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.
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MPSC Case No. 21870

Attorney General's Response to Customer A's Application for Leave to Appeal Ruling on Motion to Quash Discovery Request and Protective Order and Request for Continuation of Interim Relief

On September 18, 2025, Customer A, allegedly an existing electric service customer of Consumers Energy Company ("Consumers" or "the Company"), filed a motion seeking to quash certain discovery requests included in the Attorney General's Sixth Discovery Request to the Company.[1] As part of the request, the Attorney General sought information regarding large customers with agreements with the Company regarding projects to provide large scale upgrades to their services, to understand the scope of the projects and the potential risk for stranded cost that may be borne by other customers of 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 redacted copies of contracts for the projects in question as confidential documents pursuant to the protective order entered in the case.

Customer A filed a motion to retroactively quash part of the Attorney General's discovery request and the Company's response. It also requested that

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

persons receiving the redacted contracts be required to delete or destroy them and that certain notice requirements be imposed on Consumers requiring it to provide notice to any customer that it has a contract with, before it responds to discovery. In support of its motion, Customer A challenged the relevance of the Attorney General's request and its propriety under the rules for discovery, alleging violations of Consumers' Data Privacy Tariffs, and raising concerns regarding possible disclosure of information under the Freedom of Information Act ("FOIA"). The Attorney General, Michigan Public Service Commission Staff ("Staff"), and the Company submitted responses to the Motion.

A hearing on the Motion was held on September 30, 2025. A ruling on the Motion was issued on January 22, 2026. The ALJ determined that the discovery request was relevant and both it and Consumers' response were appropriate, therefore denying the Motion to Quash. However, the Ruling 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.[2]

On February 2, 2026, the Attorney General and Staff filed Applications for Leave to Appeal the Ruling's requirement that the contracts be destroyed in contravention of the State's record retention policies and the Protective Order that they were subject to under the case. Customer A filed its Application for Leave to Appeal on February 5, 2026.

[2] Ruling, p. 16.

I. **Background and Introduction**

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.[3] She describes *typical* 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.[4] And, that unlike many other capital programs, projects under this subprogram are based on the needs and expectations of specific customers.[5] 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.[6]

There were ten projects listed under this subprogram, but only nine of the projects have customers committed to moving forward.[7] Spending on the project that will not be moving forward was approved in the Company's previous electric rate case, Case No. U-21585, and the Company claims to have incurred some expenditures under the then existing contract. Since the spending was approved, the contract for this project has been cancelled and 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

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[3] Hayward Direct Testimony, 3 TR 1296.
[4] *Id*.
[5] *Id*., at 3 TR 1297.
[6] *Id*. at 3 TR 1297 - 1298.
[7] See, Exhibit A-109 (MLH-3) and Hayward Direct Testimony, 3 TR 1299.

termination.[8] "*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."[9]

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.

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.**

It is against this background and pursuant to the rules of practice and procedure before the Public Service Commission, the Michigan Court Rules and consistent with the Michigan Rules of Evidence, the Attorney General submitted discovery in this case to Consumers seeking relevant information.

II. Analysis

A. The Attorney General's made a reasonable discovery request for relevant information.

Consumers is a regulated utility under the authority of the Michigan Public Service Commission ("the Commission"). It filed an application seeking cost

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[8] *See*, Hayward Direct Testimony, 3 TR 1299.
[9] *Id*. (emphasis added).

recovery and other authorizations and is required to provide evidence to support the reasonableness and prudence of its proposals. To the extent there are still questions, discovery is available as discussed above. The Attorney General without malice, but with the intent to understand the full scope of the Company's HVD Strategic Customers New Business Program not only to verify the reasonableness of the cost, which is relevant in this electric rate case, but to also ascertain whether there are sufficient protections so that other Company customers are not required to cover stranded costs if one of these expensive and highly individualized projects is cancelled before the Company can recover all of the costs owed by the Customer for which the project was undertaken sought discovery.

