994 order, p. 9. However, as the parties also note, the Commission is careful to protect the confidentiality of price terms. *See*, April 20, 2009 order in Case No. U-15806, pp. 10-11; October 31, 2012 order in Case No. U-16582, p. 6; November 19, 2015 order in Case No. U-15805, p. 5; and March 17 order, p. 16.

The 2022 protective order defines "Protected Material" as: (1) the affidavit of Mark A. Becker; (2) trade secrets or confidential, proprietary, or commercially sensitive information; (3) information obtained under license from a third party; (4) information that could identify bidders and bids; and (5) any form of information that discloses the Protected Material. 2022 protective order, p. 2. I&M argues that the Category 1 and 2 testimony contains information that is confidential, commercially sensitive, or constitutes a trade secret. In response to the Attorney General's motion to unseal, the Staff took no position with respect to Categories 1 and 2 but opposed the disclosure of the information contained in Category 3. Staff's response to the Attorney General's motion to unseal, pp. 4-5. The Commission agrees with the Staff and the ALJ that Category 3 presents a different situation. In its response to the motion to unseal, I&M provided the affidavit of Mr. Gaul, which contains much of the same information that is conveyed in I&M's response brief and the application for leave. Mr. Gaul indicates that the Designated Information will disclose I&M's negotiating strategy, as well as costs, prices, contract terms, and bidder-specific data. But because his affidavit does not distinguish Category 3 from the remaining categories, it is of marginal assistance to the Commission with respect to the application for leave.

In the application for leave, I&M repeatedly contends that the Category 1 and 2 testimony is very specific regarding contract terms and of such strategic importance that its disclosure would eliminate the company's competitive advantage when dealing with developers and others, would provide competitors with a competitive advantage, and would impair the future solicitation of bids as well as future negotiations related to the four projects. The Commission disagrees and finds these arguments to be generalized, rather than specific, because they fail to define the clear and serious injury that would result from disclosure. Even assuming that the testimony is confidential, I&M offers only equivocal, general, and vague descriptions of the purported injury. The Category 1 and 2 testimony is of a highly general nature. Therefore, the Commission finds that I&M has failed to satisfy the second prong of the standard for requiring confidentiality and thus affirms the ruling without deciding whether the testimony is in fact confidential, trade secret, or commercially sensitive. Based on the application for leave and Mr. Gaul's affidavit, the Commission is not persuaded that I&M has made the required particularized showing of a clearly defined and serious injury. Thus, the Commission finds that the ruling should be affirmed.

IV. INITIAL BRIEFS

A. Indiana Michigan Power Company

I&M begins by reiterating that the approved IRP "identified a significant need for new supply-side resources to replace the capacity and energy associated with retirement of the Company's Rockport Plant in 2028." I&M's revised initial brief, p. 12 (citing 11 Tr 1674-1675). After summarizing the testimony regarding the projects, I&M avers that the record indicates that each project was the product of a competitive procurement process that complies with the Commission's guidelines and that the projects are consistent with the company's "approved IRP in terms of type and amount of resources, operation characteristics, and cost." *Id*., p. 15.

The company notes that all parties agree that the Elkhart County Solar Project Renewable Energy PPA, Sculpin Solar Project PPA, and the Montpelier CPA are reasonable and should be approved. *Id*., p. 16 (citing 11 Tr 1754, 1765). I&M disputes the Attorney General's argument that the finalized LCOE associated with the Mayapple Solar Project PSA is too high to be the result of competitive procurement. Citing MCL 460.6t(12), the company argues that it complied with the requirements and the approved settlement agreement. Specifically, I&M states that it "implemented a competitive bidding process, MCL 460.6t(12)(a), that allows third parties to submit firm and binding bids, MCL 460.6t(12)(b), and that the finalized costs for the Projects are not significantly higher than the initially approved costs under the IRP, MCL 460.6t(12)(c)." I&M's revised initial brief, p. 16. The company further claims that, even if the Commission found that the finalized costs are "significantly higher" than the initially approved costs, the record demonstrates that the finalized costs of the projects are nevertheless reasonable and prudent considering current market conditions. *Id*. (citing MCL 460.6t(12)(c)).

With respect to the competitive bidding process, I&M argues that the record demonstrates that the "competitive procurement process was designed to be open and non-discriminatory, [is] consistent with the Commission's Competitive Procurement Guidelines, and consider[s] both third-party and utility ownership options." I&M's revised initial brief, p. 16 (citing 11 Tr 1692). I&M avers that its retention of CRA as the IM was consistent with the Competitive Procurement Guidelines and that the IM "helped support the design and development of the RFP[,] . . . led the stakeholder engagement process and feedback, conducted the Eligibility and Threshold review for all proposals; and monitored the RFP administration from issuance to selection." I&M's revised initial brief, p. 17. The company reiterates that the IM "was also consulted post selection to

address issues during contract negotiations, such as pricing changes due to supply constraints, to ensure the competitive procurement process was not compromised." *Id*. (citing 11 Tr 1694).

