STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of **CONSUMERS ENERGY COMPANY** for authority to increase its rates for the generation and distribution of electricity and for other relief. /	Case No. **U-21870** **(e-file paperless)**

MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S APPLICATION FOR LEAVE TO APPEAL THE RULING ON MOTION TO QUASH DISCOVERY REQUEST AND PROTECTIVE ORDER

The Michigan Public Service Commission Staff ("Staff"), pursuant to Michigan Administrative Code Rule 792.10433 states as follows:

1. A Motion to Quash was anonymously filed by a Consumers Energy Company (the "Company" or "Consumers") customer under the pseudonym "Customer A" on September 18, 2025.

2. The Motion to Quash took issue with materials provided by the Company in response to a discovery request by the Attorney General, including redacted contracts between the Company and Customer A (the "Contracts").

3. Customer A claimed that the Contracts were provided in violation of Michigan's data privacy laws and rules without meaningful notice to allow Customer A to prevent disclosure.

4. Customer A asked, amongst other requested relief, that the parties to the above-captioned case be ordered to delete and destroy all electronic and printed copies of the Contracts. This requested relief was based, at least in part, on

apprehension of a hypothetical future Freedom of Information Act ("FOIA") request for the Contracts.

5. Staff, the Company, and the Attorney General all filed responses in opposition to Customer A's Motion to Quash.

6. A hearing was held on September 30, 2025.

7. On January 23, 2026, the Administrative Law Judge issued a ruling granting the motion in part and denying the motion in part (the "Ruling").

8. The Ruling found that the Company did not disclose Private Customer Information and did not violate the Customer Data Privacy Tariff or Commission rules. Nevertheless, the Ruling found that "a possible future FOIA request for the Contracts supports granting Customer A relief under the Motion." (Ruling, p 16.)

9. The Ruling ordered parties to delete or destroy all copies of the Contracts within ten days of the Ruling and notify Customer A's attorney that they have done so.

10. Mich Admin Code, R 792.10433 allows for appeals to the Commission from rulings of presiding officers. "During the course of a proceeding, a party may appeal a ruling of the presiding officer by filing an application for leave to appeal the ruling to the commission." Mich Admin Code, R 792.10433(1).

11. For the reasons more thoroughly articulated in the Brief in Support, Staff respectfully requests the Commission reverse the Ruling's direction to parties to delete or destroy the Contracts, the provision of which did not violate the Customer Data Privacy Tariff or Commission rules, which are protected under the

protective order in the same manner as all other confidential information, and which are likely public records subject to the State record retention laws and schedules.

PRAYER FOR RELIEF

Wherefore, Staff respectfully requests the Commission grant Staff's application for leave to appeal, grant Staff's request for immediate relief from the order to destroy the Contracts, and grant any additional relief the Commission deems appropriate.

Respectfully submitted,

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DATED: February 2, 2026

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of **CONSUMERS ENERGY COMPANY** for authority to increase its rates for the generation and distribution of electricity and for other relief. /	Case No. **U-21870** **(e-file paperless)**

MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL THE RULING ON MOTION TO QUASH DISCOVERY REQUEST AND PROTECTIVE ORDER

As indicated in the accompanying Application for Leave to Appeal, Staff seeks immediate relief from the order to delete or destroy all copies of certain contracts (the "Contracts") between Consumers Energy Company (the "Company" or "Consumers") and its anonymous customer, participating here under the pseudonym "Customer A." As Staff noted in its response to Customer A's Motion to Quash, the appropriate mechanism for protecting such confidential discovery materials is either a nondisclosure agreement or protective order. This is further supported by the determination in the ALJ's Ruling on Motion to Quash Discovery Request and Protective Order (the "Ruling") that the Contracts did not include Private Customer Information and that no violation of the Customer Data Privacy Tariff or Commission rules occurred.

The apprehension of a future Freedom of Information Act ("FOIA") request cannot justify the destruction of discovery materials that were properly sought and

properly provided. Such a result would simultaneously undermine the discovery and FOIA processes. This is especially true when such materials appear to fall clearly within the definition of records that cannot be disposed of, except as provided by applicable State retention and disposal schedules. For the reasons explained further below, Staff requests the Commission grant Staff's application for leave to appeal, grant Staff's request for immediate relief from the order to destroy the Contracts, and grant any additional relief the Commission deems appropriate.

