STATE OF MICHIGAN
IN THE COURT OF APPEALS

MICHIGAN ENVIRONMENTAL COUNCIL, NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB.

Court of Appeals No. 380334

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DTE ELECTRIC COMPANY

Appellees,

ATTORNEY GENERAL DANA NESSEL

Court of Appeals Nos. 380362, 380364

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DTE ELECTRIC COMPANY

Appellees,

GREAT LAKES RENEWABLE ENERGY ASSOCIATION,

Court of Appeals No. 380462

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DTE ELECTRIC COMPANY

Appellees,

____/

In the Matter of the Application of DTE Electric Company for Approval of Special Contracts,

MPSC Case No. U-21990

BRIEF OF APPELLANTS
MICHIGAN ENVIRONMENTAL COUNCIL,
NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB

ORAL ARGUMENT REQUESTED
THE APPEAL INVOLVES A RULING THAT A STATE GOVERNMENTAL ACTION IS INVALID.

August 6, 2026

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over Appellants' appeal under MCL 462.26(1) and Article 6, § 28. Under MCL 462.26(1), "any party in interest, being dissatisfied with any order of the [Public Service Commission (PSC)] … may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals." To satisfy the jurisdictional requirements of MCL 462.26(1), an appellant need not have been a party to the proceedings below. See *In re Application of Consumers Energy*, unpublished opinion of the Court of Appeals, issued December 6, 2013 (Docket Nos. 317456, 317460) ("MCL 462.26 allows a 'party in interest,' not only an actual party to proceedings before appellee [PSC], to bring an appeal of right from a MPSC order in this Court … Otherwise, the words 'in interest' would be improperly rendered nugatory or mere surplusage."). Appellants filed a timely appeal of the PSC's December 18, 2025 and March 27, 2026 Orders approving DTE Electric's application for ex parte approval of the special contracts and denying Appellants' motion for a contested case and petitions for intervention and rehearing. Appellants are dissatisfied with the Orders, which denied them their procedural right to participate in a case with potentially significant impacts on their members' electricity rates.

Article 6, § 28 likewise guarantees judicial review of a PSC order if (1) it is the final decision of the administrative agency, (2) the agency acted in a judicial or quasi-judicial capacity, and (3) the decision affected private rights or licenses. *Midland Cogeneration Venture LP v Naftaly*, 489 Mich 83, 91; 803 NW2d 674 (2011) Const 1963, art 6, § 28. Appellants meet each of these requirements. First, it is indisputable that the December and March Orders are the PSC's final decisions. Second, it is likewise indisputable that the PSC acted as an "arbitrator adjudicating disputed claims," which is a quasi-judicial function. See *Midland Cogeneration*

Venture, 489 Mich at 91-92 ("It is well settled that an arbitrator's function is quasi-judicial in nature."); see also *NRDC v Dep't Env't Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013). Lastly, and as stated above, the PSC's Orders directly affected Appellants' rights to participate in a contested case, as guaranteed under MCL 460.6a(1) and 460.6a(3). See *Ass'n of Data Processing Service Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970) (intervention by right); see also *In re Application of The Detroit Edison Co for Authority to Increase its Rates*, order of the Public Service Commission, entered January 11, 2010 (Case Nos. U-15768 and U-15751), p 7 (permissive intervention). This court therefore has jurisdiction over this appeal under MCL 462.26 and Const 1963, art 6, § 28.

STATEMENT OF QUESTIONS

1. Did the PSC apply MCL 460.6a erroneously by granting ex parte approval of special contracts between DTE Electric Company (DTE) and a data center where DTE did not demonstrate with record evidence that the expenditures it will make under the contracts and recover from all customers in rates will not result in an increase in the cost of service to its customers?

   PSC answers: No.

   Appellants answer: Yes.

2. Did the PSC interpret MCL 460.6a erroneously when it held that special contracts that do not result in an immediate change in rates or in the cost of service to customers qualify for ex parte approval, even where it is clear that the special contracts could—or even likely will—result in a rate increase request by the utility in a future rate case?

   PSC answers: No.

   Appellants answer: Yes.

3. Was the PSC's decision to approve the special contracts ex parte "unlawful or unreasonable" under MCL 462.26 or not "authorized by law" under Article 6, § 28 of Michigan's 1963 Constitution because the PSC relied on materials not in the administrative record for its findings in support of ex parte treatment and approval of the contracts?

   PSC answers: No.

   Appellants answer: Yes.

4. Were the PSC's sua sponte imposition of a condition that DTE agree the data center's payment obligations contracts will at least cover the costs to serve the data center, and its "caution" to DTE that the utility will bear responsibility for any future shortfalls, arbitrary, capricious, unreasonable, and insufficient to validate the PSC's misinterpretation of MCL 460.6a and to overcome the lack of record evidence supporting the PSC's findings regarding the impact of the special contracts on the cost of service for other customers?

   PSC answers: No.

   Appellants answer: Yes.

5. Were the PSC's Orders approving the special contracts and denying petitions for rehearing arbitrary and capricious under Article 6, § 28 of Michigan's 1963 Constitution because the PSC approved a collateral requirement without the analysis that it required six weeks earlier, in a similar case, and without meaningfully addressing issues raised by Appellants that may render the collateral requirement meaningless?

   PSC answers: No.

   Appellants answer: Yes.

INTRODUCTION

Section 6a(1) of the public utility statutes provides: "A gas utility, electric utility, or steam utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section." MCL 460.6a(1). One of the requirements of that section is: "The commission shall require notice to be given to all interested parties within the service area to be affected, and allow interested parties a reasonable opportunity for a full and complete hearing"—i.e., a contested case. *Id*. Section 6a(3) carves out a narrow exception to section 6a(1): "An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing"—i.e., ex parte. MCL 460.6a(3). These two provisions are at the center of this appeal.

The plain meaning of these provisions is that a hearing is required unless the utility's request will not result in an increase in the cost of service to its customers.[1] The utility has the burden to prove, by a preponderance of the evidence, that such an increase will not occur.

In this case, the Michigan Public Service Commission approved two special contracts between DTE Electric Company and a data center being developed by Oracle and OpenAI. The contracts require DTE to make hundreds of millions of dollars of investments just to connect the data center, and billions to serve it over the long run. No utility in Michigan has ever incurred costs that high for one customer. Yet the PSC took extraordinary steps to decide that the two special contracts were eligible for ex parte approval and approve them on an expedited basis.

[1] Section 6a(1) refers to the cost of services while section 6a(3) refers to the cost of service.

First, the PSC found that DTE's application met the standard for ex parte treatment under section 6a "because conditional approval of the special contracts will not result in an increase to the rates, rate schedules, or costs of service for any customers."[2] However, it is undisputed that DTE will initially invest hundreds of millions of dollars to serve the data center (eventually billions) and will recover those costs from all customers in rates.

The PSC did not determine otherwise. Instead, the PSC found that revenues from selling power to the data center will exceed the increased costs DTE will recover in rates from its other customers to fund the investments. But the PSC made the finding about revenues in reliance on unredacted contracts and an affordability analysis undertaken by DTE that are not in the record. Even agency decisions outside of contested cases must be based on an administrative record. The absence of evidence in the record supporting the PSC's finding and the reliance on evidence outside the record are both legal errors.

The PSC also relied on *Attorney General v Pub Serv Comm'n*, 227 Mich App 148, 155; 575 NW2d 302 (1997) to approve the contracts and deny the motions for a contested case.[3] The Court of Appeals in *Attorney General* deferred to the PSC's interpretation of section 6a to allow approval of special contracts ex parte even if the utility may seek a rate increase in the future to make up lost revenue resulting from the contracts. In this case, the PSC interpreted *Attorney General* to mean that "special contracts that do not result in an immediate change in rates or in the cost of service to customers qualify for ex parte approval, even where it is clear that the

[2] PSC Order Approving DTE's Application (U-21990-0029, December 18, 2025), p 31, MNS Appendix E.

[3] *Id*. at 27-29 (discussing *Attorney General v Pub Serv Comm'n,* 227 Mich App 148, 155; 575 NW2d 302 (1997); *appeal den*, 459 Mich 910; 589 NW2d 282 (1998)).

existence of the special contracts could—*or even likely will*—result in an associated revenue request by the utility in a future rate case."[4]

The PSC's extension of *Attorney General* in this case—from authorizing ex parte approval in a situation where a future increase is speculative to one where it is all but certain—is contrary to the plain text of section 6a and was legal error. If the Court nevertheless finds that *Attorney General* controls the outcome in this case, Appellants urge the Court to indicate disagreement with it under MCR 7.215(J). *Attorney General* held that the PSC could approve a special contract even if a future rate increase was possible by deferring to the PSC's legal interpretation of section 6a. The Michigan Supreme Court subsequently ended the practice of deferring to agency interpretations in *In re Rovas Complaint Against SBC Michigan*, 482 Mich 90, 107-09; 754 NW2d 259 (2008).

After relying on materials not in the record for its critical finding and extending *Attorney General*'s deferential reading of section 6a, the PSC proclaimed that even if the special contracts may increase the cost of services for other customers, it could ameliorate that problem by simply conditioning its approval of the contracts on DTE agreeing that the "the Customer's obligations under Rate D11 and the special contracts will at least cover the costs to serve the Customer (including generation, transmission, distribution, or other costs)."[5] The PSC issued this condition sua sponte, and Appellants and others sought rehearing and clarification on it because it is unclear how the condition could override terms of the contracts the PSC approved and the condition lacks any clear means of application or enforcement. The PSC also cautioned DTE that "any unrecovered costs shall not be borne by ratepayers and that DTE Electric bears

[4] *Id*. at 29 (emphasis added).

[5] December Order, p 40, MNS Appendix E.

responsibility for any remaining liability."[6] However, that caution is not a condition and it is unclear what legal or regulatory effect it has, if any. The sua sponte condition and the caution are unreasonable and arbitrary substitutes for findings based on record evidence.

Finally, after pinning its approval on the purported condition that the data center's obligations "will at least cover the costs to serve the Customer," the PSC approved a parent company guarantee for the data center's payment obligations to DTE instead of requiring the data center to provide more secure form of collateral.[7] That decision contradicted the PSC's decision on the same issue in a case six weeks earlier. In that case, involving Consumers Energy's tariff for data center customers, the Commission rejected a parent guarantee as a generally acceptable form of collateral and instead required a standby irrevocable letter of credit or cash. The Commission's abrupt reversal of itself on the collateral issue was arbitrary and capricious, and therefore unlawful, unreasonable, and not authorized by law.

STATEMENT OF FACTS

The data center special contracts

On October 31, 2025, DTE applied to the PSC for expedited, ex parte approval of two "special contracts" with Green Chile Ventures LLC.[8] Green Chile Ventures is a subsidiary of Oracle Corporation, who is partnering with artificial intelligence company OpenAI to build the

[6] *Id*. at 41.
[7] See *id.*
[8] DTE Application (U-21990-0002, Oct. 31, 2025), MNS Appendix A. Record references of this form are to the PSC e-docket for this proceeding, which can be found at https://mi-psc.my.site.com/s/case/500cs000019nj4mAAA/in-the-matter-of-the-application-of-dte-electric-company-for-approval-of-special-contracts (accessed July 2, 2026).