I&M continues by describing the competitive procurement process that was conducted and restating the IM's testimony regarding the reasonableness of the process. *See*, I&M's revised initial brief, p. 18. The company again contends that it followed the Commission's Competitive Procurement Guidelines and states that "[t]he record demonstrates the Company followed these guidelines and conducted a fair, transparent, and competitive RFP to ensure the integrity of the process and that the Projects selected by I&M were the best choice for the Company and its customers." *Id*., pp. 18-19. Therefore, I&M opines that the Commission should conclude that the company's 2022 RFP was a proper competitive solicitation process consistent with MCL 460.6t(12)(a).

In addition, I&M argues that, while the final costs may be on the higher end of the projections in the approved IRP, they are not "significantly higher" than what was approved. The company indicates that when comparing the finalized LCOEs of the solar projects to the blended LCOE approved in the IRP, the costs are similar. Specifically, I&M states that "[a]t most, when including Lake Trout in the solar portfolio, the finalized LCOE is within 5% -- which cannot be deemed 'significantly higher.'" I&M's revised initial brief, p. 20. Further, when removing the Lake Trout project, which is pending in another proceeding, I&M states that the final LCOE is actually lower than the blended LCOE as approved in the IRP. *Id*., pp. 19-20. With respect to the Montpelier CPA, I&M contends that "the annual fixed cost is significantly less than the annual fixed cost for CT resources in the IRP." *Id*., p. 20. Given this, the company avers that the final costs cannot be deemed to be "significantly higher" under MCL 460.6t(12). Comparing the cost difference to other Commission decisions, I&M states that a finalized cost difference of only 5%

cannot be deemed significant. *See*, I&M's revised initial brief, pp. 20-21 (citing April 8, 2021 order in Case No. U-20165, and July 26, 2023 order in Case No. U-21193).

Continuing, the company contends that, even if the Commission concluded that the finalized costs are "significantly higher" than what was approved in I&M's IRP, the costs should still be approved as reasonable and prudent under MCL 460.6t(12). I&M states that "'reasonable and prudent' costs under MCL 460.6t(12)(c) are costs that are commercially practical and the result of a competitive procurement process—which the Projects are." I&M's revised initial brief, p. 22 (citing 11 Tr 1692, 1659, 1774). The company argues that the record shows that the final LCOEs for the Mayapple Solar Project PSA are reasonable when considering current market conditions and that the revised costs show that I&M "and its developers responded to these market changes during negotiations to ensure the Company can stay on schedule to meet its capacity and energy needs." I&M's revised initial brief, p. 23.

I&M also states that it is not seeking recovery of costs that have not yet been incurred and that, once the costs are actually incurred, the Commission will review such costs before inclusion in rates. The company contends that the Staff agrees with the approval of costs not yet incurred as part of the overall cost of the projects. *Id*., p. 25 (quoting 11 Tr 1806).

Responding to the Attorney General's contentions, the company avers that the "conclusion related to the cost increase of the Mayapple Solar Project is premised on a skewed view of the cost through the RFP presented by the Company." I&M's revised initial brief, p. 26. The company states that the Attorney General improperly compares the economic analysis LCOE score value to the updated project-specific LCOE which was refined through due diligence and revised costs. *See*, *id*. I&M further states that the assessment of contingency costs was not included at the time of initial bid selection, that these "costs are justified based on a quantitative risk analysis that is

developed during contract negotiations," and that if project contingency costs "were added to the initial bid selection LCOE, the increase between that value and the final LCOE presented in the case would be reduced." *Id*., pp. 26-27 (citing 11 Tr 1726).

The company also disputes the assertion that the negotiations were unreasonable because I&M did not act outside of the competitive procurement process given "it is standard industry practice to conduct post-solicitation contract negotiations to produce a final form, execution-ready agreement." I&M's revised initial brief, p. 27 (citing 11 Tr 1662). Overall, I&M argues that the Attorney General's assertions should be rejected and that the suggestion to request revised bids would create a moving target for utilities. I&M's revised initial brief, p. 28. Further, the company reiterates its position that the Attorney General presented no evidence to substantiate how the outcome would have been any different if I&M had requested revised bids. I&M again states that the market for renewable energy resources is competitive and dynamic and that requesting revised bids from developers would have resulted in delay in the procurement process. Therefore, the company requests that the Commission reject the Attorney General's position and find that the projects were the result of competitive solicitation and should be approved. *Id*., p. 29.

B. Commission Staff

The Staff first provides the regulatory framework and the standard of review before summarizing the positions of the parties and testimony. *See*, Staff's amended initial brief, pp. 1-24. Next, the Staff offers background information regarding the projects and opines that the four projects should be approved. *See*, *id*., pp. 24-28. With respect to the Mayapple Solar Project PSA, the Staff contends that, contrary to the Attorney General's position, "the Mayapple Solar Project PSA is the result of the same competitive solicitation process that yielded the other three contracts in this case." *Id*., p. 27. Therefore, the Staff contends that if the other projects can be

considered to be the result of competitive solicitation, the Mayapple Solar Project PSA also "can reasonably be considered as resulting from a competitive procurement as the Company utilized the exact same process in obtaining it." *Id*., p. 28.