I. Authority for Appeal

Mich Admin Code, R 792.10433 allows for any party during a proceeding to appeal a ruling of a presiding officer to the Commission. The appeal must be sought within 14 days of the ruling, unless otherwise provided by the presiding officer. The administrative rules further provide that the Commission shall grant an application and review the presiding officer's ruling if any of the following provisions apply:

> (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. [Mich Admin Code, R 792.10433(2)(a)– (c).]

In the instant matter, the second prong justifies the Commission granting appeal of the Ruling at this time.[1] The Ruling orders parties and party representatives to "delete any electronic copies of the Contracts, destroy any printed copies of the Contracts, and certify to Customer A's attorney that they have complied with this Ruling and Protective Order" within ten days of the Ruling.[2] (Ruling, p 20.) Staff agrees with the Attorney General that such instruction may "violate state document retention requirements and other statutes." (Attorney General's Response to Motion to Quash, p 15.) In fact, as discussed below, Staff asserts that the Ruling erred in determining that materials received via discovery, which are subject to both Staff's and Staff Counsel's applicable retention schedules, are not public records required to be retained accordingly. See Section III.B below. Staff will, therefore, face substantial and irreparable harm if the order to delete and destroy such materials is not overturned. The public at large will also face harm if record retention requirements are not followed. FOIA, which is inherently dependent on appropriate record retention, exists to protect the public's access to "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees." MCL

[1] Staff notes that, after issuing the Ruling, the ALJ issued the proposal for decision ("PFD") in this case on January 29, 2026. Given that the PFD does not address the Ruling or the Motion to Quash, Staff files this Appeal rather than addressing its requested relief in Exceptions.

[2] Given this appeal and the potential for destruction of the Contracts to violate applicable State retention schedules, as discussed further below in Section III.B, Staff and Staff Counsel do not intend to delete or destroy copies of the Contracts while this appeal is pending.

15.231(2); see also *Kestenbaum v Michigan State University*, 414 Mich 510 (1982). Improper destruction of public records would, therefore, undermine this public interest. For these reasons, immediate appeal is appropriate under Mich Admin Code, R 792.10433(2)(b).

II. Ruling From Which Relief is Sought

On September 18, 2025, an anonymous customer of the Company filed a petition to intervene for limited purposes, a request to proceed under the pseudonym "Customer A," and a motion to quash a portion of a discovery request submitted by the Attorney General to the Company. (Customer A's petition for Late Intervention, pp 1–5; Customer A's Motion to Quash, pp 1–17.) Specifically, the motion explains Customer A was made aware that the discovery responses would, and eventually did, include copies of certain contracts between Customer A and the Company with redactions. (Customer A's Motion to Quash, p 1.) Customer A claimed the disclosure of the Contracts violated the Company's Customer Data Privacy Tariff and Commission rules. (*Id.* at 1, 5–9.) Customer A also noted that the Contracts were provided to multiple State employees and expressed concerns regarding the potential disclosure of the Contracts through FOIA. (*Id.* at 1, 9–15.) Customer A also asserted the objective for the discovery request could be met in ways that avoided the harm Customer A seeks to prevent. (*Id.* at 15–16.)

Staff, the Company, and the Attorney General filed responses in opposition to the requested relief. All three parties asserted or implied that the Company's response did not violate the Company's Customer Data Privacy Tariff. (Staff's

Response to Motion to Quash, p 6; Consumers' Response to Motion to Quash, pp 5–10; Attorney General's Response to Motion to Quash, pp 7–8.) Staff further noted that the proper means for protecting such materials are nondisclosure agreements and protective orders. (Staff's Response to Motion to Quash, p 6.) The Company asserted that, even if the discovery responses had contained Private Customer Information, it was authorized to disclose them in this instance because of its obligation under the Commission's rules to "respond promptly and fully to requests for discovery." (Consumers' Response to Motion to Quash, pp 3–5.) The Attorney General defended the relevance and propriety of the discovery request, noted that FOIA does not justify a motion to quash, and noted that an order to delete or destroy the Contracts may violate state document retention requirements and other statutes. (Attorney General's Response to Motion to Quash, pp 6–15.)