Stargate data center in Saline, Michigan.[9] DTE projects that the data center's peak load will be 1.4 gigawatts (GW).[10] That amount of electric demand represents more power than a good-sized power plant can generate.

The special contracts for the data center include a primary supply agreement, or PSA, and an energy storage agreement, or ESA.[11] DTE describes various provisions of the agreements in written materials that the PSC refers to as "testimony" supporting the application, including provisions DTE claims are protective of customers.[12] However, many of these claims cannot be verified because the versions of the contracts in the record are heavily redacted.[13] DTE and the PSC signed a nondisclosure agreement under which the PSC never received the unredacted contracts and, instead, viewed them on a read-only private portal website made available by DTE.[14]And the written "testimony" is not really testimony because it was never sworn, formally admitted into evidence, or subject to cross examination.[15]

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9 Attorney General's Notice of Intervention and Request for a Contested Proceeding (U-21990-0003, Nov. 6, 2025), p 3, ¶ 11.

10 DTE Application, Direct Testimony of Neal T. Foley (U-21990-0002, Oct. 31, 2025), p 5, MNS Appendix B. A gigawatt is equal to one billion watts—the unit of electrical power used in the International System of Units. U.S. Energy Information Administration Glossary ("EIA Glossary"), https://www.eia.gov/tools/glossary/index.php?id=G (accessed July 22, 2026).

11 DTE Application, Exhibits A-1 and A-2 (U-21990-0002, Oct. 31, 2025), MNS Appendix C and D.

12 E.g., Foley Direct, pp 7-36, MNS Appendix B.

13 Exhibits A-1 and A-2, MNS Appendix C and D.

14 December Order, p 32 n 8, MNS Appendix E, Confidentiality and Nondisclosure Agreement (NDA), November 12, 2025, MNS Appendix F.

15 See Mich Admin Code, R 792.10128(1) (testimony shall be upon oath or affirmation).

The special contracts require DTE to make very large investments. First, DTE must construct a new substation to serve the data center.[16] The substation will cost $300 million to construct.[17] The owner of the data center property is providing a $40 million construction advance toward that cost.[18] DTE plans to recover the other $260 million by adding it to the utility's rate base, where it will be charged to all DTE customers in rates.[19] The amount a utility charges customers for an expenditure included in its rate base is known as the "revenue requirement" for that expenditure.[20] DTE projects that its revenue requirement for the data center substation will start at $35 million per year and decrease gradually over time as the investment depreciates.[21]

DTE acknowledges that constructing the substation will *increase* distribution charges paid by other customers—the portion of bills for delivery of electricity—by almost $40 million in the first year.[22] DTE claims that revenues from charges for distributing power to the data

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[16] Foley Direct, p 31, MNS Appendix B.

[17] *Id*. at 31.

[18] *Id*. at 32.

[19] *Id*. at 32-33. A utility rate base is the total of all capital investments made by the utility to serve customers, after subtracting certain items. Lazar et al, *Electricity Regulation in the US: A Guide. Second Edition.* (Montpelier, VT: The Regulatory Assistance Project), p. 51, MNS Appendix G. A utility recovers its investments and a return on them in rates, based on calculations approved by the regulator. *Id.* at 52, 58-59.

[20] Foley Direct, p 31, MNS Appendix B.

[21] *Id*. A utility's revenue requirement is the total revenue it is authorized to recover, which includes both expenses and a return on rate base. EIA Glossary, https://www.eia.gov/tools/glossary/index.php?id=R (accessed July 10, 2026).

[22] Attachment A (included in U-21990-0020), Revenue Deficiency Summary by Class, p 1, MNS Appendix H (showing $39,730 increase in distribution revenue deficiency on line 30, column (3)). In addition to the $35 million revenue requirement, the other almost $5 million increase results from tax impacts.

center will eventually exceed the annual revenue requirement for the substation; and that increased revenue from charges for electricity production will result in overall savings to other customers.[23] However, these projections are based on an "affordability analysis" that is not part of the record in this case.[24] Like the unredacted contracts, PSC personnel viewed the affordability analysis on DTE's read-only website.[25] Such analyses are typically reviewed in their native software, so the user can use the formulas and links embedded within them to check the calculations and verify the information presented. That is not possible within a read-only portal.

In addition to the substation, DTE also projects that the data center will require $200 million of upgrades to the transmission system to provide power and transmit electricity from large battery systems that will be constructed to serve the facility.[26] DTE projects that the revenue requirement for the transmission upgrades will start at $30 million per year, decreasing gradually over time.[27] DTE plans to recover the revenue requirement for the transmission upgrades through the power supply cost recovery (PSCR) clause.[28] Under MCL 460.6j(b), an electric utility may recover certain costs in a monthly PSCR surcharge, including transmission

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[23] Foley Direct, p 32, MNS Appendix B; see also, Attachment A, p 1, MNS Appendix H. Electric bills typically include separate charges for distributing a customer's electricity and for producing that electricity.

[24] December Order, p 32 n 8, MNS Appendix E.

[25] Confidentiality and NDA, MNS Appendix F; December Order, MNS Appendix E; Affidavit of Caroline Palmer (included in U-21990-0012, November 19, 2025), ¶ 5, MNS Appendix I.

[26] Foley Direct, p 31, MNS Appendix B.

[27] *Id.*

[28] *Id.* at 31-32.

costs.[29] Transmission costs are allocated to all customers under a formula approved by the PSC.[30] Therefore, all customers will contribute to the transmission upgrades necessary to serve the data center.

Unlike the substation, DTE does not claim that transmission revenues paid by the data center will eventually exceed the revenue requirement for the transmission upgrades. Instead, DTE witness Neal Foley testified: "The Company highlights that transmission cost upgrades *were considered* when it estimated the total affordability benefit" associated with the special contracts.[31] It is unclear what "considered" means in this context. But, as noted above, there is no way to verify claims regarding an affordability benefit because the affordability analysis is not in the record.

In addition to the substation and the transmission upgrades, DTE will incur several other categories of costs under the special contracts. These include costs for purchasing or constructing battery energy storage facilities with a total capacity up to the data center's load of 1.4 GW.[32] DTE states that the data center will pay the revenue requirement for the batteries.[33] However, most of the terms governing the data center's payment of battery costs cannot be verified because the energy storage agreement is heavily redacted.[34] DTE states that the data center will receive

[29] Appellate decisions authorize an electric utility to include transmission costs in its PSCR surcharge. *In re Detroit Edison Co*, 276 Mich App 216; 740 NW2d 685 (2007), rev'd in part, aff'd on other grounds, 483 Mich 993 (2009).

[30] The PSC has approved the allocation of transmission costs to each major class of customers based on the class's contribution to monthly peak demand. *In re Detroit Edison Co,* order of the Public Service Commission, issued June 15, 2015 (Case No. U-17689), p 24.

[31] Foley Direct, p 32, MNS Appendix B (emphasis added).

[32] Foley Direct, p 13, MNS Appendix B.

[33] *Id*. at 15-16.

[34] Exhibit A-2, MNS Appendix C.

the financial benefits of the batteries—including all capacity, energy, and ancillary service revenues the batteries receive from markets run by the grid operator, the Midcontinent Independent System Operator (MISO).[35] Again, however, most of the contract terms regarding these benefits are redacted.[36]

DTE also states that it will incur additional fuel and purchased power costs to serve the data center.[37] DTE recovers these costs from all customers through the PSCR surcharge.[38] Therefore, all customers will pay a share of the additional fuel and purchased power costs to serve the data center.[39] Additionally, increased electricity demand from data centers increases the price of power on the MISO energy market, which is likely to increase the PSCR surcharges paid by all customers.[40]

DTE also states that it will incur costs for incremental renewable generation to comply with the State of Michigan's renewable energy requirements.[41] Public Act 235 of 2023 requires

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[35] Foley Direct, p 18, MNS Appendix B.

[36] Exhibit A-2, MNS Appendix C.

[37] Foley Direct, p 30, MNS Appendix B.

[38] MCL 460.6j(1)(b) (referring among other things to the booked costs of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions). For confirmation, see Foley Direct, p 33 Table 1, MNS Appendix B.

[39] The PSC allocates fuel costs to the major customer classes using a formula that is based 90 percent on each class's total energy use and 10 percent on its contribution to monthly peak demand. *In re DTE Electric Co,* order of the Public Service Commission, issued January 23, 2025 (Case No. U-21534), p 289.

[40] Association of Businesses Advocating Tariff Equity (ABATE) Petition to Intervene & Motion for a Contested Case Proceeding (U-21990-0011, November 19, 2025), p 7, MNS Appendix J. See also, Saul, et al, *AI Data Centers Are Sending Power Bills Soaring,* Bloomberg Technology (September 29, 2025), https://www.bloomberg.com/graphics/2025-ai-data-centers-electricity-prices (accessed July 22, 2026).

[41] Foley Direct, p 31, MNS Appendix B.

electric utilities like DTE to meet a renewable energy standard corresponding to 50% of its retail electricity sales by 2030 and 60% by 2035. MCL 460.1028(1) and (2). Therefore, DTE will need to increase its portfolio of renewable energy generating assets in proportion to the increased electricity sales to the data center. DTE says it has not determined the amount and type of new renewable generation it will acquire to satisfy the higher requirement.[42] However, DTE estimates that if it added all the new renewable generation in the form of solar, it would require 3.2 GW of new solar capacity.[43] For context, that is more solar generation capacity than DTE currently owns.

DTE plans to recover the costs of the additional renewable generation through the PSCR surcharge.[44] However, DTE did not present any costs for the new renewable generation in the materials supporting its application, nor did it identify the costs for renewable generation included in its affordability analysis.[45]

DTE claims that increased revenues from the sale of electricity to the data center will spread the utility's fixed costs over more sales revenue, ultimately resulting in savings for the rest of the utility's customers that exceed all the increased costs DTE will incur to serve the data center. DTE calls this claim regarding revenues and costs the "affordability benefit."[46] DTE claims that the affordability benefit from the data center will start near zero in 2026 and ramp up

[42] DTE Application, Direct Testimony of Kevin L. Bilyeu (U-21990-0002, October 31, 2025) p 11, MNS Appendix K.

[43] *Id*. at 7. Note—DTE disclosed that its affordability models assumed that only ~1.8 GW of new solar capacity would be required. Foley Direct, p 28 n 6, MNS Appendix B.

[44] Foley Direct, p 33, MNS Appendix B.

[45] Affidavit of Caroline Palmer, ¶5.b n 8, MNS Appendix I.

