

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.

MPSC No. U-21870

Attorney General's Application for Leave to Appeal Ruling on Motion to Quash Discovery and Protective Order

On January 22, 2026, a ruling on the Motion to Quash a Portion of a Discovery Request and Production to Prevent the Improper Disclosure of its Confidential Information file by Anonymous Customer A was issued. It was denied in part and granted it in part. Attorney General Dana Nessel (“the Attorney General”), pursuant to Michigan Administrative Code Rule 792.10433 states the following:

1. On September 18, 2025, Customer A filed a Motion to Quash a Portion of a Discovery Request and Production to Prevent the Improper Disclosure of its Confidential Information (“the Motion”).
2. In addition to seeking the retroactive quashing of discovery served by the Attorney General on the Company and the Company’s response which included the production of heavily redacted contracts between it and several large customers, it requested the return or destruction of the Contracts.

3. The redacted Contracts were provided as confidential documents pursuant to the protective order entered in this case on June 5, 2026. The protective order provided for notice by the Attorney General and MPSC Staff if they determine that any confidential information provided to them must be provided in response to FOIA. It also provided for document retention consistent with the States document retention schedules.
4. The Attorney General, Michigan Public Commission Staff, and Consumers Energy filed responses opposing the Motion and/or relief requested and a hearing on the Motion was held on September 30, 2025.
5. A Ruling denying the Motion in part and granting it in part was issued on January 22, 2026. The Ruling did not quash the discovery request and response including the production of the redacted Contracts; however it requires the deletion of emails containing the Contracts and destruction of any copies of the Contracts. The Ruling required those actions be taken in no more than 10 days after the Ruling was issued and that certification be provided to Customer A.
6. The Attorney General maintains that the requirement to delete or destroy the Contracts is unwarranted because it is premised on a speculative claim that they may be produced in the future in response to some hypothetical FOIA request, is contrary to the protective order issued in this case and under which the contracts were provided, maybe contrary to the States retention schedules, and may be done in violation of state law.

7. Mich Admin Code R 792.10433(2)(a) allows for appeals to the Commission from ruling of a presiding officer, including during the course of a proceeding.
8. Mich Admin Code R 792.10433(2)(b) also allows for appeals to the Commission during case proceedings to prevent substantial harm to the appellant or the public-at-large.
9. For the reasons provided in the attached Brief in Support, the Attorney General requests that the Commission grant her request for leave to appeal and that the Ruling's requirement that all parties delete the Contracts provided in response to the Attorney General's discovery request be disallowed, subject to the requirements provided in the Protective Order, dated June 5, 2025.

RELIEF REQUESTED

Wherefore, the Attorney General respectfully requests that this Application be granted in its entirety. That any requirement to delete or destroy documents as directed in the Ruling be stricken. However, if the Commission determines that the ALJ's Ruling should be confirmed, the Attorney General asks that it be limited to the destruction of Customer A's contract only. No other customer sought relief, Customer A did not establish standing to speak on their behalf, and the ruling did not establish a basis for granting such sweeping relief.

Respectfully submitted,

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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.

MPSC No. U-21870

Brief in Support of the Attorney General's Application for Leave to Appeal Ruling on Motion to Quash Discovery and Protective Order

I. Introduction

On January 22, 2026, ALJ Jonathan Thoits (the “ALJ”) issued a ruling (“the Ruling”) to a Motion to Quash a Portion of a Discovery Request and Production to Prevent the Improper Disclosure of its Confidential Information file by Anonymous Customer A (“the Motion”). He denied the Motion in part and granted it in part. While the Ruling did not quash the discovery by the Attorney General and the response including the production of documents pursuant to the protective order entered in the case, it required all recipients of the discovery response to delete or otherwise destroy document provided with the response based on erroneous analyses. This appeal seeks a review of that Ruling by the Michigan Public Service Commission (“the Commission”) and the disallowance of its requirement for the parties to destroy certain documents received in response to discovery served by the Attorney General.

