

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own
motion to open a contested case proceeding
for determining the process and requirements
for a forward locational requirement under
MCL 460.6w.

Case No. **U-18444**
(e-file paperless)

**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
MOTION FOR ENTRY OF A PROTECTIVE ORDER**

The Michigan Public Service Commission (MPSC or the Commission) Staff (Staff) pursuant to Rule 432 of the Michigan Administrative Hearing System's Administrative Hearing Rules, R 792.10432 and MCR 2.302(C)(8), files this Motion for Entry of a Protective Order (Motion) to govern the release, use, and disclosure of confidential, proprietary, or commercially sensitive information (Protected Material), in any manner or form in this proceeding. In support therefore, Staff states as follows:

1. On October 11, 2017, the Commission issued an Order in this case wherein it opened a contested case proceeding for the purposes of determining the process and requirements for a forward locational requirement under MCL 460.6w. The Commission's order directed Staff to submit a proposal to the docket by November 15, 2017, that addressed the following questions:

- I. What is the MISO LCR for each zone?
 - a. How should the LCR, for purposes of Section 6w, be projected four years into the future as set forth in the law?

- II. How should incremental capacity need be determined initially and also going forward?
 - a. What is an appropriate time period for assessment?
4 years? 5 years? 10 years?
 - i. What should the starting date be for the time period under consideration?
 - ii. What should the ending date be?
 - b. How should plant retirements be factored into the analysis to determine incremental need?
 - c. How should new resources, including generation and demand response, be factored into the analysis to determine incremental need?
 - i. How to account for recent or planned capacity additions?
 - ii. How to account for plants whose useful life may be extended, such as investing in older peaking units to allow for continued operation for capacity purposes?
 - d. What load projection should be used for the analysis and should the projection be set at base year or have a growth assumption?
 - e. Should the incremental capacity need only be established four years into the future, or should it be projected for additional planning years as well?
- III. Once the incremental need is determined, how should the incremental need be allocated to the load serving entities within the zone?
 - a. Should allocations be based on load ratio share or some other approach?
 - b. How should changes in load levels for each LSE over time be accounted for?
 - c. How does the recommended incremental capacity need with allocation translate to the individual

load serving entity locational requirements in zonal resource credits per planning year?

- IV. How should the incremental need be re-evaluated or re-assessed going forward? How often?
- V. Based on Staff's proposed methodology, what is the recommended incremental capacity need for the 2022/2023 planning year, and how would that be allocated among load serving entities?
- VI. What resources should count towards meeting Michigan's forward locational requirement?
 - a. Can both new and existing resources be used?
 - b. How should Michigan's forward locational requirement related to resources MISO allows to count – e.g., if MISO allows external resources with transmission service to qualify towards meeting LCR?
 - c. If MISO changes its eligibility criteria over time, how should that be handled?
 - d. What evidence or guarantees must an LSE provide to show it will meet Michigan's forward locational requirement?

The Commission also noted, based on its September 15 Order in Case No. U-18197, that it will “evaluate, as part of a contested case process, the percentage of non-auction purchases applicable for planning years 2022 and beyond in order to make refinements if needed based on the impact of energy waste reduction initiatives or other considerations.” MPSC Case No. U-18197, 09/15/17 Order, p 32.

2. Staff's report and workpapers related to its report contain information such as resource listings and plant retirement information that has been provided confidentially. This information contains sensitive issues for the parties in this

case. Once publicly disclosed, this information will have the potential to be misused and misunderstood absent a full and fair opportunity to explain the data and the appropriate meaning to be drawn from its conclusions. This docket could also lead to parties disclosing confidential information such as planned plant retirement data, plans that may change as future events unfold. Therefore, it is imperative that the parties maintain the privacy of this information. Staff requests that the Administrative Law Judge enter a Protective Order, which would allow parties to examine the data used to complete Staff's report, and which may apply to other materials submitted by the parties, as appropriate, throughout this case.

3. Although the Commission rules do not expressly address the issuance of protective orders, Rule 403(1) of the Michigan Administrative Hearing System's Administrative Hearing Rules, R 792.10403 states, "These rules govern the practice and procedure in all proceedings before the commission, except as otherwise provided by statute or these rules. In areas not addressed by these rules, the presiding officer may rely on appropriate provisions of the currently effective Michigan court rules." Turning to the Michigan Court rules, MCR 2.302(C) explains motions for protective orders. MCR 2.302(C)(8) states:

On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

Furthermore, Section 80 of the Michigan Administrative Procedures Act specifically provides a presiding officer may “[r]egulate the course of the hearings...” MCL 24.280(d).