[46] Foley Direct, p 25, MNS Appendix B.

to almost $300 million in 2029 before starting to decrease in 2030.[47] However, as noted above, DTE did not submit the affordability analysis on which these claims are based with its application and supporting materials. Nor are any of the calculations or supporting assumptions used to estimate the claimed affordability benefit in the record.[48] In affidavits, witnesses for the Attorney General and Appellants here described numerous technical problems evident in DTE's description of the affordability analysis.[49]

In addition to the non-record affordability analysis, DTE submitted a table of projected rates with and without the data center, as an attachment to a response brief.[50] The attachment was not part of DTE's application, and almost nothing is known about what costs and revenues DTE used to produce it. DTE claimed that while the attachment showed all customer classes would incur higher distribution (aka delivery) charges, they would incur lower production charges for the generation of electricity once the data center is at full load.[51] However, DTE has not demonstrated that the data center will be at full load before other customers' distribution charges increase to fund the initial connection investments. DTE's testimony even says the data center can delay ramping up to full load for a year.[52]

Moreover, it is undisputed that the attachment shows a clear net cost-of-service increase for at least one set of its customers: retail open access customers. Under the Customer Choice

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[47] *Id*. at 28.

[48] Affidavit of Caroline Palmer, ¶ 5.b, n 8, MNS Appendix I.

[49] Affidavit of Sebastian Coppola (included in U-21990-0003, November 6, 2025), MNS Appendix L; Affidavit of Caroline Palmer, MNS Appendix I.

[50] Attachment to DTE Response Brief (U-21990-0020, Nov. 26, 2026), MNS Appendix H.

[51] *Id*. For the reference to the data center being at full load, see DTE Response Brief (U-21990-0020, Nov. 26, 2026), at 11.

[52] Foley Direct, p 12, MNS Appendix B.

and Electricity Reliability Act, MCL 460.10 *et seq*., retail open access customers only pay DTE delivery charges because they pay alternative electric suppliers, not DTE, for the production of their electricity.[53] As a result, retail open access customers will incur higher delivery charges but will not receive lower production charges, which will increase their cost of service.[54]

In sum, the special contracts obligate DTE to invest more money than it has ever invested to serve a customer—and to serve new electric load on a scale that no utility in Michigan has ever served before. DTE will recover the cost of these investments from all customers in rates. And the record does not demonstrate whether, how, or when anticipated revenues from the data center will offset these costs. The seven-week ex parte process through which the PSC approved these unprecedented special contracts is described next.

The PSC's ex parte approval of the contracts

After DTE filed its application and supporting materials on October 31, 2025, several parties or groups of parties filed petitions to intervene, objections to the request for ex parte approval backed by expert affidavits, and motions for a contested case.[55] DTE filed responses opposing the requests for a contested case.[56] In a rare if not unprecedented occurrence, Governor

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[53] See ABATE Motion, pp 2-4, MNS Appendix P.

[54] *Id*. See also Attorney General Petition for Rehearing and Clarification (U-21990-0031, January 8, 2026), p 22, MNS Appendix Q ("ABATE further identified that even this limited production showed a clear rate increase for a customer class.").

[55] These parties were the Attorney General; ABATE; the Michigan Environmental Council, Natural Resources Defense Council, Sierra Club, and Citizens Utility Board of Michigan (collectively, MNSC); the Ecology Center, Environmental Law & Policy Center, Union of Concerned Scientists, and Vote Solar (collectively, CEO); and the Great Lakes Renewable Energy Association (GLREA). See docket numbers U-21990-0003, -0011, -0012, -0015, and -0018, respectively.

[56] DTE Response to Attorney General (U-21990-0009, November 18, 2025); DTE Response to ABATE, MNSC, CEO, and GLREA (U-21990-0020, November 26, 2025). ABATE, the

Gretchen Whitmer—who appointed all three of the Commissioners—submitted a letter to the PSC supporting the data center special contracts.[57]

The PSC approved the special contracts and denied the requests for contested cases on December 18, 2025, about seven weeks after DTE filed its application.[58] By contrast, most major cases before the PSC are decided in ten months.[59]

In its order, the PSC relied on *Attorney General v Pub Serv Comm'n,* 227 Mich App 148; 575 NW2d 302 (1997) to approve the contracts and deny the motions for a contested case.[60] The PSC interpreted *Attorney General* to mean "special contracts that do not result in an immediate change in rates or in the cost of service to customers qualify for ex parte approval, even where it is clear that the existence of the special contracts could—or even likely will—result in an associated revenue request by the utility in a future rate case."[61] The PSC acknowledged "the unprecedented size of the Customer in this case and the unique considerations in addressing load of this magnitude associated with a single customer," but asserted (without citing any examples)

Attorney General, and MNSC also filed motions for leave to reply to DTE's responses, and DTE filed a response to ABATE. See U-21990-0021, -0022, -0025, -0027, and -0028.

[57] Governor Whitmer letter (U-21990-4871-CC, December 3, 2025).

[58] The PSC held a "virtual public hearing" on December 3, 2025, but that was an ad hoc event to provide an opportunity for public comment, not a formal administrative hearing required by section 6a. Transcript of public hearing (U-21990-0025, December 12, 2025).

[59] See MCL 460.6a(5) (10 months for rate cases); MCL 460.6t (300 days for initial decision in IRP cases); MCL 460.1022(5) (300 days for renewable energy plan); MCL 460.6s (270 days for certificates of necessity for new generation); MCL 460.10gg(6) (270 days for contracts approving long-term industrial load rates).

[60] December Order, pp 27-29, MNS Appendix E, discussing *Attorney General v Pub Serv Comm* 227 Mich App 148, 155; 575 NW2d 302 (1997); *appeal den*, 459 Mich 910; 589 NW2d 282 (1998).

[61] December Order, p 29, MNS Appendix E.

that "special contracts with individual customers that meet the statutory standards are routinely addressed through ex parte proceedings."[62]

The PSC found that "the application meets the standard for ex parte treatment authorized by MCL 460.6a(3) because conditional approval of the special contracts will not result in an increase to the rates, rate schedules, or costs of service for any customers."[63] In support, the PSC relied on the terms and conditions of the two redacted contracts, which it found "reflect distinct protections for the utility with respect to stranded costs" and "mitigate cost subsidization for existing customers."[64] The PSC also relied on the results of the affordability analysis—which it found would "provide an opportunity for a benefit to existing customers in the form of increased affordability due to the increased share of fixed costs that will be borne by the Customer"—and certain conditions described below.[65] The PSC relied on these same terms and conditions in the redacted contracts and the affordability analysis to determine that the special contracts were in the public interest.[66]

Recognizing its reliance on materials that are not in the record, PSC stated that its "Staff was able to perform an investigation in order to substantiate the validity of the request for ex parte treatment. Complete, unredacted copies of the PSA and ESA were made available by DTE Electric to the PSC and the Staff, and the Staff performed an audit of the application and

[62] December Order, p 30, MNS Appendix E.

[63] *Id*. at 31.

[64] *Id*. at 32.

[65] *Id*.; see also *id*. at 33, discussing minimum termination amounts. These amounts appear only in DTE's testimony about the contracts and whatever analysis it conducted based on the contract terms.

[66] *Id*. at 32-33.

testimony regarding the proposed project."[67] As noted above, however, the referenced audit and investigation consisted of Staff reviewing the materials pursuant to a non-disclosure agreement on a view-only portal website.[68] They were not part of the administrative record, and they are not available for judicial review.

The order also stated that the PSC Staff received two cost-of-service studies and rate design models showing that the data center would reduce power supply costs for other customers.[69] The order states that these materials were made "publicly available" as Attachment A to one of DTE's response briefs.[70] However, that is not correct. A cost-of-service study is a long and complex model created in Excel or similar program and containing many different sheets or tabs—with inputs and assumptions listed, and with formulas included in the electronic document that enable others to verify the calculations contained in the study.[71] By contrast, Attachment A is a PDF of the output summary from a cost-of-service study, with no inputs or assumptions identified and no way to verify the information presented.[72] Further, contrary to the order's characterization, Attachment A only presents the output of one cost-of-service study, not two, and does not include any rate design models.

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[67] December Order, p 32-33, MNS Appendix E.

[68] *Id*.

[69] December Order, pp 37-38, MNS Appendix E. The order refers to a cost-of-service study as a COSS. For Attachment A, see MNS Appendix H.

[70] *Id*.

[71] For a description of the components of a cost-of-service study, see Federal Energy Regulatory Commission (FERC), *Cost-of-Service Rates Manual* (June 1999), https://www.ferc.gov/sites/default/files/2020-08/cost-of-service-manual.pdf, accessed July 24, 2026. See also, Palmer Affidavit, ¶¶ 4, 5.a, MNS Appendix I; Coppola Affidavit, ¶¶ 6, 10, MNS Appendix L.

[72] Attachment A, MNS Appendix H.

Further, DTE states that the cost-of-service study demonstrates benefits to residential customers "once the [data center] Customer's full load is realized, and accordingly no cost of service increase."[73] However, the record is not clear on whether the increase in other customers' distribution charges to fund the initial investments will coincide with the timing of the data center's ramp up to full load. Finally, as noted above, Attachment A shows an increase in other customers' distribution rates of $39 million in the first year due to the addition of the data center, purportedly offset by a larger but unverified decrease in energy production rates. But, as discussed below, one group of customers—those who buy their energy from alternative electric suppliers—do not pay production charges to DTE, meaning these customers will pay increased distribution rates with no reduction in production rates.[74]

Next, the PSC imposed certain conditions on its approval of the contracts. The PSC imposed the conditions sua sponte—they were not recommended by any of the objecting parties or outlined in any testimony. The most relevant condition for this appeal, and one the appellees will undoubtedly highlight, is:

> The approval in the instant case is conditioned upon the assumption, as represented by DTE Electric in its application, testimony, and subsequent filings, and in the materials provided pursuant to the Staff's audit, that the Customer's obligations under Rate D11 and the special contracts will at least cover the costs to serve the Customer (including generation, transmission, distribution, or other costs). These are conditions that do not require amendment of the special contracts. The Commission directs DTE Electric to file, within 30 days of the date of this order, a letter in the instant docket accepting these conditions.[75]

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[73] DTE Response (U-21990-0020, November 26, 2025), at 11.
[74] See ABATE Motion for Leave to File Reply (U-21990-0021, December 3, 2025), pp 2-4, MNS Appendix P.
[75] December Order, pp 40-41, MNS Appendix E; see also, *id.* at 43. DTE submitted a letter stating that the utility accepts the conditions in the December 18, 2025 order while rephrasing the quoted

Other conditions included the filing of a new tariff for data centers (that will not apply to the Oracle/OpenAI data center); filing an amended renewable energy plan in DTE's next IRP case; updating its energy waste reduction surcharges; including an analysis of the impact of the data center on DTE's need for generation resources in its next capacity demonstration filing; filing various cost-of-service studies and a proposed administrative fee for future data centers in its next electric rate case; and filing updated emergency procedures and various quarterly and annual reports.[76] Among the required reports is an annual filing "related to the realization of the affordability benefit," which the PSC authorized DTE to file under seal.[77] Finally, the PSC pronounced that if the data center defaults on its payment obligations in the future, and the collateral requirements in the contracts are insufficient to cover any losses, then the PSC "specifically cautions" DTE that the utility will bear responsibility for any remaining liability.[78]

Curiously, despite requiring DTE to agree by letter that the data center will bear the costs of the multi-billion-dollar contracts, the PSC accepted a guarantee from the data center's parent company in lieu of more secure collateral such as cash or a letter of credit.[79] That decision was all the more arbitrary because just six weeks earlier, the PSC reached the opposite conclusion in a different case regarding the same issue—rejecting Consumers Energy's request to allow a parent guarantee as a default form of collateral in Consumers' new data center tariff.[80]

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condition and reserving various rights. DTE Electric letter to PSC (U-21990-0034, January 15, 2026), MNS Appendix O.