On January 22, 2026, the Administrative Law Judge ("ALJ") issued the Ruling denying in part and granting in part Customer A's Motion to Quash. The Ruling found that the information sought via discovery was relevant to the case and agreed with the Attorney General that Customer A's alternative proposal of using aggregate data was an insufficient substitute. (Ruling, pp 9–10.) The Ruling disagreed with the Company's assertion that it was permitted to disclose Protected Customer Information pursuant to its obligation to respond to discovery requests, (*Id.* at 10–14,) but this point is moot given that the Ruling also found that the Company redacted all of the Protected Customer Information and complied with the Customer Data Privacy Tariff and Commission rules. (*Id.* at 14–15.) Despite this

finding, the Ruling found that "a possible future FOIA request for the Contracts supports granting Customer A relief under the Motion." (*Id.* at 16.) The Ruling also rejected the Attorney General's argument that the requested relief might violate State record retention statutes. It found that the Contracts do not constitute a record for these purposes, even though no party had made this argument. (*Id.* at 16–20.) Parties were ordered to delete or destroy any electronic or printed copies of the Contracts and to notify Customer A's attorney that they have done so within ten days of the Ruling. (*Id.* at 20.)

III. Discussion

A. The Ruling erred in ordering the return or destruction of the Contracts even after finding that the Company did not violate the Customer Data Privacy Tariff or Commission rules.

The Ruling explicitly found that the Company did not violate the Customer Data Privacy Tariff or Commission rules in responding to the Attorney General's discovery request or by providing the redacted Contracts. (Ruling, pp 14–15.) The Ruling agreed with the Company's explanation that, because it "redacted all Protected Customer Information" and marked the redacted contracts as "confidential," it did not violate the tariff or rules. (*Id.*) The Ruling went on to explain that "together with Customer A's non-objection to the production of Attachment 2, this Ruling finds both the Request and Consumers' Responses are appropriate." (*Id.* at 15.)

Despite these findings, the Ruling nonetheless claimed good cause was shown to grant Customer A's request that the contracts be returned or destroyed. (*Id.* at

20.) However, the only supposed basis for this good cause appears to be Customer A's apprehension that a FOIA request for the Contracts may be made in the future and that its subsequent attempts to protect that information would be unsuccessful. (*Id.* at 16.) The Ruling found, without supporting authority, that "a possible future FOIA request for the Contracts supports granting Customer A relief under the Motion." (*Id.*) There was also some high-level discussion of discovery limitations in the context of Customer A's motion arguments and whether the Company could have disclosed Protected Customer Information under these circumstances,[3] but the Ruling does not explain if and how these limitations justify the relief ordered here. (*Id.* at 4, 12–13.) Staff submits that they do not.

While Staff recognizes and understands the ALJ's efforts to find a compromise result, (see 1 TR 24,) [4] even if such discovery limitations were the asserted basis for the order to delete or destroy the Contracts, the ordered remedy is puzzling given the Ruling's explicit determination that the Company did not violate

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[3] Staff notes that it has not addressed the Ruling's finding that the Company was not permitted to disclose Protected Customer Information pursuant to Rule 53 of its data privacy policy and Mich Admin Code, R 791.10423, despite having taken a position on related matters in its response. (Staff's Response to Motion to Quash, pp 5–6.) This finding is no longer relevant since the Ruling found that the Company redacted all Protected Customer Information and did not violate the Customer Data Privacy Tariff or Commission rules. (Ruling, pp 14–15.)

[4] Staff notes that the transcript for the September 30, 2025 hearing on the Motion to Quash is labeled volume 1 on the e-docket (available here: https://mi-psc.my.site.com/s/filing/a00cs000016RGG1AAO/u218700326), though there was a previously compiled transcript for the prehearing. To remain consistent with the Ruling, Staff has used "Volume 1" in its citations to the September 30, 2025 transcript.

the Customer Data Privacy Tariff or Commission rules.[5] Without such violation, Staff asserts that its previously articulated opposition to the motion is all the more persuasive. Namely, that "[p]rotective orders and non-disclosure agreements provide the appropriate framework for disclosing such material in discovery." (Staff's Response to Motion to Quash, p 6.)