4. The appropriateness of the issuance of protective orders in Commission proceedings for documents which are confidential, proprietary, commercially sensitive, or involve trade secrets is well established. For example, protective orders have been issued in Case Nos. U-9322 and U-9611 (July 18, 1990); U-10335 (November 29, 1993); U-10491 and U-10492 (July 19, 1992); U-13221 (March 20, 2002); U-14040 (May 11, 2004); U-15988 (August 3, 2009); U-16166 (July 23, 2010); U-16417 (August 5, 2011); and U-17672 (November 19, 2014). In its June 30, 1994 Order in Case No. U-10282, the Commission discussed the standard that it applies when considering whether to issue a protective order. The Commission stated that the moving party must show “(1) that the information at issues is a trade secret or otherwise confidential, and (2) that disclosure would work a clearly defined and serious injury.”

5. Staff is proposing a Protective Order for use of Protected Material in this proceeding (Attachment A). The proposed Protective Order appropriately allows the use of Protected Material in this proceeding, but protects the information from public disclosure and from use outside the context of this proceeding. Parties are also permitted to challenge another party’s designation of materials as Protected Materials.

6. The proposed Protective Order will not hinder the Commission's, the Administrative Law Judge's, the MPSC Staff's, or any properly admitted party's review of the Staff report, testimony, exhibits, discovery responses, etc. in Case No. U-18444, because all parties will continue to have full access to the confidential information once they have executed a nondisclosure statement.

WHEREFORE, for the reasons stated herein, Staff respectfully requests the proposed Protective order be entered in these proceedings.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
STAFF**

Lauren D. Donofrio (P66026)
Meredith R. Beidler (P78256)
Assistant Attorneys General
Public Service Division
7109 W. Saginaw Hwy., 3rd Floor
Lansing, MI 48917
Telephone: (517) 284-8140

Dated: November 30, 2017
18444/Motion for Protective Order

STATE OF MICHIGAN

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PROTECTIVE ORDER

This Protective Order governs the use and disposition of Protected Material that any party discloses to another party during the course of this proceeding. The intent of this Protective Order is to protect non-public, confidential information, and materials so designated by the Disclosing Party or by any other party, which information and materials contain confidential, proprietary, or commercially sensitive information. This Protective Order defines "Protected Material" and describes the manner in which Protected Material is to be identified and treated. Accordingly, it is ordered:

I. "Protected Material" and Other Definitions

A. For the purposes of this Protective Order, "Protected Material" consists of trade secrets or confidential, proprietary, or commercially sensitive information provided in the Disclosing Party's discovery or audit responses, any witness' related exhibit and testimony, and any arguments of counsel describing or relying on the Protected Material. Subject to challenge under Paragraph IV.A, Protected Material shall consist of non-public confidential information and

materials including, but not limited to, the following information disclosed during the course of this case if it is marked as required by this Protective Order:

1. Trade secrets or confidential, proprietary, or commercially sensitive information provided in responses to discovery, in responses to an order issued by the presiding hearing officer or the Michigan Public Service Commission (MPSC or the Commission), in testimony or exhibits filed later in this case, or in arguments of counsel;
2. To the extent permitted, information obtained under license from the third-party licensor, to which the Disclosing Party or witnesses engaged by the Disclosing Party is a licensee, that is subject to any confidentiality or non-transferability clause. The information includes reports, analyses, models (including related inputs and outputs), trade secrets, and confidential, proprietary, or commercially sensitive information that the Disclosing Party or one of its witnesses receives as a licensee and is authorized by the third-party licensor to disclose consistent with the terms and conditions of this Protective Order; and
3. Information that could identify the bidders and bids, including the winning bid, in a competitive solicitation for a power purchase agreement or in a competitively bid engineering, procurement, or construction contract at any stage of the selection process (i.e., before the Disclosing Party has entered into a power purchase agreement or selected a contractor).

B. The information subject to this Protective Order does not include:

1. Information that is or has become available to the public through no fault of the Receiving Party or Reviewing Representative and no breach of this Protective Order, or information that is otherwise lawfully known by the Receiving Party without any obligation to hold it in confidence;
2. Information received from a third party free to disclose the information without restriction;

3. Information that is approved for release by written authorization of the Disclosing Party, but only to the extent of the authorization;
4. Information that is required by law or regulation to be disclosed, but only to the extent of the required disclosure; or
5. Information that is disclosed in response to a valid, non-appealable order of a court of competent jurisdiction or governmental body, but only to the extent the order requires.