The fact that at least one project had been cancelled and the Company was seeking to recover its cost was also of concern. While the Company notes that the agreement in question provides for repayment in this situation, there is no guarantee that repayment will occur as evidenced by the witness's caveat of "if" the Company recovers the costs incurred for the discontinued project.[10] So, other customers may ultimately bear the costs for the failed project.

Whether or to what extent a discovery request will elicit confidential information is not always known when it is submitted. However, protective orders are entered in rate cases, to allow for the sharing of confidential information, including the potential that confidential materials will be responsive to discovery requests. In the case of discovery, it allows for the flow of relevant information in the relatively compacted time frame available to conduct rate cases. The Company,

[10] Hayward Direct Testimony, 3 TR 1299.

which is also a party to the contracts and more importantly a regulated utility seeking cost recovery for the projects being undertaken, has the burden of demonstrating that the costs are reasonable and prudent. Customer A chides the Company, arguing, in essence, that the Company disclosed the contract with Customer A to support getting more money.[11] This is a meritless argument. Information regarding the Company's business dealings are discoverable and subject to review and examination to the extent that they can impact ratepayers. The Company responded consistently with the rules of discovery and would have been subject to a motion to compel if it did not comply. Following the normal process and cadence of a rate case, the Attorney General requested relevant information and according to the Ruling on the Motion to Quash received appropriate information.[12]

B. Customer A's has not demonstrated a specific harm.

Customer A argues that its data privacy rights were violated by Consumers when it responded to the Attorney General's discovery request.[13] The contracts provided by the Company redacted customer specific information, including its name and location and other items such as total cost per project load data.[14] The redactions led the ALJ to determine that Consumers' response did not violate its data privacy tariff. However, Customer A claims that the unredacted parts of the contract reveal its commercially sensitive information or trade secrets.

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[11] Customer A's Appeal Brief, p. 14
[12] Ruling on Motion to Quash Discovery Request and Protective Order, p 9.
[13] *See*, Motion to Quash, pp 5 – 6.
[14] The Attorney General is not conceding that the redactions were necessary or appropriate in all situations.

Customer A argues that it had the right to protection of its unaggregated data from disclosure in this proceeding, and that right was violated when Consumers provided its information to "FOIA-able entities."[15] It claims that unredacted information in the contract is normally kept confidential because competitors can mine them for competitive advantage. It notes that the contracts are for facilities that use large amounts of energy under Rate LED. That customers decide whether a facility can provide services at the right time and at particular price which it claims were provided in the unredacted portions of the contract.

Customer A does not make a convincing case that knowledge of the fact that it has a contract to receive power is a disadvantage. First, the likelihood that customers and competitors would resort to FOIA to obtain contracts that they may not know exist, is pure speculation, or that knowledge gained from the unredacted portions would be a great advantage to competitors has not been substantiated. Second, Customer A's claim that knowing when a facility is planning to take power of a certain maximum level "is vital competitive information. A competitor could gain commercially-valuable insight regarding what timing would need to be included in its terms to lure away a customer, or whether a particular customer is likely to have the new facility as an option for service given their electrical demand and timing,"[16] is also speculative and does not demonstrate an actual harm. Unless a facility has its own power plant, it is commonplace for it to tap into a utility's power supply. The contracts are just evidence of that fact. The timing of a facility's

[15] Application Brief, p. 8.
[16] Application Brief, p. 8.

availability is likely tied to many factors, not just when it will receive power. Presumably, Customer A is communicating with existing or potentially new customers on its plans, so they should not need to resort to FOIA to obtain relevant information. However given Customer A's anonymous appearance, it is not possible to truly test the veracity of its claims or what it may or may not be communicating publicly. Further, the fact that Customer A has secured its power supply can also be positive as it demonstrates from an energy perspective, that the Company will have an important element for operating or expanding its business.

Customer A further speculates on how a customer may learn that a competitor is undergoing an expansion and may figure out who it is by analyzing the redacted portions of the contract. Based on that analysis they could learn specifics such as the existence of letters of credit, equipment that needs to be purchased, or when it is going online.[17] The likelihood of any of that happening nor whether knowledge of that information would truly provide a competitive advantage has not been demonstrated.