Moreover, Staff urges the Commission to find that one's apprehension of a potential FOIA request alone is not a valid basis upon which to order the destruction of discovery materials. To do otherwise would undermine not only the FOIA regime discussed further below but could also undermine Staff's and other parties' ability to conduct the robust discovery needed in contested cases.

This perspective is further buttressed by representations of counsel for Staff and the Attorney General on the record indicating those parties would provide the same notice to Customer A's attorney that would otherwise be owed to the Company if Staff or the Attorney General received a FOIA request pertaining to the confidential Contracts. (1 TR 48–49; MPSC Case No. U-21870 6/5/2025 Protective Order, p 7.) While there is no guarantee that such notice will prevent disclosure,

[5] Even Customer A's attorney appeared to suggest that a violation of the tariff or rules may be important to justify return or destruction of the Contracts, at least if a court order were required to permit such return or destruction. (1 TR 45–46.)

(see 1 TR 26,)[6] this has been the appropriate safeguard for confidential information in countless Commission cases and is the approach adopted by the Commission in its Non-Modifiable Protective Order issued for every rate case. MPSC Case No. U-18238, 4/25/2024 Order, p 9; MPSC Case No. U-18238, 7/9/2024 Rate Case Filing Requirements, Attachment 13, p 7. Staff asserts it is equally sufficient for Customer A and nothing in the Motion or Ruling demonstrates otherwise.

For these reasons, Staff maintains its position that the protective order is the proper mechanism to safeguard discovery materials, especially when such materials are properly produced. The Ruling, having found the discovery responses to be consistent with applicable tariff requirements and Commission rules, erred in finding that more aggressive relief was warranted. This is especially true given that such relief was based on Customer A's mere apprehension of a potential future FOIA request and given that the identified materials appear to fall explicitly under the retention schedules applicable to both Staff and Staff Counsel, as discussed in the section below.

B. The Ruling erred in finding that the Contracts are not records under the Michigan record retention statutes.

As the Attorney General pointed out, not only was the Motion to Quash's requested relief–specifically the destruction of the Contracts–inappropriate given

[6] Staff also notes that, while it understands the desire of Customer A to protect information from disclosure, that interest cannot eclipse the Commission's interest in fulfilling its obligations to required record retention and its stated emphasis on transparency when possible. MCL 15.231(2); MCL 18.1287(2)–(3); see e.g. MPSC Case No. U-21806, 9/30/2025 Order, p 107.

the protections already in place, it may also cause some parties to violate the State's record retention laws. (Attorney General's Response to Motion to Quash, p 15.) In response to these concerns, the Ruling attempts to distinguish the Contracts from public records that would be subject to the State's retention laws and schedule. (Ruling, pp 16–20.) Staff acknowledges there is limited authority on the parameters of what constitutes a public record. See *Howell Ed. Ass'n, MEA/NEA v Howell Bd. of Ed.*, 287 Mich App 228, 243 (2010). Given its obligation to properly retain public records and the potential penalties for failing to do so, however, Staff is compelled to respond to this analysis to note where it appears to be in error. In fact, Staff submits that materials received as discovery responses in a contested MPSC case very likely constitute public records that must be kept pursuant to applicable State retention schedules.

1. **The Contracts are likely a public record subject to State retention laws and schedules.**

As the Ruling acknowledges, the Michigan Penal Code makes clear that "official books, papers or records created by or received in any office or agency" of the State are "public property belonging to the people of" Michigan and can only be disposed of pursuant to Michigan law, including MCL 399.811. MCL 750.491; (Ruling, pp 16–17.) To willfully do otherwise constitutes a misdemeanor "punishable by imprisonment for not more than 2 years or a fine of not more than $1,000.00." MCL 750.491.

While MCL 750.491 does not define the term "record," as the Ruling notes, other Michigan statutes provide guidance on what is meant. (Ruling, p 17.) MCL 750.491 states that records may only be properly disposed of pursuant to a limited number of statutes, including MCL 399.811 of the Michigan History Center Act. The Michigan History Center Act defines "record" broadly as any one of several formats, including documents prepared by an electronic medium and recorded information in any electronic or digital file format. MCL 399.802(i). The definition does not provide any requirements regarding the use of the material as consideration for its designation as a record. *Id.* The Ruling does not discuss this specific definition, but it appears clear that the Contracts would fall within it.