C. “Party” refers to Staff or any other person, company, organization, or association that is granted intervention in Case No. U-18444 under the Commission’s Rules of Practice and Procedure, Mich Admin Code, R 792.10401 et al.

D. “Receiving Party” means any party to his proceeding who requests or receives access to Protected Material, subject to the requirement that each Reviewing Representative sign a Nondisclosure Certificate attached to this Protective Order as Attachment 1.

E. “Reviewing Representative” means a person who has signed a Nondisclosure Certificate and who is:

1. An attorney who has entered an appearance in this proceeding for a Receiving Party;
2. An attorney, paralegal, or other employee associated, for the purposes of this case, with an attorney described in Paragraph I.E.1;
3. An expert or employee of an expert retained by a Receiving Party to advise, prepare for, or testify in this proceeding; or

4. An employee or other representative of a Receiving Party with significant responsibility in this case.

A Reviewing Representative is responsible for assuring that persons under his or her supervision and control comply with the Protective Order.

F. “Nondisclosure Certificate” means the certificate attached to this Protective Order as Attachment 1, which is signed by a Reviewing Representative who has been granted access to Protected Material and agreed to be bound by the terms of this Protective Order.

II. Access to and Use of Protected Material

A. This Protective Order governs the use of all Protected Material that is marked as required by Paragraph III.A, and made available for reviewing by the Disclosing Party to any Receiving Party or Reviewing Representative. This Protective Order protects: 1) the Protected Material; 2) any copy or reproduction of the Protected Material made by any person; and 3) any memorandum, handwritten notes, or any other form of information that copies, contains, or discloses Protected Material. All Protected Material in the possession of a Receiving Party shall be maintained in a secure place. Access to Protected Material shall be limited to persons authorized to have access subject to the provisions of the Protective Order.

B. Protected Material shall be used and disclosed by the Receiving Party solely in accordance with the terms and conditions of this Protective Order. A Receiving Party may authorize access to, and use of, Protected Material by a

Reviewing Representative identified by the Receiving Party, subject to Paragraphs III and V below, only as necessary to analyze the Protected Material; make or respond to discovery; present evidence; prepare testimony, argument, briefs, or other filings; prepare for cross-examination; consider strategy; and evaluate settlement. These individuals shall not release or disclose the content of Protected Material to any other person or use the information for any other purpose.

C. The Disclosing Party retains the right to object to any designated Reviewing Representative if the Disclosing Party has reason to believe that there is an unacceptable risk of misuse of confidential information. If a Disclosing Party objects to a Reviewing Representative, the Disclosing Party and the Receiving Party will attempt to reach an agreement to accommodate that Receiving Party's request to review Protected Material. If no agreement is reached, then either the Disclosing Party or the Receiving Party may submit the dispute to the presiding hearing officer. If the Disclosing Party notifies a Receiving Party of an objection to a Reviewing Representative, then the Protected Material shall not be provided to that Reviewing Representative until the objection is resolved by agreement or by the presiding hearing officer.

D. Before reviewing any Protected Material, including copies, reproductions, and copies of notes of Protected Material, a Receiving Party and Reviewing Representative shall sign a copy of the Nondisclosure Certificate (Attachment 1 to the Protective Order) agreeing to be bound by the terms of this

Protective Order. The Reviewing Representative shall also provide a copy of the executed Nondisclosure Certificate to the Disclosing Party.

E. Even if no longer engaged in this proceeding, every person who has signed a Nondisclosure Certificate continues to be bound by the provisions of this Protective Order. The obligations under this Protective Order are not extinguished or nullified by entry of a final order in this case and are enforceable by the MPSC or a court of competent jurisdiction. To the extent Protected Material is not returned to a Disclosing Party, it remains subject to this Protective Order.

F. Members of the Commission, Commission Staff assigned to assist the Commission with its deliberations, and the presiding hearing officer shall have access to all Protected Material that is submitted to the Commission under seal without the need to sign the Nondisclosure Certificate.

G. A party retains the right to seek further restriction on the dissemination of Protected Material to persons who have or may subsequently seek to intervene in this MPSC proceeding.

H. Nothing in this Protective Order precludes a party from asserting a timely evidentiary objection to the proposed admission of Protected Material into evidentiary record for this case.