On September 18, 2025, Customer A filed its motion seeking to quash certain discovery requests included in the Attorney General’s Sixth Discovery Request to the Company.¹ The request sought contract information for large contractual customers with projects requiring large scale upgrades to their services, to understand the scope of the project and the potential risk for stranded cost that may be borne by other customers of Consumers Energy Company (“Consumers” or “the Company”). On September 16, 2025, the Company provided a response to the Attorney General’s discovery request which included among other things, objections to part of the requests and heavily redacted copies of contracts for the projects in question as confidential documents pursuant to the protective order entered in the case.²

Customer A’s motion sought to retroactively quash part of the Attorney General’s request and requires that anyone receiving the heavily redacted contracts, return or otherwise delete or destroy them. It also sought certain notice requirements be imposed on Consumers requiring it to obtain informed consent from any customer that it has a contract with before responding to discovery. The Motion challenged the relevance of the Attorney General’s request and its propriety under the rules for discovery, alleged violations of Consumers’ Data Privacy Tariffs, and raised concerns regarding possible disclosure of information under the Freedom

¹ This discovery request was served on the parties to the case on September 2, 2025.

² Exhibit A to the Attorney General’s Response contains the Company’s public response.

of Information Act (“FOIA”). Customer A argued that the Michigan Court rules permit discovery to be circumscribed to prevent excessive, irrelevant, or unduly burdensome requests among other things. It also argued that the Michigan Court of Appeals has upheld court orders that prescribe discovery procedures in order to prevent disclosure of confidential matters of third parties (including advance notice of requests and an opportunity to review the disclosures prior to production), or discovery of documents that are not relevant to determination of issues in the case.³ The Attorney General, Michigan Public Service Commission (“MPSC”) Staff, and the Company submitted responses to the Motion.

A hearing was held on September 30, 2025 on the Motion, during which the parties reiterated and expanded on their positions. During the hearing, the ALJ announced that he would issue a written ruling. He also stated “[b]ut I’m – as you could probably gather from my questions, I’m, trying to explore whether or not there’s a way to, to split the baby, if you will, for lack of a better term, to offer some protections for Customer A while not inhibiting Consumers nor the Attorney nor any other party from, from being able to access and use all appropriate information with respect to the matters at issue.”⁴ The Ruling was issued on January 22, 2026, and was clearly constructed in such a way to accomplish the “splitting of the baby” referenced by the ALJ. While the ALJ ultimately determined that the discovery request was relevant and both it and Consumers’ response were appropriate,

³ Motion, pp. 1, 3, 9 – 16.

⁴ Hearing Transcript of September 30, 2025 Hearing on the Motion.

therefore denying the Motion to Quash, the Ruling nonetheless granted Customer A's requested relief that all parties be required to destroy copies of all the contracts provided in response to the Attorney General's discovery request and delete all emails containing the same within 10 days basing it primarily on the possibility of disclosure through FOIA.⁵ This outcome is contrary to the applicable facts and law. It is also disproportionate to any interest that Customer A has in this case and should be rejected. Finally, the existing Protective Order for the case provides reasonable protection as discussed below.

II. **Legal Standard for Appeal**

The authority for appealing a ruling of a presiding officer to the Commission during a proceeding is found in Mich Admin Rule 792.10433, which allows for an appeal to be filed within 14 days of the ruling, unless otherwise provided by the presiding officer. The Commission shall grant an application and review the presiding officer's ruling if an 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 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.⁶

⁵ Ruling, p. 16.

⁶ Mich Admin R 792.10433(2)(a) – (c).

In the instant case, interlocutory relief from the Commission is necessary prior to the submission of the full case to it to prevent substantial harm to the appellant or public-at-large. First, as discussed above, the Ruling directing the parties to the case to delete or other destroy all copies of the contracts received in discovery was issued on January 22, 2026, and requires certification that the parties carried out the directive within 10 days. Second, the PFD in this case was issued on January 30, 2026, with deadlines for filing exceptions by February 17, 2026, and replies to exceptions by February 26, 2026. Third, the earliest that the full case will be submitted to the Commission for a final order will be February 26, 2026, nearly a month after the deadline included in the Ruling to destroy the contracts and certify their destruction, and a final order from the Commission is anticipated in early April 2026. Fourth, the Ruling does not provide for or even acknowledge the possibility for a party to appeal the decision before compliance with the directive. Fifth, compliance with the directive will make an appeal through exceptions moot. For these reasons, an immediate appeal is appropriate.