[76] *Id*. at 39; 35-36; 37; 37; 39-40; and 41-42, respectively.

[77] *Id*. at 42.

[78] *Id*. at 41.

[79] *Id*. at 6, 8, and 33.

[80] *In re Consumers Energy Co*, order of the Public Service Commission, issued November 6, 2025 (Case No. U-21859), pp 112-113.

Several parties filed petitions for rehearing and clarification of the PSC's ex parte approval of the contracts.[81] Among other things, Appellants here, MEC, NRDC, and Sierra Club—asked the PSC to clarify how the condition that DTE agree the data center will cover its costs would be verified or enforced.[82] Appellants also sought clarification of whether the "caution" regarding default by the data center was a condition of approval, and if so, how it would be enforced.[83] Appellants noted the importance of protection from default due to many publicized reports concerning Oracle's troubled finances.[84] DTE filed an answer opposing the petitions for rehearing.[85]

The PSC denied the petitions for rehearing and clarification.[86] The PSC held that the petitioners were not parties to the case (because the PSC decided it ex parte over the petitioners' objections), and therefore, the petitioners did not have standing to file the petitions.[87] The PSC also stated that it already considered the issues raised by the petitioners[88]—a doubtful assertion

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[81] Attorney General's Petition for Rehearing and Clarification (U-21990-0031, January 8, 2026); MNS Petition for Rehearing and Clarification (U-21990-0032, January 8, 2026), MNS Appendix M; Petition for Rehearing by GLREA (U-21990-0033, January 14, 2026).

[82] MNS Petition, p 5, MNS Appendix M.

[83] *Id*. at 9-10.

[84] *Id*. at 8-9, particularly the financial news articles cited at n 24.

[85] DTE Electric Company's Answer Opposing Petitions for Rehearing (U-21990-0039, January 29, 2026). The Attorney General also filed a motion to reopen the proceeding due to ambiguities in DTE's letter purporting to accept the conditions, which MEC, NRDC, and Sierra Club supported and DTE opposed. (See U-21990-0036, -0037, and -0040).

[86] PSC Order Denying Petitions for Rehearing (U-21990-0044, March 27, 2026), MNS Appendix N. The order also denied the AG's motion to reopen the proceeding.

[87] *Id*. at 20-21.

[88] *Id*. at 26-27.

since the petitions sought clarification of conditions that appeared for the first time in the approval order.

This appeal followed.

STANDARD OF REVIEW

Decisions by the PSC are reviewable under MCL 462.26 and Article 6, § 28. Const 1963, art 6, § 28. A party challenging a PSC decision under MCL 462.26 must prove "by clear and satisfactory evidence" the decision is "unlawful or unreasonable." MCL 462.26(8). An order is unlawful if based on "an erroneous interpretation or application of the law" and unreasonable if "unsupported by the evidence." *Att'y Gen v Mich Pub Serv Comm'n*, 206 Mich App 290, 294; 520 NW2d 636 (1994) (citing *Assoc Truck Lines, Inc v Mich Pub Serv Comm'n*, 377 Mich 259; 140 NW2d 515 (1966)). Unlawful and unreasonable orders may be vacated and set aside by the Court of Appeals. *Att'y Gen v Mich Pub Serv Comm'n*, 152 Mich App 427, 429; 394 NW2d 35 (1986) ("Any common carrier or other party in interest…may…commence an action…against the commission as defendant to vacate and set aside any such order.").[89]

A party challenging an order under Article 6, § 28 must prove (1) in cases with a hearing, the order is not "supported by competent, material and substantial evidence," and (2) in cases "where [no] hearing is required," the order is not "authorized by law." Const 1963, art 6, § 28. An order is not "authorized by law" if it is "in violation of a statute," "in excess of the statutory authority or jurisdiction of the agency," "made upon unlawful procedures resulting in material

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[89] After *Attorney General v MPSC* (1986), the Legislature amended MCL 462.26, transferring jurisdiction from the "circuit court in chancery for the county of Ingham" to the court of appeals. 1986 PA 312. The amended statute—MCL 462.26(4)—reserves to the court of appeals "the same equitable powers as possessed by the circuit court…prior to the [amendment's] effective date."

prejudice," or "arbitrary and capricious." *Brandon Sch Dist v Mich Educ Special Serv Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991). Arbitrary is: "'Without adequate determining principle … Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, … decisive but unreasoned.'" *Bundo v Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976) (quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946)) (alterations in original). Capricious is: "'Apt to change suddenly; freakish; whimsical; humorsome.'" *Id.*

On appeal, the Court "review[s] de novo questions of law," such as "the proper interpretation of a statute" and "whether an agency's action complied with a statute." *Rovas*, 482 Mich 90, 97; 754 NW2d 259 (2008); *NRDC v Dep't of Env't Quality*, 300 Mich App 79, 88; 832 NW2d 288, 294 (2013); see MCL 462.26 (whether a decision is "unlawful"—i.e., based on an erroneous interpretation or application of the law); also Const 1963, art 6, § 28 (whether a decision is "authorized by law"—i.e., in violation of a statute or in excess of the agency's statutory authority).

As discussed below in Section II.A, the Court also reviews the administrative record to determine whether there is evidentiary support for the agency's decision. See *Assoc Truck Lines*, 377 Mich at 279 (reviewing the administrative record, pursuant to MCL 462.26, to determine whether the decision is "totally unsupported by admissible and admitted evidence"); see also *Henderson v Civil Serv Comm'n*; 503 Mich 978, 980; 923 NW2d 595 (2019) (CAVANAGH, J., concurring) (stating that arbitrary and capricious review under Article 6, § 28 requires the Court to "review the evidentiary record in order to determine there was not a *complete lack* of evidentiary support for [the] agency's decision").

ARGUMENT

I. The PSC's ex parte approval of the special contracts was unlawful, unreasonable, and not authorized by law.

The PSC's ex parte approval of the data center special contracts was unlawful and unreasonable under MCL 462.26, and was not authorized by law under Article 6, § 28, for three reasons previewed in the introduction to this brief.

First, the PSC's finding that DTE's application met the standard for ex parte approval because it will not result in an increase to the rates, rate schedules, or costs of service for any customers was not supported by any record evidence—only evidence that is not in the record—and it is contradicted by evidence that is in the record.

Second, the PSC interpreted *Attorney General* to mean that it can approve special contracts ex parte that do not immediately change rates or costs, even if they likely will do so in the future. *Attorney General* has no application here because it is undisputed that DTE will incur costs to serve the data center that it will recover from all customers in rates. And if *Attorney General* does apply here, the Court should indicate disagreement with the *Attorney General* opinion's expansive interpretation of section 6a(3), which resulted from the Court applying a standard of review for agency statutory interpretation that the Michigan Supreme Court later overturned.

Third, the PSC's attempt to bypass the contested case process by imposing a condition on its approval that DTE agree the data center will cover its costs and cautioning DTE that the utility would bear risk of non-payment, was arbitrary and not a lawful substitute for a hearing or findings based on evidence.

A. Sections 6a(1) and 6a(3) require a contested case unless the utility proves that approval of its request will not result in an increase in the cost of service.

As noted in the introduction, section 6a(3) provides: "An alteration or amendment in rates or rate schedules applied for by a public utility that *will not result* in an increase in the cost of service to its customers may be authorized and approved without notice or hearing." MCL 460.6a(3) (emphasis added). Coupled with section 6a(1)'s general hearing requirement, the statute unambiguously requires a hearing unless the utility proves that approval of its request will not result in an increase in the cost of service to its customers.

"Statutory interpretation begins with examining the plain language of the statute. When that language is clear and unambiguous, no further judicial construction is required or permitted." *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich 97, 119; 949 NW2d 73 (2020) (internal citations omitted). "Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning." *Mantei v Mich Pub Sch Employees Retirement Sys*, 256 Mich App 64, 72; 663 NW2d 486 (2003). "When a term is not defined in the statute, it is appropriate to consult dictionary definitions to determine the meaning of the term." *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 533; 669 NW2d 594 (2003).

The dictionary definition of "result" is "to proceed or arise as a consequence, effect, or conclusion." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/result (accessed July 15, 2026). The phrase "will not" is unambiguous. Thus, unless an increase in the cost of service for other customers will *not* arise as a consequence, effect, or conclusion of the special contracts, the PSC cannot approve them ex parte. Further, as the applicant, DTE has the burden to prove that an increase in the cost of service will not result, by a preponderance of the evidence. *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 88-89; 367 NW2d 1 (1985) (party asserting claim in an administrative proceeding has the burden of persuasion).

B. The PSC's finding that the special contracts will not result in any increase in the cost of service to other customers is not supported by any evidence in the record.

For the reasons just outlined, the statute requires a hearing unless the utility proves by a preponderance that an increase in the cost of service for other customers will not result from the special contracts. There is no evidence in the record for this case to support such a finding, and there is evidence in the record that supports a contrary finding. Therefore, the PSC's ex parte approval of the special contracts is unlawful, unreasonable, and unauthorized by law.

Here, the PSC concluded that "the application meets the standard for ex parte treatment authorized by Section 460.6a(3) because conditional approval of the special contracts will not result in an increase to the rates, rate schedules, or costs of service for any customers."[90] As detailed in the statement of facts, however, DTE will spend $260 million to construct a substation to serve the data center, the costs of which DTE will recover from all customers in rates—with a first-year revenue requirement of $35 million and an increase in distribution charges to current customers totaling $39 million the first year. As also detailed in the statement of facts, DTE will incur $200 million for transmission upgrades that it will recover from all customers through the PSCR surcharge—with a first-year revenue requirement of $30 million. Plus, DTE will incur additional fuel and purchased power costs to serve the data center, which DTE will recover from all customers through the PSCR surcharge; costs for incremental renewable generation necessary to comply with the State of Michigan's renewable energy requirements for power sales to the data center; and other costs. It is undisputed that DTE will incur all these costs because DTE identified them in its testimony.

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[90] December Order, p 31, MNS Appendix E.