The Staff further avers that there is nothing on the record to demonstrate that I&M did not comply with the requirements of MCL 460.6t(12) and the competitive procurement process. The Staff reiterates the record testimony and states that I&M implemented a competitive solicitation process, allowed third parties to submit firm bids, and exceeded the target of 50% PPAs. *See*, Staff's amended initial brief, p. 29 (citing 11 Tr 1656-1658, 1661-1665, 1724-1739, 1773-1774, and 1776-1777). The Staff also notes that its analysis demonstrates that the cost of the projects is not "higher than what was approved in the IRP, much less *significantly* higher." Staff's amended initial brief, p. 29 (emphasis in original).

Responding to the Attorney General's assertion that I&M should have requested revised offers, the Staff contends that "the proposed solution would not have solved the perceived problem," and "[t]he fact that there is a chance for both bidder and Company to react to changing market conditions is in fact a good thing." *Id*., p. 33. Further, the Staff states that requesting revised bids would add significant delays without any assurances that revised bids would result in lower costs as there is no indication on record that others would have been able to better control cost than the shortlisted bidders.

The Staff also contends that "the amount of final purchase price is not dispositive of whether the competitive procurement process was employed in securing a project. Despite the Attorney General's contentions, this should not serve as a basis to deny the Mayapple contract." *Id*., p. 34 (citing 11 Tr 1752-1754). The Staff opines that the Attorney General's main issue is with the final contracted price of the Mayapple Solar Project PSA. Specifically, the Staff states that "it may be

an unwelcome conclusion to have a higher final price" but this "does not change the fact that the price is reasonably a result of the present market." Staff's amended initial brief, p. 35. Therefore, the Staff reiterates its conclusion that the Mayapple Solar Project PSA "was the result of a competitive solicitation and is a measure of the current market price for solar." *Id*.

The Staff further asserts that all costs for the Mayapple Solar Project PSA should be approved by the Commission but avers "that the pre-approval does not mean that these costs should be included in projected rates." *Id*. More specifically, the Staff contends that preapproval should be granted but the costs should not "be included in rates until these costs are incurred, the Company has provided evidence that they have been incurred, the Company provides an explanation of what event or events lead to these costs being necessary, and that the Commission has found the costs to be reasonable and prudent." *Id*., p. 36 (citing 11 Tr 1807). The Staff reiterates that while it supports preapproval, it does not support the inclusion of such costs in rates and recommends that the Commission approve all four projects presented by I&M for approval in this proceeding. *See*, Staff's amended initial brief, pp. 36-37.

C. Michigan Department of Attorney General

The Attorney General begins with a review of the record and its applicable legal standards. In this regard, the Attorney General states that, given the specific resources that the company is seeking approval for in this proceeding, MCL 460.6t(12) is not controlling. More specifically, the Attorney General argues that:

> [i]n the underlying IRP case, I&M did not identify the specific electric generation facility – Mayapple – that the company now proposes to purchase via the PSA. Nor did I&M identify the specific PPAs (Elkhart and Sculpin) that it proposes to enter into – or even identify those projects as ones for which the company would seek PPA approvals.

> Further, in approving the settlement agreement in the underlying IRP case the Commission noted that it was not preapproving any costs for any resources; but rather would review the selection of resources and costs in future proceedings . . . .

Attorney General's initial brief, p. 5. Therefore, she avers that the remaining question is "whether the costs of the agreements for which I&M seeks approval are reasonable and prudent." *Id*., p. 7.

The Attorney General continues, arguing that I&M has not met its burden of proof to demonstrate that the Mayapple Solar Project PSA is reasonable and prudent on this record. She reiterates the position that, based upon the final negotiated prices, the Elkhart County Solar Project Renewable Energy PPA, Sculpin Solar Project PPA, and the Montpelier CPA can reasonably be considered the result of competitive solicitation whereas the Mayapple Solar Project PSA cannot. *See*, *id*., pp. 10-11. In sum, the Attorney General states that:

> [d]ue to the combination of the high price and large increase in price for Mayapple, the large variation in price increases among the selected bidders, and I&M's failure to re-engage the cut projects in negotiations to determine how much their prices would change, [Mr.] Jester recommended that the Commission should conclude that I&M has not demonstrated that the selection of Mayapple or its LCOE are reasonable and prudent. The pricing for Mayapple was not determined through a competitive solicitation and the resulting price was high compared to offers made in the competitive solicitation.

Id., p. 12.

In response to the Staff's testimony, the Attorney General contends that, while the Staff made the blanket statement that the final LCOEs are within the range that has been seen for solar pricing, the Staff did not provide specific evidence to support this contention. The Attorney General cites to the Commission's 2022 Renewable Energy Report, Appendix E, arguing that the report "presents utility-scale solar LCOEs that range from $41.72 per MWh to $66.51 per MWh [megawatt-hour] for utilities other than I&M." Attorney General's initial brief, p. 13. While acknowledging "that there has been recent upward pressure on solar prices," the Attorney General

states that "neither I&M nor Staff has placed any evidence in the record regarding what magnitude of increase is consistent with the market." *Id*.

The Attorney General also responds that I&M "did not provide the required explanation in its application or direct testimony" as to why it utilized an IM rather than an IA, consistent with the Commission's Competitive Procurement Guidelines, and further notes "concerns about a process where Staff sponsors what amounts to friendly discovery to fill a hole in a utility's direct case." *Id*. In addition, the Attorney General avers that the utilization of an IA could have added much needed transparency through the negotiation process. While the Attorney General acknowledges that price increases from bid to negotiations are common, she asserts that the Staff "provided no evidence that near-40% increases in price are commonplace" or that Commission approval of such an increase "is (or should be) commonplace." *Id*., p. 14.