According to Customer A, the Commission's decision regarding application of the data privacy rules will affect potential rights and remedies under the Uniform Trade Secrets Act, MCL 445.1901 et seq.[18] It claims to have rights under the Act if the productions of its contract violated the customer data privacy rule.[19] Michigan law protects trade secrets from misappropriation. According to Customer A – "Trade secrets include information that derives independent economic value from

[17] Id., at p. 9.
[18] Application Brief, p. 12.
[19] Id.

not being generally known to other persons who can obtain economic value from disclosure or use, provided there are reasonable efforts made to maintain its secrecy. MCL.1902(d)."[20] It also claims that a court of competent jurisdiction can compel "affirmative acts to protect a trade secret" from "actual or threatened" misappropriation.[21]

First, Customer A must demonstrate that a trade secret exists that has or may be threatened with misappropriation. MCL 445.1902(d) defines a trade secret:

> (d) "Trade secret" means information, including a formula, pattern, compilation, program, device method, technique, or process, that is both of the following:
>
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In support of its trade secrets claim, Customer A states that "[d]isclsoure of information to government entities, especially if it renders information disclosable to the public, is often a dispositive factor in determining whether that information is entitled to protection as a trade secret."[22] It cites two cases – *Rockwell Med, Inc. v Yocum*, 76 F Supp 636, 648 (ED Mich, 2014), *aff'd* 630 Fed Appx 499 (CA 6, 2105); and *Lomasey v Old Nat'l Bank*, No. 1:24-CV-359, 2024 WL 2938841 (WD Mich, June 11, 2024), app dis No. 24-1538, 2024 WL 5256377 (6th Cir, Oct 24, 2024). Neither of these cases support the argument.

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[20] Id.
[21] Id., citing MCL445.1903.
[22] Application Brief, p. 13.

The *Rockwell* case involved an action against the former employee of a pharmaceutical company for allegedly misappropriating and wrongfully disclosing information regarding the outcome of clinical trials, the design of those trials, compliance of the trial design with FDA regulations, and the refusal of FDA to approve the trial design. The court found that none of those things

> "constitute any sort of "formula, pattern, compilation, program, device, method, technique, or process" as those terms reasonably can be understood. Moreover, it is evident that none of the information relating to the Phase III trial protocols was "the subject of efforts that are reasonable under the circumstances to maintain its secrecy," because they were at a minimum, disclosed to the FDA for the purpose of seeking approval of the trial design, and they necessarily would have been disclosed to patients involved in the trials and doctors conducting them."[23]

The Court's focus was clearly on the fact that the Company had disclosed information regarding its trial protocols to the FDA as part of the approval process and the information would be made available to patients participating in the trial and their doctors. In this case, the contracts provided from discovery were not made a part of the records in this case and the Attorney General has not made any plans to disclose them to anyone else. Another distinction worth noting is the court found that none of clinical trial protocols developed by the company or the results they obtained constituted the kind of information that would be considered a trade secret.

In this case, Customer A is claiming the potential for a trade secret violation based on a vague and speculative set of circumstances related to the hypothetical disclosure through FOIA of a power agreement it entered into with a public utility.

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[23] *Rockwell Med, Inc v Yocum*, 76 F Supp 636, 647 – 648 (2014).

In the *Lomasney* case, the court noted that to the extent the plaintiff was claiming that a mortgage is a trade secret, that it is the antithesis of a trade secret because it is recorded for all to see.[24] The contract in this case is not recorded for all to see and unless or until the Attorney General receives a FOIA request, no determination has been made that it will be disclosed. Customer A appears to fall short of supporting this claim.

C. Response to Customer A's claim that public entities have multiple mechanisms to obtain sufficient information without violating customer data privacy rule.