III. **Factual Background**

Company witness Megan L. Hayward provided testimony regarding the Company's HVD Strategic Customers New Business Program which includes the capital costs of meeting the new business needs of large C&I customers that are too energy intensive to be served by the area LVD system.⁷ She describes *typical*

⁷ Hayward Direct Testimony, 3 Tr 1296.

investments for the program, including dedicated substations and interconnections of dedicated substations to HVD system with poles, conductors, and metering to connect new C&I customers.⁸ And, that unlike many other capital programs, projects under this subprogram are based on the needs and expectations of specific customers.⁹ The Company is projecting bridge period and test year spending of \$90,045,000 and \$43,860,000, respectively for this subprogram net of expected contributions made to the Company by the customers for these projects.¹⁰

There were ten projects listed under this subprogram, but only nine of the projects have customers committed to moving forward.¹¹ One project was cancelled. Because spending was previously approved for the cancelled project, the Company is seeking recovery of the expenditures already incurred in this case from other ratepayers, pending recovery of these costs from the contract customer per the contractual terms for termination.¹² “*If* and when the Company recovers these costs from the customer, that money will be credited to this sub-program and netted back out of rate base.”¹³ This situation prompted the Attorney General to seek discovery in this case for information regarding the terms of the contracts for these large

⁸ *Id.*

⁹ Hayward Direct Testimony, 3 Tr 1297.

¹⁰ *Id.* at 3 Tr 1297 – 1298.

¹¹ *See*, Exhibit A-109 (MLH-3) and Hayward Direct Testimony, 3 Tr 1299.

¹² *See*, Hayward Direct Testimony, 3 Tr 1299.

¹³ Hayward Direct Testimony, 3 Tr 1299 (emphasis added).

customer contracts to determine the potential for other ratepayers to be responsible for costs Consumers is unable to recover, among other things.

IV. Analysis

Consumers is a regulated utility under the authority of the Michigan Public Service Commission (“the Commission”). It filed an application seeking cost recovery and other authorizations and is required to provide evidence to support the reasonableness and prudence of its proposals. To the extent it does not, the Commission’s Rules of Practice and Procedure state in R 792.10423 that:

Discovery shall, as far as practicable, be conducted in the same manner as in the circuit courts of this state pursuant to the Michigan court rules or as otherwise provided by law. When appropriate, the presiding officer shall set time limitations for the conduct of discovery. Every party shall respond promptly and fully to requests for discovery. The parties shall not use discovery to harass or cause needless delay.

In addition, MCL 24.275 states that “[i]n a contested case the rules of evidence as applied in nonjury civil cases in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.”

The courts must insist that discovery be conducted in a way which “promote[s] the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment.”¹⁴ This should also be true for contested case before the Commission.

¹⁴ *Hallett v Michigan Consolidated Gas Co*, 298 Mich 582, 591; 299 NW 723 (1941).

In fact, MCR 2.302(B)(1) provides that:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. **Information within the scope of discovery need not be admissible in evidence to be discoverable.**

Customers A claim that the Attorney General's discovery request is overbroad and requires production of highly sensitive customer information that was irrelevant to the stated purpose of the request was refuted by the Attorney General and rejected by the ALJ.¹⁵ The Ruling correctly determined that the requested information and the information included in Consumers' response was relevant in this case.¹⁶ It also agreed with the Attorney General that Customers A's proposed alternative of using aggregate information does not address the purpose of the request and would obscure the scope and nature of the expenditures in questions.¹⁷ The Attorney General is not appealing that part of the Ruling.