Responding to the Staff's claim that the Sculpin Solar Project PPA increased by a greater percentage, the Attorney General discounts this, arguing that the original price of the Mayapple Solar Project was much higher to begin with. In addition, the Attorney General asserts that the Sculpin Solar Project PPA's "final price is modestly above the upper range of bids from the RFP, while Mayapple's final price is far beyond the upper limit of that range." *Id*., p. 15. In response to the Staff's claim that an audit of the procurement and selection process demonstrated that it was reasonable, the Attorney General states that:

> [w]hile a Staff audit of materials not in the record may be sufficient to support approval of an *ex parte* filing, evidence in a contested case must be made part of the record and the Commission may not consider evidence not in the record in making its decision. Further, a Staff audit does not relieve a utility of its obligation in a contested case to prove its case with record evidence – as discussed in the legal standards section above.

Id., p. 15 (footnote omitted).

In response to I&M's testimony, the Attorney General makes similar assertions that the company did not provide evidence to demonstrate price increases such as those associated with the Mayapple Solar Project were typical or reasonable. *See*, *id*., pp. 15-16. The Attorney General notes that some of the specifics relating to I&M's testimony were not submitted into the record and, therefore, cannot be evaluated. *Id*., p. 16. Similarly, the Attorney General responds to the company's testimony relating to the 2023 RFP, including revised bids from projects excluded in the 2022 RFP process, and state that the 2023 RFP is not in evidence. Therefore, she contends that under the Michigan Rules of Evidence Rule 703 (MRE 703), testimony relating to the 2023 RFP was improper. *See*, Attorney General's initial brief, pp. 17-18.

V. REPLY BRIEFS

A. Indiana Michigan Power Company

I&M disputes the Attorney General's claims and argues that she has not provided "any evidence that the finalized prices are higher than those approved in the IRP or are unreasonable or imprudent" and recommends that the Commission reject the "plea that the Commission ignore the applicable law and facts." I&M's reply brief, p. 2. I&M notes that the reasonableness of the Elkhart County Solar Project PPA, the Sculpin Solar Project PPA, and the Montpelier CPA is not disputed. Therefore, the company avers that the Commission must determine if the Mayapple Solar Project PSA costs are significantly higher than what was approved in the IRP. *Id*. (citing MCL 460.6t(12)(c)).

Contrary to the Attorney General's claim, I&M argues that MCL 460.6t(12) is applicable. Further, the company notes that "[t]he evidence in this case supports approval of the Mayapple Solar Project under either standard" and that the "challenge of the proper statutory framework for this proceeding is a red herring that the Attorney General has resorted to only after failing to refute

I&M's showing that the costs presented in this case are not significantly higher than those approved in the IRP." I&M's reply brief, pp. 3-4. I&M contends that the Attorney General's interpretation is contrary to the plain language of the statute. Emphasizing the language in MCL 460.6t(11), the company argues that the statute "allows cost pre-approval not only during a direct IRP proceeding but also for projects identified after the Commission approves an IRP." I&M's reply brief, p. 6. Further, I&M contends that the Attorney General's interpretation of the statute would render MCL 460.6t(12) meaningless:

> [b]ecause subsection 12 review occurs only after the Commission has approved a utility's IRP, if specific projects are approved during the direct IRP proceeding under subsection 11, subsection 12 review would not be necessary; the costs would have already been pre-approved. Under the Attorney General's suggested interpretation, there would be no need for subsection 12 approval and, therefore, subsection 12 would be rendered meaningless.

I&M's reply brief, p. 6.

I&M also argues that the Attorney General's interpretation ignores language in MCL 460.6t(11) which allows for general cost approval. Specifically, the company states that:

> [t]he Legislature's inclusion of "other investments and resources" to create a "catch all" suggests that costs that are approved in an IRP are not necessarily the same costs that can be pre-approved for "specifically identified investments." Subsection 11 thus includes two forms of cost approval: costs included in an approved IRP and costs for specific projects that are pre-approved for the purposes of cost recovery.

I&M's reply brief, p. 8. The company further argues that this interpretation is not novel but is the same interpretation that the Commission has utilized since the enactment of the IRP statute.

Noting that the while the Commission did not preapprove specifically identified investments when it approved the contested settlement agreement, I&M asserts that the Commission did, however, approve the company's Preferred Portfolio as modified by the contested settlement

agreement "which necessarily includes the cost estimates submitted by the Company under subsection 5(j)." I&M's reply brief, pp. 9-10.

I&M objects to the Attorney General's claim that the Mayapple Solar Project PSA finalized costs should be compared to the initial bids. Rather, I&M asserts that pursuant to MCL 460.6t(12)(c), the finalized costs should be compared to what was actually approved in the IRP and not the initial bid prices. The company contends that the Legislature could have required a comparison of initial bids to final costs if it wished, but instead chose to require a comparison to the costs approved in the IRP. *See*, I&M's reply brief, pp. 10-11. I&M explains that:

> a competitive process can take up to a year from initial bid to an execution-ready contract. During that time, developers and the Company respond to market conditions and pressures, such as changes in law and international conflicts. Staff witness Champion confirms that bid pricing is based on assumptions at the time of bid submittal and price increases during negotiations are common.