Customer A claims that the Customer Data Privacy rule allows the Commission to waive the rules in advance if needed for a particular purpose and that if a motion had been filed prior to the production of the contracts, "presumably Customer A would have had notice and the opportunity to be heard prior to the production of its protected information. Customer A might have been willing to voluntarily produce the information if the Commission and the Attorney General agreed to protect that information from FOIA, a process clearly provided for under Michigan law. MCL 15.243(f)."[25]

First, The Attorney General will not opine if such a process for waiving the data privacy rules is possible for purposes of responding to a discovery request. She notes that the standard time for responding to discovery is eight business days before staff and intervenor testimony and five days thereafter. Given the limited time available to respond to discovery in a rate case, this process may be

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[24] *Lomasney v Old National Bank*, 2024 WL 2945671,*2 (April 10, 2024).
[25] Application Brief, pp 15 – 16.

unworkable. Further, until the Attorney General receives a discovery response, she would not know the basis for any confidentiality claims, so seeking a waiver beforehand would not be possible.

Second, it is not clear that Customer A would have notice and an opportunity to respond if it is not a party to a case.

Third, Customer A conditions an agreement to produce the documents on the Attorney General proactively granting the documents an exemption from FOIA. Aside from the fact that FOIA is intended to be a pro-disclosure law, the cited provision is discretionary if certain conditions are met. MCL 15.243 provides:

> (1) A public body may exempt from disclosure as a public record under this act the following:
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> (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
>
> (i) The information is submitted upon a promise of confidentiality by the public body
>
> (ii) The Promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
>
> (iii) The description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

In this case, the Attorney General was participating in rate case litigation as an advocate for ratepayers (primarily residentials who bear the largest share of rate increases). The exemption process would be burdensome during a rate case, especially if it has to be repeated multiple times. And it is unnecessary with a

protective order in place, which addresses the potential for addressing a FOIA request if one is received.

Fourth, Customer A's claim that the Attorney General's seeking and obtaining relevant information harmed it because "she decided to seek protected information without following the legal process by which it could have received the information without violation of the law and causing competitive harms"[26] is baseless and unjustified. The Attorney General sought discoverable information in good faith under the rules of discovery and the process set up for discovery in this case. The response was provided according to those same rules and the protective order entered in the case. There is no legal requirement to exempt discoverable information from FOIA, even if it is confidential. And Customer A has not explained how the Attorney General would even pursue a FOIA exemption before submitting her request since Customer A was not a party to the case and was otherwise unknown to her. Finally, as discussed above, Customer A has not demonstrated any actual harm, it has just put forth speculative claims and accusations.

Customer A also proposes an alternative of using aggregated data, instead of individual customer data as an alternative to providing the contracts.[27] However, aggregate data does not address the purpose for which the discovery request was submitted and would in fact obscure the scope and nature of the expenditures in question. The individual contracts cover individual projects with separate costs,

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[26] Application Brief, p 16.
[27] Application Brief, p. 16.

schedules and obligations. While there may be similar requirements in the various contracts, the form and overall contract terms varied. Providing an aggregate amount for some of the terms across the various contracts would be misleading since not all terms apply to all of the contracts. Further, Consumers' response in subparagraph (c) of AG-CE-0478, which Customer A referred to in her Motion to Quash, only indicates that depending on the type of contract certain minimum billing requirements for certain energy usage and/or provisions for prorated payment of investment if the customer ceases operations prior to the end of the term of the contract may apply. It also notes that it may require additional security depending on the outcome of risk reviews it performs. However, this type of general statement does not explain the risk of any one contract. Reviewing the contracts matter because they provide the best evidence of the costs and likely risks of each project, and simply providing aggregated data is not sufficient.

Customer A's requirements are counterproductive to the purpose of discovery as discussed above and if adopted unduly restricts the Attorney General or any other party, the ALJ and the Commission ability to obtain and review relevant information.

III. Relief Requested

For the reasons stated above, the Attorney General respectfully requests that Customer A's Application for Leave to Appeal and underlying relief be denied.

Respectfully submitted,

Dana Nessel
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PROOF OF SERVICE - U-21870

The undersigned certifies that a copy of the ***Attorney General's Response to Customer A's Application for Leave to Appeal Ruling*** was served upon the parties listed below by e-mailing the same to them at their respective e-mail addresses on the 19th day of February 2026.

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