The PSC found that despite the many costs DTE identified in its own testimony, the special contracts would nonetheless not result in an increase in the cost of service to DTE's other customers. The PSC made this finding by accepting DTE's claim that the revenues from selling electricity to the data center would exceed these additional costs—the so-called "affordability benefit" described in the statement of facts. However, the affordability analysis that concluded such a benefit would occur is not in the record—as discussed in more detail in Section II, below. Almost nothing is known about that analysis—for example, what amounts DTE assumed it would incur for all the additional costs besides the new substation and transmission upgrades, what costs DTE excluded from the analysis, what revenues DTE assumed it would receive from the data center, etc. With only the additional costs in the record, there is no evidence on which to conclude the special contracts will not result in an increase in the cost of service to DTE's other customers.

As further noted in the statement of facts, DTE also attached to a response brief a copy of the output of a cost-of-service study that purportedly compared customer rates in scenarios with and without the data center. DTE claimed that while the attachment showed all customer classes would incur higher distribution charges, they would incur lower production charges once the data center is at full load, resulting in an overall reduction in their costs of service. However, DTE has not demonstrated that the data center will be at full load before other customers' distribution charges increase to fund the initial connection investments.

Moreover, as discussed in the statement of facts it is undisputed that the attachment shows a clear net cost-of-service increase for retail open access customers. That is because these customers only pay DTE delivery charges; they pay alternative electric suppliers, not DTE, for the production of their electricity. As a result, retail open access customers will incur higher delivery charges but will not receive lower production charges, which will increase their cost of service. Because this information is derived from DTE's attachment, it is undisputed that the special contracts will result in an increase in the cost of service for retail open access customers—and so the attachment cannot support a finding that the contracts meet the standard in section 6a(3).

C. *Attorney General v Public Service Commission* and the other cases on which the PSC relied are distinguishable because in those cases it was unknown whether the utility would seek to increase rates in a future case as a result of the approvals.

In approving the special contracts ex parte, the PSC incorrectly relied on Court of Appeals decisions that are not applicable to the facts in this case: *Att'y Gen v Mich Pub Serv Comm'n*, 227 Mich App 148; 575 NW2d 302 (1997) and *Att'y Gen v Mich Pub Serv Comm'n*, 206 Mich App 290; 520 NW2d 636 (1994).[91]

In the 1997 *Attorney General* case, Consumers Energy sought approval of a special contract that would provide a rate discount to one customer. 227 Mich App at 148-152. Unlike the case at bar, there was a high degree of uncertainty as to whether the discounted rate would result in any increased costs to other customers. "Consumers maintained that the discount rates would still exceed the variable costs associated with producing the energy involved." *Id*. at 150. If so, there would be no revenue shortfall, and no increase to other customers' rates would be necessary. Although there was a possibility that Consumers would someday seek to increase other customers' rates to recover a hypothetical revenue shortfall resulting from the contract, it was no more than a mere possibility. *Id*. at 153. Because the contract merely "left open the

[91] December Order, pp 27-29, MNS Appendix E.

possibility" of a future increase, *id*. at 152, which Consumers did not expect, the Court found the contracts would not result in an increase in the cost of service for other customers. *Id.* at 154.

The 1994 *Attorney General* case involved a settlement between Consumers Power Company and the PSC Staff to address excess earnings by Consumers during the period since its previous rate case. 206 Mich App at 292.[92] Under the settlement, Consumers committed to address $200 million in excess earnings by reallocating some of the funds to cover other operation and maintenance expenses and/or providing refunds to customers. *Id.* Appellants in that case argued that spending any reallocated funds on operation and maintenance increased customers' cost of service, but the Court disagreed because Consumers had already earned those funds and was not recovering them from ratepayers. *Id*. at 295.[93]

In contrast to the 1997 and 1994 *Attorney General* cases, it is undisputed that the special contracts in this case commit DTE to spending hundreds of millions (and eventually billions) of dollars that the utility says it will recover from all its customers in rates. The only dispute is whether revenues from the data center will be enough to cover these costs, and whether DTE will start recovering some or all of the costs before it receives enough revenue from the data center to cover them. As such, the PSC's reliance on the two *Attorney General* cases was in error.[94]

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[92] See also *In re Consumers Power Co*, erratum to order of the Public Service Commission, issued December 19, 1991 (Case No. U-10037), Exhibit A (Settlement Agreement), p 1, available at <https://adms.apps.lara.state.mi.us/Mpsc/ViewCommissionOrderDocument/470> (accessed July 30, 2026).

[93] See also *In re Consumers Power Co*, erratum to order at Exhibit A, p 1.

[94] In its December Order, the PSC also cited *Attorney General v Pub Serv Comm'n*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 1999 (Docket No. 207993), p 4. See December Order, p 29, MNS Appendix E. This non-precedential case simply provides one example of when notice and hearing is required under Section 460.6a(3). It does not preclude notice and hearing in other cases with cost-of-service impacts.

D. The expansive reading of section 6a in the 1997 *Attorney General* opinion was not necessary to its holding and was also legal error because it relied on a since-overturned standard of review for agency interpretation of statutes, and so the PSC should not have relied on that holding in this case.

In its order approving DTE's special contracts with the data center, the PSC cited the 1997 *Attorney General* opinion and stated: "the Court of Appeals has found that special contracts that do not result in an immediate change in rates or in the cost of service to customers qualify for ex parte approval, even where it is clear that the existence of the special contracts could—or even likely will—result in an associated revenue request by the utility in a future rate case."[95]

In the 1997 *Attorney General* case, the Court reviewed the same statutory language at issue in this case, which at that time was in section 6a(1).[96] The Attorney General argued that whenever a rate change "may have the effect of increasing costs to customers in the future, it cannot be said that the alteration 'will not result' in a cost or rate increase." 227 Mich App at 153. The Court responded first by stating a standard of review for agency interpretation of statutes that was commonly invoked at that time: "Although statutory interpretation is a question of law subject to review de novo on appeal, this Court ordinarily will *defer* to the construction placed on statutory provisions by the governmental agency charged with applying them, unless the agency interpretation is clearly wrong." *Id*. at 153 (citation omitted, emphasis added). The Court then stated:

> We are not persuaded that the PSC's interpretation of subsection 6a(1) is unreasonable or contrary to the statutory language. The PSC's interpretation recognizes that merely approving and implementing the rate amendments in question is not sufficient, in and of itself, to cause any rate or cost of service increase to occur. That is, even though the PSC may not have prohibited the utility from seeking a rate increase at some point in the future, and even though the PSC may have expressly laid the groundwork for such a future rate increase

[95] December Order, p 29, MNS Appendix E.
[96] 2016 PA 341 moved this language to section 6a(3).

> request, the fact remains that mere approval and implementation of the contract, without more, will not result in any rate or cost increases. In this regard, the discount contract may be viewed as merely resulting in a reason for Consumers to seek a rate increase in the future—i.e., a reduction in Consumers rate revenues, as opposed to actually resulting in any future cost or rate increases that may occur—after proper notice and a full contested case hearing, in the event that Consumers seeks to recover its lost Upjohn revenue from its other customers. *Id*. at 154.

The Court concluded: "Because the PSC's interpretation of subsection 6a(1) is reasonable and consistent with the legislative intent behind the statute of ensuring notice and hearing before the implementation of any increase in customer costs of service or rates, we *defer* to the PSC's determination." *Id*. at 155 (emphasis added).

There are three problems with the 1997 *Attorney General* Court's reasoning. First, it contradicts the plain meaning of the language in section 6a, by adding an additional requirement that the contract approval by itself, *without more*, directly cause a cost-of-service increase, rather than merely "result in an increase in the cost of service."

Second, it was unnecessary. The Court's statement that a contract may be approved ex parte even if it "expressly laid the groundwork" for a future rate increase goes well beyond the facts of that case, in which any such increase was speculative at best. And the PSC stretched that dictum even further in this case, pronouncing that a contract may be approved ex parte even if it likely will result in a rate increase request in the future.[97]

Third, and most importantly, the 1997 *Attorney General* decision contravenes the standard of review for agency statutory interpretations in place today. As noted, the Court decided that case by deferring to the PSC's interpretation of section 6a. But eleven years later, the Michigan Supreme Court clarified that courts must not defer to agency interpretation of

[97] December Order, p 29, MNS Appendix E.

statutes in *In re Rovas Complaint Against SBC Michigan*, 482 Mich 90, 107-09; 754 NW2d 259 (2008). The *Rovas* Court explained: "When considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute. While a court must consider an agency's interpretation, the court's ultimate concern is a proper construction of the plain language of the statute." *Id*.

Importantly, the *Rovas* Court noted that, in the years leading up to the *Rovas* decision, the Court of Appeals in some cases had "used the erroneous 'deference' or 'great weight' standard to allow agencies improperly to assume the courts' role as the final arbiter of a statute's meaning." *Id*. at 107. The *Rovas* Court explained that courts should not defer to an agency's interpretation of a statute:

> By using a deferential standard … the panel below abdicated its judicial authority to construe statutes … [T]he agency's interpretation is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons. Furthermore, the agency's interpretation can be particularly helpful for "doubtful or obscure" provisions. But, in the end, the agency's interpretation cannot conflict with the plain meaning of the statute. "Respectful consideration" is not equivalent to any normative understanding of "deference" as the latter term is commonly used in appellate decisions.

Id. at 108 (citations omitted).

The *Rovas* Court further explained that, "[t]o avoid further confusion," courts should not rely on "recent cases, which have erroneously introduced inappropriate concepts such as 'deference.'" *Id*. Under *Rovas*, the 1997 *Attorney General* decision erred by deferring to the PSC's interpretation of section 6a.

The dissent in an unpublished 1998 case illustrates the correct analysis when the judiciary interprets the same statute based on its plain meaning rather than deferring to the PSC. In *Attorney General v Pub Serv Comm'n*, unpublished per curiam opinion of the Court of Appeals, issued August 18, 1998 (Docket No. 193794 et al), pp 1-3, the Court affirmed the PSC's ex parte approval of rate discounts for large customers, finding that the 1997 *Attorney General* case controlled. In dissent, Judge Jansen explained that under section 6a, "if the effect of the contracts will be to increase the cost of services to its customers, [then] notice and a hearing must be provided. It is only where a change in the rates will not result in an increase in the cost to its customers can the contracts be approved without notice or a hearing." *Id*. at 5 (JANSEN, J., dissenting). Judge Jansen noted "the statutory language is mandatory by the use of the word 'will' under its plain and ordinary meaning;" and therefore "the fact that Consumers Power argues that an increase may not occur is not enough; it must show that an increase will not occur. Consumers Power has not done so in this case and, in fact, has clearly set forth the groundwork to raise rates in the future." *Id*. She concluded that "the effect of these contracts will be to increase the rates of other customers" and therefore "notice and a hearing is required before the PSC can rule on the contracts." *Id*.

In conclusion, because the facts of the 1997 *Attorney General* case are materially different, it does not control the outcome of this case. Further, the statement in the 1997 *Attorney General* case that section 6a authorizes the PSC to approve a special contract ex parte even if it "expressly laid the groundwork" for a future increase in rates resulted from that Court deferring to the PSC's interpretation of the statute, which *Rovas* has since held to be erroneous. This Court should either find that the 1997 *Attorney General* decision does not control the outcome in this case, or if does control, the Court should indicate disagreement with it under MCL 7.215(J)(2) because it is contrary to current law on the standard of review.