Id., p. 12 (citing 11 Tr 1914). In the company's opinion, if the Attorney General's argument is adopted, a utility would be punished "for conducting due diligence and a risk assessment then negotiating as necessary to reasonably respond to those risks" and "a comparison of the finalized costs to initial bids [would be] meaningless, contrary to MCL 460.6t(12), and would be an unreasonable and unreliable standard. The record shows that post-bid negotiations are commonplace." I&M's reply brief, p. 12.

I&M contends that the Attorney General failed to present any evidence for their conclusion that the Mayapple Solar Project PSA is the result of bilateral negotiations as opposed to competitive solicitation. The company states that the Attorney General's:

> reliance solely on price to refute that the Company demonstrated that a competitive process selected the Mayapple Solar Project is contrary to MCL 460.6t and the Competitive Procurement Guidelines. Under MCL 460.6t(12), finalized costs [are] evaluated separately from the competitive process, suggesting that the finalized price and the process by which [those] finalized costs [were] reached are separate inquiries. Indeed, the Commission's Competitive Procurement Guidelines state

> when the guidelines are used by a utility, "it is presumed that the resulting prices and contracts are reasonable and prudent."

I&M's reply brief, p. 13 (quoting September 9 order, Exhibit A, p. 1). I&M further states that the record demonstrates that it used a competitive process consistent with the Commission's Competitive Procurement Guidelines, and as such, the company has met the requirements under MCL 460.6t(12)(a) to select the Mayapple Solar Project PSA.

In addition, the company states that the attempt to single out the Mayapple Solar Project PSA lacks merit when considering the other three projects were the result of the same competitive process. *See*, I&M's reply brief, p. 14 (citing Staff's initial brief, p. 27). I&M indicates that the Attorney General failed to cite to any difference in the process and the only challenge made is with respect to the contract negotiations. Continuing, the company avers that "contract negotiations are a necessary step in the competitive procurement process. The fact that the Company engaged in contract negotiations does not taint the competitiveness of the All-Source RFP. Indeed, the record demonstrates that contract negotiations are commonplace and provide[] a benefit to the Company and its customers." I&M's reply brief, p. 14. I&M reiterates that contract negotiations are essential in allowing a response to changing market conditions. Citing the Staff's initial brief, the company notes its agreement that there should be flexibility for terms and price during the competitive solicitation process given it can take more than a year from receiving initial bids to obtaining finalized costs. *Id*., p. 15 (citing Staff's initial brief, p. 34).

I&M again argues that allowing all bidders to provide revised bids before final selection would not guarantee a different outcome. Reiterating its testimony, the company states that had "all the remaining shortlisted projects been given an opportunity to reprice, the outcome would have, *with a high degree of certainty*, resulted in the same selection at the final negotiated prices given considerations of both non-price and price factors." I&M's reply brief, p. 16 (citing

11 Tr 1821; emphasis in original). Thus, I&M contends that the Attorney General has failed to demonstrate that the Mayapple Solar Project PSA was not the result of the competitive procurement process.

Further, the company contends that the finalized costs of the Mayapple Solar Project PSA are not significantly higher than the costs approved in the IRP and that they are also reasonable and prudent. I&M states that the Attorney General's "price evaluation is speculative and undefined, and does not refute the Company's evidence demonstrating the consistency of the Mayapple Solar Project to the approved IRP." I&M's reply brief, p. 16. I&M notes that the Attorney General's analysis is not specifically defined and it is unclear what comparisons are being made. With respect to the projects excluded from final negotiations, the company contends that the record demonstrates that the excluded projects "still would not have been selected because of non-pricing factors and their inability to support a reliable generation transition. Thus, even if the costs were hypothetically lower [than] the Mayapple Solar Project, they were not feasible options, and it would not change the outcome of the RFP." *Id*., p. 17.

I&M states that the record makes clear that the Mayapple Solar Project PSA "is consistent with the type and amount of resources, operational characteristics, and cost[s] approved in the Commission's Order Approving Settlement Agreement in Case No. U-21189," that the costs are not significantly higher, and that the finalized costs are also reasonable and prudent. I&M's reply brief, pp. 17-18. The company further states that Mr. Gaul testified regarding the facts of the 2023 RFP, not his opinion, and the Attorney General misapplies MRE 703. Specifically, I&M states that Mr. Gaul:

> testified to the number of bids received, the average of the 2023 RFP PSA bid prices, and the range of bid prices received. He then compares those values to the Mayapple PSA price. These are facts and MRE 703 does not require that the 2023

> RFP itself be in the record to further substantiate witness Gaul's factual testimony of which he has personal knowledge.

I&M's reply brief, p. 18.

B. Commission Staff

The Staff argues that the Commission should approve all four projects in the company's March 30 application. The Staff points to its initial brief to reiterate that the Commission should review the March 30 application under MCL 460.6t as the appropriate standard and reject the Attorney General's argument that this provision is not applicable and that the reasonableness and prudence standard should be utilized in its place. Staff's reply brief, p. 1. The Staff notes that, even in applying the reasonable and prudent standard, all four projects should be approved.