III. Procedures

A. The Disclosing Party shall mark any information that it considers confidential as “CONFIDENTIAL: SUBJECT TO THE PROTECTIVE ORDER ISSUED IN CASE NO. U-18444.” If the Receiving Party or a Reviewing Representative makes copies of any Protected Material, they shall conspicuously mark the copies as Protected Material. Notes of Protected Material shall also be conspicuously marked as Protected Material by the person making the notes.

B. If a Receiving Party wants to quote, refer to, or otherwise use Protected Material in pleadings, pre-filed testimony, exhibits, cross-examination, briefs, oral argument, comments, or in some other form in this proceeding (including administrative or judicial appeals), the Receiving Party shall do so consistent with procedures that will maintain the confidentiality of the Protected Material. For purposes of this Protective Order, the following procedures apply:

1. Written submissions using Protected Material shall be filed in a sealed record to be maintained by the MPSC’s Executive Secretary Section, or by a court of competent jurisdiction, in envelopes clearly marked on the outside, “CONFIDENTIAL: SUBJECT TO THE PROTECTIVE ORDER ISSUED IN CASE NO. U-18444.” Simultaneously, identical documents and materials, with the Protected Material redacted shall be filed and disclosed the same way that evidence or briefs are usually filed;
2. Oral testimony, examinations of witnesses, or argument about Protected Material shall be conducted on a separate record to be maintained by the MPSC’s Executive Secretary Section or by a court of competent jurisdiction. These separate record proceedings shall be closed to all persons except those furnishing the Protected Material and persons otherwise

subject to this Protective Order. The Receiving Party presenting the Protected Material during the course of the proceeding shall give the presiding officers or court sufficient notice to allow the presiding officer or court an opportunity to take measures to protect the confidentiality of the Protected Material; and

3. Copies of the documents filed with the MPSC or a court of competent jurisdiction, which contain Protected Material, including the portions of the exhibits, transcripts, or briefs that refer to Protected Material, must be sealed and maintained by the MPSC's or court's files with a copy of the Protective Order attached.

C. It is intended that the Protected Material subject to this Protective Order should be shielded from disclosure by a Receiving Party. If any person files a request under the Freedom of Information Act with the MPSC or the Michigan Attorney General seeking access to documents subject to this Protective Order, the MPSC's Executive Secretary, Staff, or the Attorney General shall immediately notify the Disclosing Party, and the Disclosing Party may take whatever legal actions it deems appropriate to protect the Protected Material from disclosure. In light of Section 5 of the Freedom of Information Act, MCL 15.235, the notice must be given at least five (5) business days before the MPSC, Staff, and/or the Michigan Attorney General grant the request in full or in part.

IV. Termination of Protected Status

A. A Receiving Party reserves the right to challenge whether a document or information is Protected Material and whether this information can be withheld under this Protective Order. In response to a motion, the Commission or the

presiding hearing officer in this case may revoke a document's protected status after notice and hearing. If the presiding hearing officer revokes a document's protected status, then the document loses its protected status after 14 days unless a party files an application for leave to appeal the ruling to the Commission within that time period. Any party opposing the application for leave to appeal shall file an answer with the Commission no more than 14 days after the filing and service of the appeal. If an application is filed, then the information will continue to be protected from disclosure until either the time for appeal of the Commission's final order resolving the issue has expired under MCL 462.26 or, if the order is appealed, until judicial review is completed and the time to take further appeals has expired.

B. If a document's protected status is challenge under paragraph IV.A, the Receiving Party challenging the protected status of the document shall explicitly state its reason for challenging the confidential designation. The Disclosing Party bears the burden of proving that the document should continue to be protected from disclosure.

V. Retention of Documents

Protected Material remains the property of the Disclosing Party and only remains available to the Receiving Party until the time expires for petitions for rehearing of a final MPSC order in Case No. U-18444 or until the MPSC has ruled on all petitions for rehearing in this case, if any. However, an attorney for a Receiving Party who has signed a Nondisclosure Certificate and who is representing

the Receiving Party in an appeal from an MPSC final order in this case may retain copies of Protected Material until either the time for appeal of the Commission's final order resolving the issue has expired under MCL 462.26 or, if the order is appealed, until judicial review is completed and the time to take further appeals has expired. On or before the time specified by the preceding sentences, the Receiving Party shall return to the Disclosing Party all Protected Material in its possession or in the possession of its Reviewing Representatives – including all copies and notes of Protected Material – or certify in writing to the Disclosing Party that the Protected Material has been destroyed.