E. The PSC's cost-of-service condition of approval failed to remedy the special contracts' cost impacts.

The PSC stated that it also satisfied the higher standard proposed in the 1997 *Attorney General* case, in which the Attorney General argued that "the only way the PSC could approve the contract without public notice and an opportunity for hearing would be if the PSC ruled that all discounts and costs resulting from the [special] contract must always be borne by Consumers and its shareholders only, and never by any of Consumers' other customers."[98] The PSC claimed that it satisfied that standard by conditioning its approval on all current and future costs caused by the data center being covered by the data center or DTE.[99] For the reasons explained below, however, the PSC's cost condition is insufficient to protect DTE's other ratepayers from the hundreds of millions of dollars of costs associated with the special contracts and therefore does not excuse the PSC's failure to hold the required hearing.

The PSC's cost condition was not raised by any party before the PSC's December Order, and, therefore, no party could weigh in on the condition before rehearing. Appellants' Petition for Rehearing explained that this condition lacked the terms and provisions needed to ensure that it could provide meaningful protection to other ratepayers from bearing the costs of serving the Customer.[100] Unfortunately, the PSC arbitrarily dismissed Appellants' concerns, without providing a rational basis for doing so. See *Int'l Union, United Auto, Aerospace & Agr Implement Workers of Am (UAW) v NLRB*, 459 F2d 1329, 1346 (DC Cir 1972) ("It has always been assumed that administrative agencies are not authorized to act arbitrarily and capriciously and that they, unlike juries, are required to give rational reasons for their decisions."); *SBC*

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[98] December Order, pp 31-32, MNS Appendix E (quoting *Att'y Gen.*, 227 Mich App at 152).
[99] December Order, pp 31-32, MNS Appendix E.
[100] MNS Petition, pp 3-7, MNS Appendix M.

Michigan v Mich Pub Serv Comm'n, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2025 (Docket No. 251117), p 4 (applying the arbitrary and capricious standard in the context of PSC orders denying rehearing and finding that "[t]he PSC's statements in denying rehearing indicate that general reflections, more than evidentiary development" led to the PSC's conclusions).

One primary fault with the PSC's cost condition is that the PSC failed to explain how compliance would be assessed or enforced.[101] It did not identify any process or docket in which DTE's costs to serve the data center would be identified and compared to the data center's payments; required no affirmative showing that the data center's actual payments fully cover the costs being incurred to serve it; and was silent on how the condition would be enforced if the data center's payments were later determined to not fully cover the costs.[102] The December Order was also deficiently vague regarding the required evaluation in future dockets of how to allocate cost increases to meet regulatory requirements related to resource adequacy, renewable energy, and clean energy.[103] Each of these errors decreases the likelihood that the PSC's condition will protect ratepayers from costs in the future.

The December Order also incorrectly stated that "[t]hese are conditions that do not require amendment of the special contracts."[104] Appellants informed the PSC that the special contracts clearly identified the costs that the data center agreed to pay and stated that they represent "the entire agreement among the Parties with respect to the subject matter hereof."[105] Because the special contracts encompass the entire agreement between the parties, the PSC's cost

[101] *Id*. at 5.
[102] *Id*.
[103] *Id*. at 5-6.
[104] *Id*. at 6.
[105] *Id*.

condition will have limited impact on what costs of service DTE can recover from the data center. As such, the PSC erred by conditioning its approval on the data center bearing the cost of additional incremental generation, transmission, or distribution investments, while simultaneously stating that the contracts did not need amending to provide that the data center will pay for those investments.[106]

The PSC did not address these issues in its Rehearing Order. Instead, the PSC stated, without evidentiary support, that "[t]he issue of cost allocation was front and center in this case and thus the Commission is not persuaded that the condition that it imposed in Ordering Paragraph B constitutes newly discovered evidence or a fact or circumstance arising after the hearing."[107] Of course, there was no actual hearing, and the condition necessarily arose after all other evidence had been submitted, as the Commission included it sua sponte in its December Order. Because the PSC did not establish that its flawed cost condition remedied the cost-of-service impacts of the special contracts, its "decisive but unreasonable" failure to grapple with and resolve the issues with its cost condition was arbitrary and capricious. *English v Blue Cross Blue Shield*, 263 Mich App 449, 472; 688 NW2d 523 (2004) (quoting *City of Romulus v Dep't of Env't Quality*, 260 Mich App 54, 63; 678 NW2d 444 (2003)). The PSC's arbitrary and capricious decision-making fails to overcome the simple fact that the special contracts will cause

[106] After the PSC's December Order, DTE submitted a letter claiming to accept the Commission's conditions and stating that "the aggregate revenues generated by the customer will cover the costs to serve them." DTE Letter, p 1, MNS Appendix O. This letter does not cure any of the deficiencies regarding how compliance with the PSC's condition would be assessed or enforced. Further, because the Customer did not sign the letter, it cannot remedy the Commission's failure to require modification to the special contracts themselves. Finally, the "aggregate" language in the letter raises the risk of DTE permitting other customers to subsidize the data center in the short term, under the theory that "aggregate revenue" might offset that subsidy in the future. See Attorney General Motion to Reopen Proceeding (U-21990-0036), pp 3-4, MNS Appendix T.

[107] PSC Rehearing Order, p 26, MNS Appendix N.

predictable cost-of-service increases, and it does not excuse the PSC's failure to hold the required hearing.

II. Contrary to law, the PSC relied on materials not in the record and not available for judicial review to support its decision to approve the special contracts ex parte.

A. PSC decisions are unlawful if not supported by evidence in an administrative record that is capable of judicial review.

Appeals to this Court of Appeals are heard on the original record. MCR 7.210(A). In an appeal of an agency's decision in a non-contested case, the record "is limited to the administrative record." See *Mich Ass'n of Home Builders v Dir of Dep't of Labor & Econ Growth*, 481 Mich 496, 500; 750 NW2d 593 (2008) (holding that "judicial review of an administrative rule, which by definition constitutes a non-contested case, is limited to the administrative record"); *Harkins v Dep't of Nat Res*, 206 Mich App 317, 323; 520 NW2d 653 (1994) (citing *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989)) (stating that, under MCR 7.210(A), a court's review "is limited to the record developed by the trial court [or administrative agency]"). Under Rule 7.210, a party may not "expand the record" on appeal by "supplying exhibits that were not a part of the record below." *Harkins*, 206 Mich App at 323 (ruling against the petitioner where reference to "exhibits that were not a part of the record below" was "necessary to resolve the instant issue"). Nor can a party reference facts outside the record to resolve issues on appeal. See *Wiand*, 178 Mich App at 143 ("This Court's review is limited to the record developed by the trial court and we will not consider references to facts outside the record."). In short, an agency must support its decisions with an administrative record—even in a non-contested case—and the administrative record must contain the facts and exhibits the agency relied upon in rendering its decision.

The Court reviews the evidence in the administrative record to determine whether the PSC's findings and decisions are "unreasonable" under MCL 462.26 and "arbitrary and capricious" under Article 6, § 28. An agency's findings and decision are "unreasonable" under MCL 462.26 if they are unsupported by evidence in the administrative record. *Att'y Gen v Mich Pub Serv Comm'n*, 206 Mich App 290, 294; 520 NW2d 636 (1994) (citing *Assoc Truck Lines*, 377 Mich 259, 279; 140 NW2d 515 (1966) ("[W]e inquire whether there was admissible and admitted evidence in the record made before the commission to support its specific finding of fact.")). Agency findings and decisions that are *not* supported by evidence in the record are "conclusionary or opinionary" and therefore unreasonable. See *Assoc Truck Lines*, 377 Mich at 279-280 (O'HARA, J., dissenting) (writing to uphold the PSC's findings because a judge sitting "in the place and stead of the commission" would find in the record "a plethora of evidence, exhibit-wise and testimonially, to support his conclusions").[108]

An order is arbitrary and capricious "when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances or significance, or when it is freakish or whimsical." *Wescott v Civil Serv Comm'n*, 298 Mich App 158, 162; 825 NW2d 674 (2012); see also *Bundo v Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976). Until recently, the scope of arbitrary and capricious review under Article 6, § 28 was not well defined for cases without a hearing, with many courts

[108] Justice O'Hara's dissent in *Associated Truck Lines* is widely cited for the principle that a PSC order is unreasonable if unsupported by "evidence in the record made before the commission." 377 Mich at 279-280; 140 NW2d at 522. The following is a non-exhaustive list of cases in which the dissent is cited: *ABATE v Mich Pub Serv Comm'n*, 322 Mich App 480, 486; 913 NW2d 406 (2017); *Att'y Gen v Mich Pub Serv Comm'n*, 316 Mich App 231, 237; 891 NW2d 871 (2016); *HAR Co, LLC v Mich Elec Transmission Co LLC*, 309 Mich App 1, 10; 867 NW2d 911 (2014); *Enbridge Energy LP v Upper Peninsula Power Co*, 313 Mich App 669, 673; 884 NW2d 581 (2015).

concluding that it was "not proper…to review the evidentiary support" for the agency's decision. E.g., *Nw Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998)).[109] This Court summarized the apparent conflict in *Wescott*, 298 Mich App at 163 n 4:

> There would appear to be some tension between the arbitrary-and-capricious standard and the inapplicability of the substantial-evidence test in cases in which no hearing was required, when, for example, there might be an absolute dearth of evidence supporting an agency's decision, which would seem to render the decision completely arbitrary and capricious, yet the rule against examining the evidentiary support for the decision would appear to mandate a holding affirming the decision.

That tension was recently addressed by the Michigan Supreme Court in *Henderson v Civil Service Commission*. See 503 Mich 978, 980; 923 NW2d 595 (2019) (CAVANAGH, J., concurring) ("[T]he 'arbitrary and capricious' standard must mean *something* in order to effectuate the Constitution's requirement of direct review.") (emphasis added). In that case, a plurality of the court agreed that arbitrary and capricious review under Article 6, § 28 requires a court to "review the evidentiary record in order to determine there was not a *complete lack* of evidentiary support" for the agency's decision and "to ascertain the determining principle applied by the agency." *Id.* at 981. An agency's decision is arbitrary and capricious—and therefore not authorized by law—if the reviewing court cannot "conduct a minimum level of review of the

[109] In *Env't Disposal Sys v Fitch*—an unpublished Court of Appeals case—the court went so far as to conclude that "[i]n the absence of a hearing, no evidentiary 'record' exists," and to the extent an administrative record is submitted to the court, it is "irrelevant." *Env't Disposal Sys*, unpublished per curiam opinion of the Court of Appeals, issued November 1, 2005 (Docket Nos. 256671 and 256820). Opinions subsequent to *Env't Disposal Sys*—including *Henderson v Civil Serv Comm*—make clear that there *is* an administrative record in cases without a hearing, and the record *is* relevant for purposes of Article 6, § 28 review. See *Henderson*, 503 Mich 978, 978; 923 NW2d 595 (2019) ("[A] reviewing court *must* review the evidentiary record.") (emphasis added).

evidentiary record" and find "*some* evidentiary support for that decision." *Id.* at 980-981; see also *id.* at 978 (MARKMAN, J., concurring).[110]

The statutory standard—MCL 462.26—and the constitutional standard—Const 1963, art 6, § 28—both require the PSC's decisions in non-contested cases to be supported by evidence. Under those standards, supporting evidence must be capable of judicial review and it must be included in the administrative record. *Home Builders,* 481 Mich at 500-501. Therefore, a PSC decision cannot withstand scrutiny if the only evidence supporting it falls outside the administrative record and is unavailable for judicial review.