The Staff also maintains that the company has met its burden of proof demonstrating that the contracts are reasonable and prudent by a preponderance of the evidence. Further, the Staff asserts that the Attorney General has "failed to present any evidence in the record that can rebut the Company's and Staff's position of project reasonableness or propose an alternative plan that is *more reasonable and prudent* than the current plan before the Commission." *Id*., p. 3 (emphasis in original). The Staff contends that the Attorney General improperly discounts:

> the expert testimony submitted by Staff based on its extensive in-person audit of the documents and bids resulting from the competitive procurement process. (AG Initial Br, pp 12–13.) The Attorney General argues that the materials reviewed in Staff's in-person audit are not in evidence. (*Id*. at 15.) Due to the competitive nature of this process, Staff does not maintain custody or control of these documents. However, what is in evidence is the expert testimony and exhibits of three qualified expert Staff witnesses explaining the proposed Mayapple contract is reasonable and prudent. (Staff Initial Br, pp 7–21.)
>
> As Staff pointed out in its testimony and Initial Brief, every bid proposal that bid into the solicitation was reviewed by Staff experts and scored. (11 TR 1781.)

Staff's reply brief, p. 4. The Staff also notes that the Attorney General failed to cite any authority for the argument that commercially sensitive procurement materials and documents must be

admitted into evidence. Given the above, the Staff asserts that the Commission should reject any argument that discounts the Staff's expert testimony "merely because voluminous commercially sensitive materials unnecessary to demonstrate the reasonableness and prudence of the application were left out of the record." *Id*., pp. 4-5.

The Staff also contends that the Attorney General presented no evidence to support the argument that any value would be added if all developers had been required to resubmit bids. The Staff also disputes the Attorney General's characterization of Exhibit S-15.1, noting that the use of Competitive Procurement Guidelines is preferable, not mandatory, and that "[u]ltimately, while Staff would like to see use of an IA, the use of an IA is not dispositive on the reasonableness of a contract. In fact, Staff has stated that it understands the pros and cons of both an IM and IA approach." Staff's reply brief, p. 6 (citing 11 Tr 1774-1776).

The Staff objects to the Attorney General's reliance on the Commission's 2022 Renewable Energy Report Appendix E because the Staff contends that the most significant data point was excluded from consideration. Specifically, the Staff notes that the I&M project, South Bend Solar, was excluded, which is the only project operating in PJM. In regard to the I&M project, the Staff states:

> [t]he rest of the data points are taken from utilities in MISO. MISO and PJM are different markets and may have price separation due to a myriad of reasons, including higher load in PJM, different interconnection processes, and different capacity markets constructs. It also shows that even historically, I&M has had [a] higher cost of solar, likely due to operating in PJM.

Staff's reply brief, p. 6.

The Staff reiterates that, while it recommends preapproval of all costs, it does not recommend inclusion of those costs in rates until costs are actually incurred, explained, and determined to be reasonable and prudent by the Commission. Staff's reply brief, p. 8.

VI. DISCUSSION

The Commission has reviewed I&M's March 30 application and the evidence, testimony, and briefing regarding the projects and finds that it is reasonable to conclude that the Elkhart County Solar Project Renewable Energy PPA, Sculpin Solar Project PPA, and the Montpelier CPA are the result of competitive solicitation and should be approved as reasonable and prudent. *See*, 11 Tr 1685, 1754, and 1765. With respect to the Mayapple Solar Project PSA, the Commission does not find the Attorney General's argument persuasive that this agreement was the result of bilateral negotiations rather than competitive solicitation.

The Commission disagrees with the Attorney General's argument that MCL 460.6t is not controlling, which raises a question of statutory interpretation. *See*, Attorney General's initial brief, pp. 5-7. The Court of Appeals recently outlined the rules of statutory interpretation as follows:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory."

In re Consumers Energy Co to Increase Rates, 339 Mich App 233, 238–39; 981 NW2d 525, 529 (2021) (quoting *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009)).

MCL 460.6t states in part:

> (11) In approving an integrated resource plan under this section, the commission shall specify the costs approved for the construction of or significant investment in an electric generation facility, the purchase of an existing electric generation facility, the purchase of power under the terms of the power purchase agreement, or other investments or resources used to meet energy and capacity needs that are included in the approved integrated resource plan. The costs for specifically identified investments, including the costs for facilities under subsection (12),

included in an approved integrated resource plan that are commenced within 3 years after the commission's order approving the initial plan, amended plan, or plan review are considered reasonable and prudent for cost recovery purposes.

(12) Except as otherwise provided in subsection (13), for a new electric generation facility approved in an integrated resource plan that is to be owned by the electric utility and that is commenced within 3 years after the commission's order approving the plan, the commission shall finalize the approved costs for the facility only after the utility has done all of the following and filed the results, analysis, and recommendations with the commission:

(a) Implemented a competitive bidding process for all major engineering, procurement, and construction contracts associated with the construction of the facility.

(b) Implemented a competitive bidding process that allows third parties to submit firm and binding bids for the construction of an electric generation facility on behalf of the utility that would meet all of the technical, commercial, and other specifications required by the utility for the generation facility, such that ownership of the electric generation facility vests with the utility no later than the date the electric generation facility becomes commercially available.