The Ruling also addressed Consumers' arguments that the response did not violate its data privacy tariff and Rule 423, and that it was not required to seek informed consent before disclosing the information. It disagreed with the Company's analysis regarding informed consent and the applicability of the data privacy tariff and Rule 423. Notably, it disagreed with the extent to which

¹⁵ See, Attorney General's Response to Motion to Quash, Section III - Analysis and Ruling p. 9

¹⁶ *Id.*

¹⁷ *Id.*, at p. 10.

discovery must be responded to, claiming that the Company may not be required to provide full responses to discovery requests.¹⁸ As discussed above, MCR 302(B)(1) describes the scope of discovery absent a court order limiting its scope. And courts have generally supported broad discovery that reveals facts rather than conceal them.¹⁹ Ultimately, the Ruling determined that the redacted information provided by the Company did not violate the data privacy tariff contrary to Customer A's assertions because Consumers redacted all Protected Customer Information consistent with the Data Privacy tariff and having marked the redacted version as "confidential" and subject to the Protective Order.²⁰

A. The Ruling erred in directing the destruction of discovery responses.

The Company, which is a party to the contracts and more importantly a regulated utility seeking cost recovery for the projects being undertaken, has the burden of presenting sufficient evidence to support its request and demonstrate that the costs are reasonable and prudent. The contracts disclosed in this case involve, Customer A along with other large customers *and* Consumers, which has certain obligations and will incur certain costs under the contracts. The proper approach when there is a concern regarding the potential exposure of confidential information is to issue confidentiality order to protect a party's interest rather than to deprive

¹⁸ Ruling, pp. 10 – 14.

¹⁹ *Hallett v Michigan Consolidated Gas Co*, 298 Mich 582, 591; 299 NW 723 (1941).

²⁰ *Id.*, at pp. 14 – 15. The Protective Order referenced in the response is the non-negotiable Protective Order approved by the Commission for use in its cases and used in this case.

others of adequate discovery.²¹ A protective order was issued in this case on June 5, 2025, limiting access to or use of confidential information unless certain procedures are followed. That is the proper vehicle for addressing Customer A’s concerns. In ruling that the discovery response including the production of the contracts by the Company was appropriate, it acknowledged compliance with the Protective Order issued in the case as discussed above. Nonetheless, the Ruling creates a second “protective order” requiring the immediate destruction of the contracts instead of their treatment as provided in the June 5, 2025 Protective Orders without adequate justification.

Section I of the protective order defines “Protected Material” in part:

“Protected Material” consists of trade secrets or confidential, proprietary, or commercially sensitive information provided in Disclosing Party’s application, exhibits, discovery or audit responses, any witness’ related exhibits and testimony, motions, objections, briefing, responses, any witness’ related exhibits and testimony, motions, objections, briefing, responses to an order issued by a presiding hearing officer or Michigan Public Service Commission (“MPSC” or the “Commission”), and any arguments of counsel describing or relying upon the Protected Material.

Clearly, the Commission understanding the nature of contested cases before it, the amount of information exchanged and the varied use and potential nonuse of information, when broadly defining “Protected Material.” The Ruling tries to narrowly define “uses” to justify the requirement to destroy the contracts as directed. However, if such a narrow view of what constitutes a use is allowed to stand, the Attorney General is concerned that it will erode her ability to obtain and

²¹ *Eyde v Eyde*, 172 Mich App 49, 57 (1988).

use information in her analysis of issues in contested cases as she sees fit because other parties (or non-parties) may seek a way around the established Protective Order, instead of relying on its provisions which balances many interests.

Section V of the Protective Order – Retention of Documents provides:

Protected Material remains the property of the Disclosing Party and, except as required by applicable law and State retention schedules, only remains available to the Receiving Party until the time expires for petitions for rehearing of a final MPSC order, until the MPSC has ruled on all petitions for rehearing in this case (if any), or until judicial review is completed and the time to take further appeal is expired. If the Disclosing Party seeks to have the Receiving Party return all Protected Material in the Receiving Party's possession or in the possession of its Reviewing Representatives, or certify in writing that all Protected Material has been destroyed, it is the responsibility of the Disclosing Party to contact the Receiving Party and make its request no earlier than the expiration of time filing petitions for rehearing in this case (if any), or until judicial review is completed and the time to take further appeal has expired. Further, for a Receiving Party that is associated with the State, the request must be consistent with the expiration of the State retention requirement.²²

The provision also allows a party to retain confidential documents for potential use in future cases, subject to the establishment of a protective order in those cases.