B. The PSC's reliance on materials not in the record is unreasonable under the statutory standard and arbitrary and capricious under the constitutional standard.

The PSC's December Order granting ex parte approval of the special contracts (and subsequent Rehearing Order) is unreasonable under MCL 462.26 and arbitrary and capricious under Article 6, § 28 because there is no support for the PSC's findings in the administrative record. As required of all agencies, a decision by the PSC must be supported with a reviewable record that contains the evidence and "reasoning behind the decision." See *Henderson*, 503 Mich at 981 (CAVANAGH, J., concurring). An order granting a public utility's application for approval of a special contract and request for ex parte treatment must be supported by specific findings

[110] Two court of appeals decisions issued since *Henderson—Meds Cafe, LLC v City of Westland* and *Grier v State Tax Commission*—have repeated the assertion that a court may not review the evidentiary support behind an agency's final decision if a hearing was not required. *Meds Cafe*, unpublished per curiam opinion of the the Court of Appeals, issued March 21, 2024 (Docket No. 364102, p 11 (citing *Brandon Sch Dist v Mich Educ Special Servs Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991)); *Grier*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2024 (Docket No. 365849) (citing *CVS Caremark v State Tax Comm'n*, 306 Mich App 58, 61-62; 856 NW2d 79 (2014)). Those unpublished decisions fail to address *Henderson* and are therefore not persuasive authority.

and evidence that (1) the contract will not result in an increase in the cost of service to customers and (2) approval will serve the public interest. MCL 460.6a(3); *In re Application of Detroit Edison Co*, order of the Public Service Commission, entered August 18, 1994 (Case No. U-10646), p 18, n 8. Though the PSC made findings to this effect, its reliance on out-of-record materials means there is no evidence supporting its findings in the administrative record, and this Court is precluded from conducting the judicial review required by law.

The December Order concludes that "the special contracts conform to the requirements of MCL 460.6a(3)" and "the weight of the evidence and public interest considerations support approval."[111] The PSC accompanies its decision with findings that "approval of the special contracts will not increase rates, rate schedules, or the cost of service to customers"; "the terms and conditions of the PSA and ESA reflect distinct protections for the utility with respect to stranded costs" and "mitigate cost subsidization for existing customers"; and approval of the special contracts will provide an "affordability benefit."[112] In support of those findings, the PSC relies heavily on a Staff "investigation" and its own "independent review" of "an unredacted copy of the affordability model used by the company" and "unredacted copies of the PSA and ESA that were made available by DTE Electric."[113] But the unredacted contracts and affordability analysis were never in any agency record—they were viewed on a private website—and they are not available for judicial review.

A limited administrative record *does* exist from the proceedings below—including DTE's publicly-filed application and testimony—but the PSC's conclusion that the special contracts will

[111] December Order, p 39, MNS Appendix E.

[112] See *id.* at 32-33.

[113] See *id*. at pp 32, 37-39.

not increase customers' cost of service and instead provide an affordability benefit lacks support in that record. Take, for example, the contention that cost recovery from the data center will exceed the incremental costs of providing it service, which is the PSC's main reason for concluding existing customers' cost of service will not increase. The public testimony of Neal Foley establishes that DTE will incur incremental costs exceeding $500 million just to connect the data center with a substation and necessary transmission upgrades.[114] Mr. Foley's public testimony confirms that those incremental costs will increase the DTE's annual revenue requirement, which will be recovered from all customers through increased distribution charges in base rates and transmission charges included in the PSCR surcharge.[115]

In contrast, the only support identified by the PSC ostensibly supporting the contention that expected data center revenue will offset the costs of serving it—creating an affordability benefit—is the non-record affordability models and analysis that the PSC and Staff were permitted to view only through a read-only portal.[116] Without those materials, the evidentiary support for an "affordability benefit" must come from DTE's application or testimony—but as Appellants previously explained, the application and testimony are "almost entirely lacking in the types of supporting assumptions, calculations, workpapers, and/or modeling files that are needed to meaningfully evaluate and verify" the claim.[117] Simply, the materials in the record do

[114] See December Order, p 10, MNS Appendix E (citing U-21990-0002, pp 37-39 (Foley Direct, pp 30-32)).

[115] See Foley Direct, pp 31-35, MNS Appendix B (providing in-record evidence that rates will increase unless the special contracts offset the incremental costs).

[116] See December Order, p 37, MNS Appendix E ("[T]he Commission and Staff were provided with an unredacted copy of the affordability model…and verified that the model shows an affordability benefit.").

[117] MNS Motion for a Contested Case (U-21990-0012, November 19, 2025), pp 7-8, MNS Appendix R.

not establish that the contracts will yield an affordability benefit. And yet, the existence of an affordability benefit is indispensable to the PSC's findings (a) that DTE Electric's application is eligible for ex parte treatment and (b) that the special contracts are in the public's interest and should be approved.

The PSC made those findings notwithstanding the complete lack of record support, making them "conclusionary or opinionary" and therefore unreasonable under the statutory standard. DTE's testimony makes assertions about the contracts' terms, protections, and affordability benefits, but those assertions are conclusory if the evidence supposedly capable of substantiating them is not in the record. The only evidence of the contracts' terms and protections is the contracts themselves, but the only copies in the record are redacted and insufficient for judicial review.[118] The only evidence of the contracts' affordability benefits is the affordability models, but unredacted copies were likewise left out of the record.[119] Even with due deference to the PSC, the December Order—and likewise the Rehearing Order—is unreasonable and contrary to law under MCL 462.26 because their findings are unsupported and unsubstantiated by evidence.

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[118] Even to the extent the in-record, redacted copies of the contracts support the PSC's assertions, the redacted portions may negate or render unenforceable any visible terms.

[119] Attachment A, MNS Appendix H—which the Commission erroneously labels a "cost-of-service study" but instead is simply the study outputs—is not evidence of the claimed affordability benefit. See Statement of Facts, *supra*. DTE omitted nearly all the components of a cost-of-service study, making it impossible for any party—and likewise this Court—to verify the information presented. The omissions are fatal because this Court cannot confirm that the results are grounded in fact and reason and not wholly arbitrary—i.e., "[f]ixed or arrived at through an exercise of will or by caprice." *Bundo*, 395 Mich at 703, n 17; 238 NW2d at 165.

Additionally, while Attachment A purports to show eventual overall rate benefits "once the [data center] Customer's full load is realized," it also shows an immediate $39.7 million increase in customers' distribution rates. DTE has not demonstrated that the increase in distribution rates will be offset during the ramp-up to full data center load.

The PSC's findings are similarly arbitrary and capricious under the constitutional standard. An arbitrary decision is one that is "decisive but unreasoned." *English*, 263 Mich App at 472; 688 NW2d at 537. "Decisive but unreasoned" is an apt description for the PSC's Orders, which make conclusions about the contracts' terms and financial impacts without the unredacted contracts and affordability analyses in the record to back them up. Under Article 6, § 28, the PSC's assertions and findings about the contracts' terms and affordability benefits must have *some* evidentiary support in the record such that a reviewing court can "conduct a minimum level of review." *Henderson*, 503 Mich at 980-981; 923 NW2d at 598. A reviewing court cannot confirm the PSC's assertions about the contracts' terms because it cannot review the full contracts; nor can it confirm the existence of an affordability benefit because it cannot review the affordability models relied on by the PSC. Since a reviewing court cannot confirm there is some evidentiary support for the PSC's decision, the resulting decision is arbitrary and capricious and contrary to law.

C. The PSC's reliance on materials not in the record is contrary to law because it precludes meaningful appellate review under Article 6, § 28.

The record underlying the PSC's decision to approve DTE Electric's application ex parte, and to deny rehearing of the same, is incomplete and therefore insufficient for judicial review under Article 6, § 28. Agencies are required to create an administrative record supporting their decisions, even in non-contested cases. See *Home Builders*, 481 Mich at 500-501. In *Jordan v HHS*, the Michigan Supreme Court held that the administrative record created by the agency must also, under Article 6, § 28, "facilitate meaningful appellate review." 510 Mich 369, 378; 987 NW2d 119 (2022). In that case—a worker's compensation case—the Court held the record created by the Workers' Disability Compensation Agency (WDCA) was "too incomplete to facilitate meaningful appellate review" because the Court could not determine "'what facts [the agency] relied upon in reaching its conclusion.'" *Id.* (quoting *Gacioch v Stroh Brewery Co*, 426 Mich 612, 620; 396 NW2d 1 (1986)). The Court remanded the case to the agency "to fill in these gaps." *Id.* at 379.

While Article 6, § 28 contains provisions uniquely applicable to worker's compensation proceedings, the requirement that the administrative record "facilitate meaningful appellate review" applies to the PSC just the same. As this Court previously wrote: "The PSC's order must contain sufficient information to permit meaningful appellate review." *In re Mich Consol Gas Co*, unpublished per curiam opinion of the Court of Appeals, issued December 11, 2014 (Docket Nos. 316141 and 316263);[120] see also *Ass'n of Businesses Advocating Tariff Equity v Mich Pub Serv Comm'n*, 212 Mich App 371, 379, 538 NW2d 30 (1995) (citing *Viculin v Dep't of Civil Service*, 386 Mich 375, 405; 192 NW2d 449 (1971)) ("Two strands of doctrine apply to the judicial review of administrative determinations. First is the principle that an agency or commission must articulate with clarity and precision its findings *and the reasons for its decisions*.") (emphasis added). That conclusion is bolstered by the fact that administrative fact-finding in worker's compensation proceedings is entitled to special deference under Article 6, § 28: "Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law." Const 1963, art 6, § 28. Findings of fact in all other administrative cases are only entitled deference to the extent they are either "supported by competent, material, and substantial evidence" or "authorized by law." See *id.* Therefore,

[120] Cited as evidence that the PSC is bound by the requirement that administrative records be sufficiently complete to facilitate meaningful appellate review.

consistent with the Michigan Supreme Court's holding in *Jordan*, this Court must determine whether the administrative record of the PSC's decision is sufficiently complete to facilitate meaningful appellate review.