(c) Demonstrated to the commission that the finalized costs for the new electric generation facility are not significantly higher than the initially approved costs under subsection (11). If the finalized costs are found to be significantly higher than the initially approved costs, the commission shall review and approve the proposed costs if the commission determines those costs are reasonable and prudent.

(13) If the capacity resource under subsection (12) is for the construction of an electric generation facility of 225 megawatts or more or for the construction of an additional generating unit or units totaling 225 megawatts or more at an existing electric generation facility, the utility shall submit an application to the commission seeking a certificate of necessity under section 6s.

Based on the plain language of these subsections, it is clear that the Legislature intended costs and specific projects to be refined through subsequent applications and proceedings before the Commission. As stated by I&M, adoption of the Attorney General's interpretation would improperly render portions of MCL 460.6t meaningless. *See*, I&M's reply brief, p. 6.

In addition, the contested settlement agreement as approved by the Commission contemplates the filing of subsequent *ex parte* applications for approval of resources consistent with those outlined in the agreement. The Attorney General does not dispute "that all of I&M's submitted

projects are consistent with the IRP, in the sense of meeting the resource and ownership mixes set forth in the settlement agreement . . . and only challenges the lack of evidence supporting the price of one of the projects." Attorney General's initial brief, p. 12. Thus, the Commission is not persuaded by the Attorney General's contention that MCL 460.6t is inapplicable when the record is clear that the company's March 30 application is consistent with the approved settlement agreement.

As quoted above, MCL 460.6t(12)(c) states that the company must demonstrate "that the finalized costs for the new electric generation facility are not significantly higher than the initially approved costs under subsection (11)." The record reflects that when considering the solar projects including the Lake Trout project pending in Case No. U-21377, the LCOE is comparable to the $80/MWh LCOE of the blended solar approved in the IRP. 11 Tr 1676-1677, 1795. Moreover, when removing the Lake Trout project, given that it is pending in another proceeding, the LCOE is actually lower than the LCOE of similar solar resources as approved in the IRP. 16-A Tr 1948-1949; 11 Tr 1793.

Given the above, the Commission concludes that the finalized costs are not significantly higher than the initially approved costs. *See*, MCL 460.6t(12)(c). Furthermore, the Commission also concludes that even assuming MCL 460.6t is not applicable, the record in this case demonstrates that the final costs for the Mayapple Solar Project PSA are reasonable and prudent. The Commission relies on the Staff's expert testimony regarding market conditions and range of solar LCOEs and finds that a Staff audit of materials and expert testimony regarding its findings is reliable evidence to be considered in a contested proceeding. Attempts to discount the Staff's expert testimony on this point are not persuasive, especially when the Attorney General admittedly acknowledged the upward trends of solar prices. *See*, Attorney General's initial brief, p. 13.

The Attorney General's comparison to utility-scale solar LCOEs in the Commission's 2022 Renewable Energy Report, which excluded an I&M specific project, is not persuasive. As the Staff indicates:

> [t]here was one Commission approved project that was excluded from this that was an I&M project–South Bend Solar at $77.58/MWh. This is the most significant data point because I&M is the only investor-owned utility operating in PJM. See Report on the Implementation and Cost-Effectiveness of the PA 295 Renewable Energy Standard (February 15, 2022), Appendix E [report]. The rest of the data points are taken from utilities in MISO. MISO and PJM are different markets and may have price separation due to a myriad of reasons, including higher load in PJM, different interconnection processes, and different capacity markets constructs. It also shows that even historically, I&M has had [a] higher cost of solar, likely due to operating in PJM.

Staff's reply brief, p. 6. The Commission agrees with the Staff's analysis and finds that, contrary to the Attorney General's assertion, the report does not demonstrate that the Mayapple Solar Project PSA is unreasonable.

The Commission is also unpersuaded by the Attorney General's argument that only the Mayapple Solar Project PSA cannot be considered to be the product of competitive solicitation. The record clearly demonstrates that all four projects were subject to the same competitive solicitation process. *See*, 11 Tr 1692-1709, 1771-1773. Rather, the Attorney General's concern clearly relates to the finalized price. Further, the record also shows that the competitive solicitation process complied with the Commission's Competitive Procurement Guidelines. 11 Tr 1774. The finalized price as compared to the initial bid does not discount the extensive competitive procurement process utilized in the selection of the projects. Concerns regarding the negotiations process also do not support the Attorney General's objections. More specifically, the record demonstrates that negotiations are a common part of the competitive solicitation process. 11 Tr 1662-1663, 1731. In addition, the Attorney General's concern with the percentage increase

over the initial bid is not persuasive given that the Sculpin Solar Project PPA increased by a greater percentage. *See*, Attorney General's initial brief, p. 15; *see also*, 11 Tr 1809-1810.

With respect to the Attorney General's assertion that I&M failed to provide the *required* explanation for its use of an IM rather than an IA to oversee the RFP process at issue, the Commission reiterates that the Competitive Procurement Guidelines are not mandatory. Therefore, the explanation was not required and did not amount to "a hole in a utility's direct case." Attorney General's initial brief, p. 13. Thus, the use of discovery responses to provide the *requested* information was reasonable in this instance.