As discussed below, the Attorney General obtained, reviewed, analyzed, and relied in part on the contracts in making some recommendations in testimony and her brief.²³ She has an interest in retaining the documents. The Commission approved protective order in the Rate Case Filing Requirements acknowledges that

²² MCL 18.1287 (1) and (2) governs the establishment of state document management systems, retention schedules and the requirement to provide safeguards against unauthorized or unlawful disposal, removal or loss of state records.

²³ See, Coppola 3 Tr 2470 – 2473 and Attorney General's Initial Brief, pp. 29 – 31.

the Attorney General and the Public Service Commission are subject to document retention requirements as governmental offices, and therefore, the protective order entered on June 5, 2025 is rightfully subject to those terms.²⁴

1. **The Rulings conclusion that the contracts could not constitute records and therefore be subject to various state laws regarding retention and destruction appears erroneous.**

The Ruling claims the contracts could not be records under various statutes in an attempt to refute the Attorney General's arguments that it may be improper to require the Attorney General to destroy documents in a manner that may be contrary to applicable state retention schedules. As noted in the Attorney General's response, public records may only be destroyed on proper legislative authority.²⁵ Any order requiring documents to be deleted or destroyed as proposed in the Motion to Quash may also violate other statutes.²⁶

The Ruling also asserts that the "claw back" of the Contracts does not appear to be contrary to the applicable record retention statutes, because they do not appear to fall within the various definitions and description of the records to which the record retention statutes and corresponding promulgated rules and policies

²⁴ See Paragraph V Retention of Documents.

²⁵ Attorney General's Response to Motion to Quash, document page 15, *referencing* Op.Atty.Gen., May 6, 1942, No. 23200, p. 601.

²⁶ *Id.* See also, Michigan Penal Code 750.491(1) – (2) and the Management and Budget Act, Act 431 of 1985, MCL 18.1285, MCL 18.287(2)(f) and (3)(c).

apply. First, the Ruling requires the destruction of the documents not their “claw back,” which presumably means their return to the sender. In fact, it is impossible to claw back an electronic document once it is sent out of one’s email system.

Second, the ALJ uses very narrow and superficial analysis of what it means to use documents to determine that the contracts do not constitute records under various statutes.

MCL 750.491(1) provides that

All official books, papers, or records created by or received in any office or agency of this state or its political subdivisions are public property belonging to the people of this state. All such books, papers, or records must be disposed of only as provided in section 11 of the Michigan history center act, 2016 PA 470, MCL 399.811, section 2a of the records reproduction act, 1992 PA 116, MCL 24.402a, and section 2137 and 2138 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2137 and 600.2138.

The Ruling notes that the section 491 does not define what is considered “official books, paper, or records” nor does the Miscellaneous Definitions of the Penal code define those terms. It then looks to some of the other statute referenced in Section 491(1) of the Penal Code which outline how books, papers, or records must be disposed of in an attempt to define “records”. First, it claims that the Contracts do not fall within the description of necessary records which need to be maintained by state agencies under Section 285(1) of the Management and Budget Act because it does not believe that the use of the contracts by the Attorney General in her analysis falls under one of the specific categories.²⁷ Specifically, regarding

²⁷ Ruling pp. 17 – 18.

records necessary for an adequate and proper recording of activities of the state agency, the Ruling posits that to the extent records documenting the litigation activities of the Attorney General in contested utility rate cases meet that requirement, the records should be limited at most to those items the Attorney General files in the case such as testimony, exhibits or briefs. The Ruling provided no basis for such a limitation. While it cited to cases in which certain uses were referenced, what is considered a use is not expressly limited as proposed by the Ruling.

A party can use documents to analyze issues in a case, clarify issues or concerns, or resolve issues or concerns even if they are not used as exhibits. More importantly, the Attorney General did use information gleaned from or better yet lacking in the in the contracts in her testimony and brief. Her expert provided comments in his testimony recommending requirements for better financial assurance for large customer contract based on the lack of information from the heavily redacted documents.²⁸ Likewise, the Attorney General's brief echoed those recommendations.²⁹ The claim that the Attorney General did not use the contracts because there were not filed as exhibits is based on an unjustifiably narrow definition of use and should be rejected.