A cursory review of the record shows that it is not. The record—as addressed above—is incomplete. This is a case regarding the approval of special contracts, but the record does not even contain complete copies of the contracts.[121] The PSC states that its Staff performed an investigation and audit, but none of the materials audited nor any statement detailing the conclusions of the audit are in the record.[122] The December Order also states that PSC and PSC Staff were provided "with an unredacted copy of the affordability model used by the company," but that appears to be an overstatement: DTE simply let them review a model on a view-only private website.[123] The PSC relies heavily on those materials in concluding that the special contracts conform to the requirements of MCL 460.6a(3). But without having them in the record, a court simply cannot determine the "facts [the PSC] specifically relied upon in reaching its conclusion," nor can it review "the reasoning behind the decision." *Jordan*, 510 Mich at 378; *Henderson*, 503 Mich at 981. A record with such gaping holes cannot facilitate the meaningful appellate review required by Article 6, § 28, and therefore, the resulting PSC decision is arbitrary and capricious and not authorized by law.

[121] Attachment A, pp 19-24, MNS Appendix H.

[122] See December Order, p 32, MNS Appendix E.

[123] See *id.* at 37.

III. The PSC's approval of the special contracts' collateral requirement was arbitrary and capricious.

The PSC's Orders were arbitrary and capricious for the additional reason that they approved a collateral requirement that was notably weaker than the standard the PSC had set just six weeks earlier, and because the PSC did not meaningfully address Appellants' well-founded concerns about this requirement.

A. The PSC acted capriciously by approving a parent guarantee as collateral without conducting the analysis that it required in an order six weeks earlier.

Six weeks prior to its December Order approving DTE Electric's special contracts, the PSC established minimum standards for contracts between another electric utility—Consumers Energy—and its large data center customers, the same type of customer at issue in this case. In a November 2025 Order, after considering testimony from intervening parties and holding a hearing, the PSC approved a set of tariff terms, or terms setting minimum standards for future contracts between Consumers Energy and these customers. The PSC set these specific contractual safeguards in order to "ensur[e] that these new large load customers fully pay for the costs needed to serve them, and that there are adequate guardrails in place to avoid both cross-subsidization from other customers and the risk of stranded assets should the anticipated load fail to fully materialize."[124]

DTE's special contracts failed to include similarly protective safeguards as the PSC required in November 2025. Appellants identified for the PSC numerous ways in which the

[124] *In re Consumers Energy Co*, order of the Public Service Commission, issued November 6, 2025 (Case No. U-21859), p 103; see also *id.* at 104 ("It is against this backdrop that the Commission reviews the specific elements proposed by the company and the evidence from the intervening parties.").

special contracts failed to meet the standards for data center contracts set in its November 2025 Order, but the PSC did not meaningfully justify the inconsistency in its orders.[125] This appeal focuses on one particularly detrimental inconsistency: the form of collateral that the customer must provide in case it becomes insolvent and cannot fulfill its performance obligations under the contracts. In this case, the PSC approved a significantly weaker form of collateral than it allowed six weeks earlier, which may result in DTE passing significant costs to its other ratepayers if the data center or its parent company becomes insolvent.

The PSC's sudden departure from the stronger terms of its November 2025 Order, without meaningful justification, falls squarely within the well-established definition of capriciousness. It is Michigan law that "[a] decision is capricious if it is '*apt to change suddenly*; freakish; whimsical; humorsome." *Bundo v Walled Lake*, 395 Mich 679, 703; 238 NW2d 154 (1976) (quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946)) (emphasis added); see also *Goolsby v City of Detroit*, 419 Mich 651, 678; 358 NW2d 856, 870 (1984) ("'caprice' means 'an impulsive change of mind.'"). When an agency changes its policy, it must "show that there are good reasons for the new policy." *FCC v Fox Television Stations, Inc*, 556 US 502, 515; 129 S Ct 1800, 1811; 173 L Ed 2d 738 (2009). An "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v Navarro*, 579 US 211, 222; 136 S Ct 2117, 2126; 195 L Ed 2d 382 (2016) (quoting *Nat'l Cable & Telecommunications Ass'n v Brand X Internet Servs*, 545 US 967, 981; 125 S Ct 2688, 2699; 162 L Ed 2d 820 (2005)).

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[125] MNS Motion, pp 9-11, MNS Appendix R.

The PSC described the importance of a strong collateral requirement in its November 2025 Order: "it is…necessary to ensure that sufficient collateral is in place if the contracted large load customer ultimately becomes insolvent and unable to pay the required exit fee. This is particularly important for customers with lower credit ratings, as well as in the case of any potential industry-wide decline that also impacts the financial position of otherwise healthy corporate parents."[126] The PSC in November approved two default acceptable forms of collateral: "a standby irrevocable letter of credit or cash (which earns interest)."[127] The PSC refused to approve a guarantee from a parent company as a default form of collateral.

Parent guarantees differ from irrevocable letters of credit from a financial institution or cash because their performance depends on the financial state of the parent company. See Stirling et al., *How Secure Is Your Performance Security? Performance Bonds, Parent Guarantees, and Letters of Credit*, 69 Found. Nat. Res. and Energy L. Ann. Inst. 25 (2023) ("Some parties on the receiving end of a credit support obligation may prefer a letter of credit or surety bond over a parent guarantee due to the risk that the entity providing the guarantee fails. For example, under guidance promulgated by the U.S. Environmental Protection Agency (EPA), self-insurance (the use of a parent guarantee to satisfy the financial responsibility requirement) represents the highest financial risk to the public due to the potential of failure by the entity making the guarantee."). If the parent company becomes insolvent at the same time as the customer or otherwise cannot perform on its obligation under the parent guarantee, then the utility would be left with substantially depressed revenue, potentially requiring increasing other customers' rates. The PSC in November stated that it did not approve parent guarantees as a

[126] *In re Consumers Energy Co*, unpub op at 104.
[127] *Id*. at 112.

default form of collateral "[b]ecause of the uncertainty regarding the credit quality of an unknown large load customer."[128] The PSC noted that it remains open to considering the use of parent guarantees on a case-by-case basis, but only if the utility demonstrated that it would be "reasonable and prudent" to accept a parent guarantee after "taking into account the risk level of the individual large load customer, including the credit rating of the customer and/or its parent company."[129]

DTE's special contracts, by contrast, could be secured through a parent guarantee from Oracle or "another Affiliate of Customer" that was not identified in the proceeding.[130] As Appellants informed the PSC, DTE did not even attempt to make a showing in its Application that its use of a parent guarantee would be "reasonable and prudent" based on an analysis of the risk level and credit rating of the data center or its parent company, as the PSC had required in Consumers' tariff six weeks earlier. [131] The PSC's Orders do not indicate that the PSC conducted such an analysis, either.

Appellants also informed the PSC of significant and growing questions about Oracle's financial health stemming from that company's rapidly growing debt load, with both Moody's and S&P labelling Oracle's outlook as "negative," and associated negative impacts to Oracle's credit rating, which the PSC did not address in its December 2025 Order.[132] Likewise, Appellants noted that DTE had not provided any risk assessment of any other potential parent guarantor, despite the special contracts specifying that the parent guarantee could come from "another

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[128] *Id.* at 112-113.
[129] *Id.*
[130] MNS Petition, p 7 n 20, MNS Appendix M.
[131] MNS Motion, p 10, MNS Appendix R.
[132] MNS Motion for Leave to File Reply (U-21990-0024, December 12, 2025), pp 9-12, MNS Appendix S; MNS Petition for Rehearing (U-21990-0032), p 8, MNS Appendix M.

Affiliate of Customer."[133] Once more, nothing in the record indicates that the PSC performed such an assessment of any other potential guarantor. Because the PSC did not perform the assessment of Oracle or other potential guarantors' financial state that it itself said was necessary in November 2025, and the administrative record shows that Oracle's financial state and credit rating are notably weak, the PSC failed to meet its own established standards for collateral.

The PSC did not substantively address the divergence from its November 2025 standards when approving the special contracts. In its Rehearing Order, the PSC claimed that it "thoroughly addressed the differences between the instant case and Case No. U-21856 [sic] in the December 18 Order," citing pages 30-31 and 39-42 of its December Order.[134] But in fact, pages 30 to 31 of its December Order only address the fact that the November 2025 tariff was the result of a contested hearing process, rather than being approved ex parte. Meanwhile, in pages 39 to 42 of December Order, the PSC "recognize[d] that the application does not mirror every aspect of the November 6 [O]rder," and therefore directed DTE Electric to file an application for a generally applicable large load customer tariff that aligns with the findings of the November 6 Order."[135] This future large load customer tariff will not apply to this specific data center customer, and the PSC did not show that there were "good reasons" for approving a parent guarantee as collateral in this case. *FCC*, 556 US at 515. The PSC's sudden change in standard, without sufficient justification, is the hallmark of capriciousness.

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[133] *Id*. at 7 n. 20.
[134] PSC Rehearing Order, p 27, MNS Appendix N.
[135] December Order, pp 39-42, MNS Appendix E.

B. The PSC did not meaningfully address issues that Appellants raised about its collateral provision, which threaten to render that provision meaningless.

In its December Order, the PSC claimed to resolve any concerns about collateral by writing:

> [I]f the company determines that the specified collateral is not sufficient to cover the full amount of the remaining financial exposure associated with the ESA or the PSA (minus the value to customers), the Commission specifically cautions DTE Electric that any unrecovered costs shall not be borne by ratepayers and that DTE Electric bears responsibility for any remaining liability. All risk associated with the sufficiency of the collateral shall be borne by DTE Electric.[136]

However, as the Appellants explained in their Petition for Rehearing, this "caution" appears unenforceable and, therefore, essentially meaningless. Unlike the conditions that the PSC included in the Order, this caution was not included in the list of things specifically ordered by the PSC set forth on pages 43-45 of the December Order.[137] Furthermore, in contrast with certain conditions in the PSC's Order, the PSC did not require DTE to affirmatively accept that it, and not its customers, will be required to bear the costs and risks of any insufficiency of the credit and collateral provisions.[138] There is therefore a significant possibility that the caution will not be enforceable or enforced in the future.

The PSC disregarded Appellants' concerns with the enforceability of this language in its Rehearing Order, other than simply noting that Appellants raised them in their Petition, and the PSC made no showing that the caution would be enforceable despite the issues identified by Appellants. The PSC's disregard of Appellants' rehearing arguments is the sort of "decisive but unreasoned" decision-making that rises to the level of being arbitrary. *English v Blue Cross Blue*

[136] December Order, p 41, MNS Appendix E.
[137] MNS Petition, pp 9-10, MNS Appendix M.
[138] *Id*.

Shield, 263 Mich App 449, 472; 688 NW2d 523 (2004). Appellants therefore request that this Court reverse the PSC's unreasonable, arbitrary, and capricious decision.

RELIEF REQUESTED

For the reasons discussed above, Appellants respectfully request that this Court vacate the PSC's Orders in Case No. U-21990, holding that the PSC erred by denying Appellants' petition for a contested case. Appellants further request this Court remand this matter to the PSC for proceedings consistent with this conclusion.

Respectfully submitted,

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WORD COUNT STATEMENT

This brief complies with the word count limitation of MCR 7.212(B)(3) because, excluding the part of the document exempted, it contains 15,725 Words.

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