The Ruling does discuss FOIA's definition of a "public record." FOIA gets to the heart of record retention, and its express purpose is to ensure "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees." MCL 15.231(2). "[E]ach provision of the FOIA must be read so as to be consistent with the purpose announced in the preamble." *Kestenbaum*, 414 Mich at 522. FOIA also provides a definition of public records that Staff submits is not only instructive, but crucial in determining whether Customer A's requested relief would result in a violation of proper record retention.

Pursuant to FOIA, a "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official

function, from the time it is created. Public record does not include computer software." MCL 15.232(i).[7] A "writing" means:

> handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, hard drives, solid state storage components, or other means of recording or retaining meaningful content. [MCL 15.232(l).]

The Contracts and other discovery materials appear to fall squarely within the broad definition of a "writing." Therefore, the remaining question is whether they are "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." MCL 15.232(i). Staff asserts that there is good reason to find that they are.

Under Michigan Law, the Department of Technology, Management, and Budget is required to solicit and approve Retention and Disposal Schedules. MCL 18.1287(2)(h), (3)(c). The Administrative Guide to State Government Procedure 0910.02[8] states that "Retention and Disposal Schedules provide the only legal

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[7] Similarly, the Administrative Guide to State Government Procedure 0910.10 (available here: https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Law-and-Policies/Admin-Guide/900/091001-Managing-Government-Records.pdf) defines records as "Recorded information in physical or electronic formats, made or received by a Michigan government agency or employee. Records document the performance of government business, and serve as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities."

[8] Available here: https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Law-and-Policies/Admin-Guide/900/091002-Records-Retention-and-Disposal-Schedules.pdf?rev=a2298e10f0c94011ab9ad2120ee71db5&hash=5F9B3FA123C23218FD01760E0C7608B9.

authorization to destroy Michigan government records." The Department of Licensing and Regulatory Affairs and the Department of Attorney General have adopted Retention and Disposal Schedules applicable to Staff and Staff Counsel. Particularly relevant in this instance are the Retention and Disposal Schedules for the Regulated Energy Division of Staff (Attachment A) and the Public Service Division of the Department of Attorney General (Attachment B).

The Regulated Energy Division Retention and Disposal Schedule specifies that rate case materials (described as records that "document rate cases heard by the MPSC," which may include "testimony exhibits, briefs, reviews, orders, etc.") must be retained until an order is issued plus 10 additional years. (Attachment A, p 3.) While this schedule does not explicitly address discovery materials, it appears likely that such materials "document rate cases heard by the MPSC." The Public Service Division Retention and Disposal Schedule is even clearer. It explicitly mentions the retention of "discovery documents," including discovery documents in administrative action cases involving Staff, which must be retained until the case is closed plus 10 additional years. (Attachment B, p 1.) Both of these schedules, and the Public Service Division schedule in particular, appear to cover the Contracts at issue in the Motion to Quash. These schedules indicate that such Contracts, when received by Staff and Staff Counsel through discovery, constitute a record subject to the applicable retention periods.

Not only are these retention schedules adopted pursuant to Michigan law, but they are anticipated and incorporated in the original protective order for this

case. The protective order explicitly notes that retention of Protected Materials under the order is subordinate to Michigan law and retention schedules. (MPSC Case No. U-21870, 6/5/2025 Protective Order, p 8.) The Commission should find that the Ruling should have incorporated this same deference.

It is worth noting that Customer A also appears to consider the Contracts public records. In its motion, Customer A states:

> Information produced in discovery in this proceeding to public employees is therefore subject to public disclosure under FOIA unless there is an applicable statutory exemption to FOIA, regardless of the existence of a protective order.
>
> Public records subject to FOIA include any "writing [] used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). FOIA "presumes records are discloseable." *Intl Union, United Plant Guard Workers of Am (UPGWA) v Dept of State Police*, 422 Mich 432, 441; 373 NW2d 713 (1985). "[O]nce a request under the FOIA has been made, a public body has a duty to provide access to the records sought or to release copies of those records unless the records are exempted from disclosure." *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564; 336 NW2d 828 (1983), citing MCL 15.233(2). [Customer A's Motion to Quash, pp 9–10 (emphasis added).]