²⁸ Coppola, 3 TR 2470 – 2473.

²⁹ Attorney General's Initial Brief, pp. 29 – 31.

Second, the Ruling makes errors regarding Section 11(2) of the Michigan History Center Act.³⁰

MCL 811.399(2) provides in part that:

A record that is required to be kept by a public officer in the discharge of duties imposed by law, that is required to be filed in a public office, or that is a memorial of a transaction of a public officer made in the discharge of a duty is the property of the state and shall not be disposed of, mutilated, or destroyed except as provided by law...

The Ruling claims that the Contracts are not a memorial of a transaction of a public officer; rather these contracts memorialize transactions between Consumers and Customer A (and other Consumers' customers), however it mischaracterizes the nature of the transaction being memorialized. Given the Attorney General's participation in the case and her use of the document as discussed herein, the ALJ's reasoning is erroneous.

2. FOIA does not justify the relief proscribed in the Ruling.

The Ruling claims that although section 115 of the Management and Budget Act does not incorporate the definition of record from section 2 of FOIA, consideration of FOIA provisions provide further support for the conclusion that the Contracts are not records subject to various state record retention provisions.³¹ It claims that "it cannot reasonably be concluded that the produced contracts were "used" by a public body in the performance of an official function. Indeed it is

³⁰ MCL 399.811. See, Ruling p. 18.

³¹ Ruling p. 19.

undisputed that the produced contracts were not “used”, as these were not admitted as exhibits into evidence. Moreover, it is clear that mere possession of the Contracts does not make the Contracts a public document.”³² This analysis should be rejected.

FOIA defines “public record” as

“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. The act separates public records into the following 2 classes: (i) Those that are exempt from disclosure under section 13. (ii) All public records that are not exempt from disclosure under section 13 and that are subject to disclosure under this act.”³³

“A writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it.”³⁴

A “public body” includes the following:

(i) A **state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch** of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.³⁵

³² Ruling p. 19, also *citing to Howell Ed. Ass’n v Howell Board of Ed.*, 287 Mich App 228, 236, 789 NW 2d 495 (2010) and *Hopkins v Duncan Tp.*, 294 Mich App 401, 409 – 410, 812 NW2d 27 (2011).

³³ MCL 15.232(2)(i).

³⁴ *Hopkins v Duncan Tp.*, 294 Mich App 409, *citing MacKenzie v Wales Twp.*, 247 Mich App 123, 129, 635 NW2d 335 (2001); *Detroit News Inc. v Detroit*, 204 Mich App, 720, 723-724, 516 NW2d 151 (1994) (“A writing can become a public record after its creation. We understand the phrase “from the time it is created” to mean that ownership, use, possession, or retention by the public body can be at any point from the record creation onward.” *Detroit News, Inc. v Detroit*, 201 Mich App. 725.)

³⁵ MCL 15.232(2)(h)(i) (emphasis added).

Therefore, the Attorney General and Department of Attorney General and its divisions are public bodies for purposes of FOIA. The Attorney General intervened in the case in her official capacity, and she is represented by the Department of Attorney General's Special Litigation Division. As discussed above, the Company, which is a party to the contracts and more importantly a regulated utility seeking cost recovery for the projects being undertaken, has the burden of presenting sufficient evidence to support its request and demonstrate that the costs are reasonable and prudent. The contracts were used in the Attorney General's analysis as memorialized in testimony and her brief. The use of the contracts in formulating testimony and in the Attorney General's brief constitutes a use. While inclusion as an exhibit is a form of use, it is not exclusive for determining whether something constitutes a public record under FOIA.

The ALJ also referenced Section 11(1)(a) of FOIA which provides for the publishing of certain categories of records, including "final orders or decisions in contested cases and the records on which they were made," to argue that the contracts are not records.³⁶ Specifically, it asserts that "as the Contracts were not admitted into evidence, the Contracts cannot reasonably be found to be records on which the pending PFD or the final Commission order "were made"". ³⁷ This conclusion makes an illogical leap from whether a contract possessed and used by

³⁶ Ruling pp. 19 – 20.