VI. Limitations and Disclosures

The provisions of this Protective Order do not apply to a particular document, or portion of a document, described in Paragraph II.A if a Receiving Party can demonstrate that it has been previously disclosed by the Disclosing Party on a non-confidential basis or meets the criteria set forth in Paragraphs I.B.1 through I.B.5. A Receiving Party intending to disclose information taken directly from materials identified as Protected Material must—before actually disclosing the information—do one of the following: 1) contact the Disclosing Party's counsel of record and obtain written permission to disclose the information, or 2) challenge the confidential nature of the Protected Material and obtain a ruling under Paragraph IV that the information is not confidential and may be disclosed in or on the public record.

VII. Remedies

If a Receiving Party violates the Protective Order by improperly disclosing or using Protected Material, the Receiving Party shall take all necessary steps to remedy the improper disclosure or use. This includes immediately notifying the MPSC, the presiding hearing officer, and the Disclosing Party, in writing, of the identity of the person known or reasonably suspected to have obtained the Protected Material. A party or person that violates this Protective Order remains subject to this paragraph regardless of whether the Disclosing Party could have discovered the violation earlier than it was discovered. This paragraph applies to both inadvertent and intentional violations. Nothing in this Protective Order limits the Disclosing Party's rights and remedies, at law or in equity, against a party or person using Protected Material in a manner not authorized by this Protective Order, including the right to obtain injunctive relief in a court of competent jurisdiction to prevent violations of this Protective Order.

Administrative Law Judge

ATTACHMENT 1

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NONDISCLOSURE CERTIFICATE

By signing this Nondisclosure Certificate, I acknowledge that access to Protected Material is provided to me under the terms and restrictions of the Protective Order issued in Case No. U-18444, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by the terms of the Protective Order. I understand that the substance of the Protected Material (as defined in the Protective Order), any notes from Protected Material, or any other form of information that copies or discloses Protected Material, shall be maintained as confidential and shall not be disclosed to anyone other than in accordance with the Protective Order.

Reviewing Representative

Date: _____

Title:

Representing:

Printed Name

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NOTICE OF HEARING

TO: ALL PARTIES OF RECORD

Please take notice that the Michigan Public Service Commission Staff's
Motion for Protective Order will be brought on for hearing before Administrative
Law Judge Dennis M. Mack, on Tuesday, December 12, 2017 at 9:00 a.m. at the
Michigan Public Service Commission, 7109 W. Saginaw Hwy., Lansing, Michigan.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
STAFF**

By its attorneys:

Lauren D. Donofrio (P66026)
Meredith R. Beidler (P78256)
Assistant Attorneys General
Public Service Division
7109 W. Saginaw Hwy.
Lansing, MI 48917
Telephone: (517) 284-8140

DATED: November 30, 2017

18444/NOH

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. **U-18444**
(**e-file paperless**)

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Timothy J. Lundgren
Laura A. Chappelle
Toni L. Newell
Varnum Law
The Victor Center
201 N. Washington Sq., Ste. 910
Lansing, MI 48933-1323
tlundgren@varnumlaw.com
lachappelle@varnumlaw.com
tlnewell@varnumlaw.com

Michigan Electric and Gas Association

James A. Ault
Michigan Electric and Gas Association
110 W. Michigan Ave., Suite 375
Lansing, MI 48933
jaault@gomega.org

Consumers Energy Company

Kelly M. Hall
Gary A. Gensch, Jr.
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201
kelly.hall@cmsenergy.com
gary.genschjr@cmsenergy.com
mpcs.filings@cmsenergy.com

Upper Michigan Energy Resources Corporation and Wisconsin Electric Power Company

Michael C. Rampe
Miller Canfield Paddock & Stone, PLC
One Michigan Ave., Ste. 900
Lansing, MI 48933
rampe@millercanfield.com

Cloverland Electric Co-Operative and FirstEnergy Solutions, Corp.

Michael G. Oliva
Leah J. Brooks
Loomis Ewert Parsley Davis & Gotting
124 W. Allegan St., Ste. 700
Lansing, MI 48933
mgoliva@loomislaw.com
ljb Brooks@loomislaw.com

Upper Peninsula Power Company

Sherri A. Wellman
Paul M. Collins
Miller Canfield Paddock & Stone, PLC
One Michigan Ave., Ste. 900
Lansing, MI 48933
wellmans@millercanfield.com
collins@millercanfield.com

CORINNA C. SWAFFORD

Subscribed and sworn to before me
this **30th** day of **November, 2017**.

Pamela A. Pung, Notary Public
State of Michigan, County of Clinton
Acting in County of Eaton
My Commission Expires: 05/07/2018