Disclosure pursuant to FOIA is limited to public records. MCL 15.233(1); see also MCL 15.232(i). Customer A's recognition that the Contracts would likely be subject to disclosure pursuant to FOIA, and its discussion of the public records definition, make clear that Customer A believes the Contracts to be public records. More importantly, if they were not public records, then the Contracts would not be subject to FOIA and the entire basis for the destruction of the Contracts ("a possible future FOIA request") would be moot. (See Ruling, p 16.) Either: 1) the Contracts are public records subject to the retention requirements and FOIA; or 2) the Contracts

are not public records and there is no legitimate apprehension of a future FOIA request. Both cannot be true. Staff submits that the Contracts are likely public records that must be kept pursuant to applicable State retention laws and schedules.

2. The Ruling erred in its analysis of the relevant record retention laws.

As noted, the Ruling seeks to determine whether the Contracts are a public record that is subject to the State record retention requirements. Staff appreciates these efforts and again acknowledges the lack of direct guidance on the application of intertwining statutory regimes to this specific fact pattern. However, Staff notes that errors in the Ruling's determination on this topic demand correction.

Staff asserts that the Ruling was correct to look at the FOIA definition of a "public record," but that it failed to properly apply the definition. The Ruling correctly noted that, while the FOIA definition of a record is expressly incorporated into the Management and Budget Act, it does not apply to sections 284 to 292 of that Act, which contain a separate definition of the term for purposes of the Management and Budget Act's record retention sections. MCL 18.1115(4); MCL 18.1284(b). No such limitation is found in either MCL 750.491 or MCL 399.811. Also, as discussed further below, the definition applicable to sections 284 to 292 of the Management and Budget Act appears broader, not narrower, than the FOIA definition. Compare MCL 18.1284(b) with MCL 15.232(i).

For these reasons, and as explained above, Staff submits that the Contracts, which were received through Staff and Staff Counsel's official participation in a contested MPSC case and retained pursuant to applicable State retention schedules, likely fall under the FOIA definition of a "public record." The Ruling disagrees. It states that the FOIA definition provides "further support for the conclusion that the Contracts are not records." (Ruling, p 19.) The Ruling acknowledges that, under FOIA, a record is a writing "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." (*Id.* at 19 (quoting MCL 15.232(i).) It goes on to assert that it cannot be concluded the Contracts were "used" by a public body[9] in the "performance of an official function" because they were not admitted into evidence. (Ruling, p 19.) In addition to failing to explain how a future FOIA request justifies the relief granted if the Contracts are not records subject to FOIA (see Section III.B.1 above), this determination has two other main flaws.

First, it is unsupported and unclear why admission into the evidentiary record is the only means by which a party may "use" the Contracts in the performance of an official function. In fact, the scope of discovery is explicitly broader than the scope of admissibility, and parties may use such materials to evaluate and further their case without admitting the materials into evidence. MCR 2.302(B)(1) ("Information within the scope of discovery need not be admissible in evidence to be discoverable."); *Micheli v Michigan Automobile Insurance*

[9] Under FOIA, a "public body" includes a State employee. MCL 15.232(h)(i).

Placement Facility, 340 Mich App 360, 371–372 (2022). Second, "use" is merely one of five ways in which a writing can constitute a public record. MCL 15.232(i). It can also be prepared, owned, in the possession of, or retained. *Id*. As explained above, discovery materials such as the Contract are obtained and possessed as a result of Staff's participation in a contested case and fall within the retention schedules applicable to Staff and Staff Counsel. Therefore, at a minimum, they appear to be "in the possession of and retained . . . in the performance of an official function" by Staff and Staff Counsel.

The Ruling correctly noted that the Court of Appeals has explained that "mere possession of a record by a public body does not render the record a public document." (Ruling, p 19 (quoting *Howell Bd of Ed*, 287 Mich App at 236 (internal quotation marks omitted).) However, *Howell Bd of Ed* addressed "personal emails" sent and received by public school teachers regarding union matters that were, despite their irrelevance to the teachers' official function, automatically retained by the school district's computer system. *Howell Bd of Ed*, 287 Mich App at 232, 236–238. The court noted that the teachers could function without the emails, which had nothing to do with the operation of the school. *Id.* at 237–238. This is clearly distinguishable from discovery materials received by Staff and Staff Counsel solely because of, and in furtherance of, their official function in the contested case. Discovery is an integral part of MPSC contested cases, and Staff cannot function without participating in it. See Mich Admin Code, R 792.10423.