³⁷ *Id.*, at p. 20.

the Attorney General can be considered a public record under FOIA to whether the Commission used it. First, Section 11(1)(a), requires that

- (1) A state agency shall publish and make available to the public all of the following:
 - (a) Final orders or decisions in contested cases and the records on which they were made.
 - (b) Promulgated rules.
 - (c) Other written statement that implement or interpret law, rules, or policy, including but not limited to guidelines manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

The listed items are required to be published or made available to the public without the need for a FOIA request, which is described in Section 3(1) of FOIA.³⁸ Consequently, the Commission publishes its orders and the record on its docket, although it does not publish confidential documents filed under seal. Second, the Motion addressed the concern that the contracts may be disclosed in possible responses by the Attorney General and MPSC Staff to FOIA requests they *may* receive in the future. This possibility does not justify the relief granted.

³⁸ MCL 15.233(1).

As discussed above in the Attorney General's response to the Motion, there is a protective order in place that restricts the public exposure of confidential information disclosed in the case, except to those parties executing a nondisclosure certificate. While it does not necessarily preclude disclosure in response to a possible future FOIA request it does require notice to be provided should the Attorney General or MPSC Staff determine that it needs to disclose any confidential information due to FOIA, at which point the party providing the confidential information can take whatever actions it deems necessary in response.³⁹ The Attorney General and MPSC Staff have already agreed to extend that notice to Customer A and further extension of that notice requirement would be an appropriate way to address a future FOIA request. And to be clear, no determination has been made at this time by the Attorney General that the contracts would constitute public documents subject to FOIA. That determination will be based on the specifics of a FOIA request if one is received.

The Ruling claims that good cause exists and has been shown for the Contracts to be returned or destroyed and that such return or destruction will not unduly prejudice the parties to this case, and that such return or destruction will be supported by the applicable court and administrative rule, and the Protective Order.⁴⁰ To the contrary good cause does not exist for the contracts to be destroyed

³⁹ See, Protective Order Section III.C.

⁴⁰ Ruling, p. 20.

within 10 days, which is the relief ultimately required by the Ruling.⁴¹ First, the Motion was filed on the basis that the Contracts may be disclosed in response to FOIA. That is a purely hypothetical claim, and the likelihood of real harm has not been demonstrated to support the relief ordered. In fact, the protective order in place for the case recognizes the possibility of FOIA but provides for discovery and possible use of confidential materials and information because to do otherwise, would deprive governmental parties and even the Commission of valuable and relevant information in deciding cases. Because the documents were heavily redacted such that identifiable information is not readily discernable, the Ruling found the request and response appropriate. The need for a second protective order has not been demonstrated in this case. Second, since the Attorney General did review and consider the contracts in her analysis, she would be prejudiced by a requirement to destroy the very documents she used while the case is still pending before the Commission. Further, the possibility that the requirement to destroy the documents would circumvent FOIA and state retention schedules should not be based on hypothetical harms and the superficial analysis provided in the Ruling.

The Ruling went to great lengths to assert that the Contracts were not records or public records under FOIA which if true does not support their destruction since that was the basis for the relief sought in the Motion. In addition, the Ruling's requirement that all parties destroy all the contracts is unwarranted

⁴¹ *Id.*

given the basis for the relief granted. First, not all parties are subject to FOIA, and no reason has been given for requiring private parties to destroy the Contracts. Further, only Customer A has sought relief, only its Contract should be subject to destruction.

B. Conclusion

The Application for Appeal should be granted in its entirety. However, if the Commission determines that the ALJ's ruling regarding the destruction of documents should be confirmed, the Attorney General asks that it be limited to the destruction of Customer A's contract only. No other customer sought relief, Customer A did not establish standing to speak on their behalf, and the ruling did not establish a basis for granting such sweeping relief.

Respectfully submitted,

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PROOF OF SERVICE - U-21870

The undersigned certifies that a copy of the *Attorney General's Application for Leave to Appeal Ruling and Brief in Support* was served upon the parties listed below by e-mailing the same to them at their respective e-mail addresses on the 2nd day of February 2026.

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