Notwithstanding the above, the Commission declines to preapprove any contingency or contingency-like expenses associated with the Mayapple Solar Project PSA. The Commission has a long-standing policy of disallowing contingency costs, which has been explained in numerous orders. *See*, November 19, 2015 order in Case No. U-17735, pp. 7-11; December 11, 2015 order in Case No. U-17767, pp. 19-20; December 9, 2016 order in Case No. U-17999, pp. 4-6; January 31, 2017 order in Case No. U-18014, pp. 12-13; March 29, 2018 order in Case No. U-18322, p. 11; April 12, 2018 order in Case No. U-18370, p. 5; September 13, 2018 order in Case No. U-18999, p. 5; May 2, 2019 order in Case No. U-20162, p. 6; September 26, 2019 order in Case No. U-20322, p. 41; December 17, 2020 order in Case No. U-20697, p. 9; December 22, 2021 order in Case No. U-20963, p. 11; and November 18, 2022 order in Case No. U-20836, p. 137.

The Staff suggests that the Commission may approve such costs at this time and reserve review for reasonableness and prudence once the costs have actually been incurred, once the company is able to provide evidence that the expenses were incurred, once the company "provides an explanation of what event or events lead to these costs being necessary," and once the costs are

reviewed by the Commission and found to be reasonable and prudent. 11 Tr 1807. However, the Commission disagrees. MCL 460.6t(11) states that:

> [i]n approving an integrated resource plan under this section, the commission shall specify the costs approved for the construction of or significant investment in an electric generation facility, the purchase of an existing electric generation facility, the purchase of power under the terms of the power purchase agreement, or other investments or resources used to meet energy and capacity needs that are included in the approved integrated resource plan. The costs for specifically identified investments, including the costs for facilities under subsection (12), included in an approved integrated resource plan that are commenced within 3 years after the commission's order approving the initial plan, amended plan, or plan review are considered reasonable and prudent for cost recovery purposes.

Although the total cost requested by the company inclusive of contingency and contingency-like costs may be a reasonable cost for such a resource, approval of contingency or contingency-like expenses would equate to a finding of reasonableness and prudence, which the Commission declines to provide at this time. Such a finding of reasonableness and prudence of contingency and contingency-like costs, inclusive of the reviews detailed by the Staff, cannot take place until such costs have been incurred.

This conclusion, however, does not preclude I&M from seeking approval of any such expenses in the future once the costs have been incurred and the company can provide evidence that the expenses were incurred, as well as an explanation of what led to the costs being necessary, as consistent with the Staff's recommendation. *See*, 11 Tr 1807. At that time, the Commission can review the costs for reasonableness and prudence. As noted by the Staff, the evidence relating to the explanation of what lead to the costs being necessary "should be provided in the CON update that is to be filed in this docket, as well as the rate case docket in which I&M is proposing to recover these costs." 11 Tr 1807. More specifically, MCL 460.6t(17) states in pertinent part:

> [i]f the actual costs incurred by the electric utility exceed the costs approved by the commission, the electric utility has the burden of proving by a preponderance of the evidence that the costs are reasonable and prudent. The portion of the cost of a

> plant, facility, power purchase agreement, or other investment in a resource that meets a demonstrated need for capacity that exceeds the cost approved by the commission is presumed to have been incurred due to a lack of prudence. The commission may include any or all of the portion of the cost in excess of the cost approved by the commission if the commission finds by a preponderance of the evidence that the costs are reasonable and prudent.

Therefore, the Commission declines to preapprove any contingency or contingency-like expenses related to the projects, as consistent with Commission precedent.

I&M also made deferred accounting requests as part of its March 30 application. March 30 application, p. 7. The Commission finds that the deferred accounting requests were not disputed on the record. 11 Tr 1766. Further, the Commission finds that, excluding any amounts relating to contingency or contingency-like expenses discussed above, the deferred accounting requests are reasonable and should be approved.

THEREFORE, IT IS ORDERED that:

A. Indiana Michigan Power Company's application for leave to appeal the Administrative Law Judge's July 26, 2023 ruling is granted but the requested relief therein is denied.

B. Indiana Michigan Power Company's request for approval of power purchase agreements, a capacity-only purchase agreement, and a purchase and sale agreement is approved, as specifically described in this order.

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. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Katherine L. Peretick, Commissioner

Alessandra R. Carreon, Commissioner

By its action of August 30, 2023.

Lisa Felice, Executive Secretary

P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-21189

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on August 30, 2023 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

Brianna Brown

Subscribed and sworn to before me
this 30th day of August 2023.

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

Service List for Case: **U-21189**

Name	On Behalf of	Email Address
Alena Clark	Michigan Public Service Commission (MPSC)	clarka55@michigan.gov
Christopher M. Bzdok	Department of Attorney General	chris@envlaw.com
Christopher M. Bzdok	Citizens Utility Board of Michigan (CUB)	chris@envlaw.com
Christopher Saunders	ALJs - MPSC	saundersc4@michigan.gov
Don L. Keskey	Great Lakes Renewable Energy Association (GLREA)	donkeskey@publiclawresourcecenter.com
Holly Hillyer	Michigan Environmental Council	holly@envlaw.com
Holly Hillyer	Sierra Club	holly@envlaw.com
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