The Ruling also cites *Hopkins v Duncan Twp*, 294 Mich App 401, 409–410 (2011) for the same purpose. However, that case addressed "personal notes" taken by a trustee at township Board of Trustees meetings for personal use that were never circulated amongst the board members, not used in the creation of minutes, and retained or disposed of at the writer's discretion. *Id.* at 402–403, 417–418. This case is once again distinguishable from discovery responses that are circulated amongst the parties of a contested case and retained pursuant to State retention schedules as part of the case file.

As the Ruling notes, the FOIA definition of a record does not apply to Sections 284–292 of the Management and Budget Act, which provide the following applicable definition instead:

> a document, paper, letter, or writing, including documents, papers, books, letters, or writings prepared by handwriting, typewriting, printing, photostating, or photocopying; or a photograph, film, map, magnetic or paper tape, microform, magnetic or punch card, disc, drum, sound or video recording, electronic data processing material, or other recording medium, and includes individual letters, words, pictures, sounds, impulses, or symbols, or combination thereof, regardless of physical form or characteristics. Record may also include a record series, if applicable. [MCL 18.1284(b).]

This definition appears broader than the FOIA definition. While Staff could not identify any cases interpreting this provision, the provision includes any "recording medium . . . regardless of physical form or characteristics" and has none of the "performance of an official function" language found in FOIA. MCL 18.1284(b); MCL 15.232(i).

This broad definition applies to MCL 18.1285, which addresses State agencies' retention policies and obligations and which the Ruling discusses. (Ruling, pp 17–18.) The Ruling noted that the statute requires each state agency to maintain records which are necessary for: continued effective operations of its agency, adequate and proper recording of the activities of the agency, or protecting the state's legal rights. It finds that the Contracts do not fall within any of these categories. (*Id.*) In doing so, the Ruling once again relies on the fact that the Contracts were not admitted into the record, claiming without support that only items filed in the case are required for adequate and proper recording of the Attorney General's activities in the contested case. (*Id*. at 18.) Not only does Staff doubt that adequate recording is limited to items filed in the contested case, the Ruling's analysis ignores the second subsection of the statute, which states: "The head of a state agency maintaining any record shall cause the records to be listed on a retention and disposal schedule." MCL 18.1285(2). The schedules adopted pursuant to this statute that are applicable to Staff and Staff Counsel include discovery materials, as explained above. Therefore, contrary to the assertion of the Ruling, MCL 18.1285 appears to support a determination that the Contracts are a record.

The Contracts, which were received by Staff and Staff Counsel through their official participation in a contested case appear to meet the definition of a record under the various statutory definitions applicable to record retention. Staff

respectfully disagrees with the Ruling's finding to the contrary and recommends the Commission reject the finding as well.

IV. Conclusion

For the reasons stated above, Staff respectfully requests that the Commission grant its application for leave to appeal, grant Staff's request for immediate relief from the order to destroy the Contracts, and grant any additional relief the Commission deems appropriate.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION STAFF

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DATED: February 2, 2026

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of **Consumers Energy Company** for authority to increase its rates for the generation and distribution of electricity and for other relief. /	Case No. **U-21870** **(e-file paperless)**

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF EATON)

Cherie A. R. Shea, being first duly sworn, deposes and says that on **February 2, 2026,** she served a true copy of **Michigan Public Service Commission Staff's Application for Leave to Appeal the Ruling on Motion to Quash Discovery Request and Protective Order** upon the parties on the attached service list **via email only**:

Cherie A. R. Shea

Subscribed and sworn to before me
this **2nd** day of **February, 2026**.

De Ann M. Payne, Notary Public
State of Michigan, County of Eaton
Acting in the County of Eaton
My Commission Expires: 11-29-31

SERVICE LIST - CASE NO. U-21870

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SERVICE LIST - CASE NO. U-21870

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