STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the matter, on the Commission's own motion, to open a docket to implement the provisions of Public Act 233 of 2023

PSC Case No. U-21547

/

ALMER CHARTER TOWNSHIP, et al.,

Court of Appeals No. 373259

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

MICHIGAN ENERGY INNOVATION BUSINESS COUNCIL, INSTITUTE FOR ENERGY INNOVATION, CLEAN GRID ALLIANCE, and **ADVANCED ENERGY UNITED,**

Intervening Appellees.

/

BRIEF OF PROPOSED *AMICI CURIAE* CLARA AND LEONARD OSTRANDER, TERESA HIMES, AND KEVIN HEATH

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com
rconybeare@goodmanacker.com

Attorneys for Proposed *Amici Curiae*

MATTHEW EISENSON
Admitted Pro Hac Vice
Senior Fellow, Renewable Energy Legal Defense Initiative
Associate Research Scholar
Sabin Center for Climate Change Law
Columbia Law School
435 W. 116th Street
New York, NY 10027
(508) 397-8177
matthew.eisenson@law.columbia.edu

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BASIS OF JURISDICTION[1]

This Court has jurisdiction over this appeal under MCL 462.26.

STATEMENT OF QUESTION INVOLVED

1. Did the Public Service Commission act lawfully and reasonably in issuing the October 10, 2024 Order?

Amici Curiae's Answer: Yes.

Appellees' Answer: Yes.

Appellants' Answer: No.

2. Is the October 10, 2024 Order a rule within the meaning of the Michigan Administrative Procedures Act?

Amici Curiae's Answer: No.

Appellees' Answer: No.

Appellants' Answer: Yes.

INTERESTS OF *AMICI CURIAE*

Amici Curiae Clara and Leonard Ostrander, Teresa Himes, and Kevin Heath (the "Milan Township Landowners") are individual landowners and farmers who wish to exercise their property rights to host solar energy facilities on their land in Milan Township (Monroe County), Michigan. They signed easement agreements in 2020 to participate in a solar project, but that project was blocked by a restrictive local zoning ordinance.

The Milan Township Landowners have a strong interest in the successful implementation of Public Act 233 of 2023 ("PA 233"), which created a new pathway for projects like theirs to

[1] Counsel for proposed *Amici Curiae* authored this Brief in whole. No party or their counsel made a monetary contribution intended to fund the preparation or submission of this Brief.

overcome onerous local restrictions. The Milan Township Landowners also have a strong interest in seeing this Court uphold the October 10, 2024 Order (the "Order") issued by the Michigan Public Service Commission ("PSC"), which will help to discourage local governments from attempting to insert unlawful restrictions into their Compatible Renewable Energy Ordinances ("CREOs").

The individual circumstances and interests of the Milan Township Landowners are described in further detail in the following paragraphs.

A. Clara and Leonard Ostrander

Clara Ostrander, 58 years old, and her husband Leonard Ostrander, 60 years old, live in Milan Township on a farmstead that has been in Clara's family for more than 154 years. As farmers, they have learned that one year can bring a tremendous crop, while the next year can bring staggering losses.

Clara and Leonard have seen many farmers go into bankruptcy, and they have attended auctions at which farmers were forced to sell their equipment to pay off debt. When Clara's own mother fell severely ill in the 1990s, Clara's father was forced to sell off part of the family farm to pay her mother's medical bills, which exceeded $500,000, even with health insurance. Today, Clara and Leonard are facing medical issues of their own. Their greatest fear is that they, too, will be forced to sell off land to pay for medical expenses.

Several years ago, Clara and Leonard learned about the possibility of a solar easement. They were initially hesitant. After significant research, however, they concluded that granting easements on part of their land for a solar project would give them the income they needed to pay the bills, while allowing them to continue farming the rest of their land. They signed an easement agreement in November 2020.

However, as discussed in more detail at pages 9–10, plans for the solar project hit a wall in February 2023 when the township government adopted a restrictive ordinance that prohibited large-scale solar projects in agricultural zoning districts. Clara and Leonard are cautiously optimistic that the project will eventually receive the necessary approvals to move forward when the PA 233 siting process is fully implemented. However, they believe this will require the PSC to crack down on continuing efforts by local governments to attempt to impose unlawful restrictions on solar, wind, and battery storage projects, as described at pages 12–16.

B. Teresa Himes

Teresa Himes, 65 years old, was raised in Milan Township and remained in Milan Township until 2014, when she moved with her husband to Napoleon Township in Jackson County. As a child, she watched her parents build a successful 1,100-acre farm from nothing. She remembers the many sacrifices her parents made in building that farm; she remembers the many meals her family ate together out in a field on a tailgate or card table as they worked long hours; and she remembers the many sleepless nights worrying about the cost of repairs, the weather, and the markets.

Teresa first learned about the possibility of a solar easement in 2018. She decided to enter into an easement agreement because of her desire to keep ownership of the land that her parents worked so hard to maintain, and she signed the necessary paperwork in November 2020. Teresa continues to own a home in Milan Township, where her daughter, her son-in-law, and her two grandchildren now reside. If the solar project is built, this home would have views of solar panels on at least two sides.

C. Kevin Heath

Kevin Heath, 61 years old, lives in Milan Township. He is the younger brother of Teresa

Himes. In 2015, Kevin was forced to put up his share of the family farm as security when refinancing a home loan and a farm loan. In 2016, Kevin decided to purchase additional land from his siblings to help keep that land in the family. However, the lender who handled Kevin's recent refinancing would not consider lending him additional money. Kevin eventually found an alternative lender who was willing to finance the purchase, but the terms of the loan were so arduous that Kevin was forced to sell off some of the family farmland just to make loan payments.

Like his sister Teresa, Kevin signed an easement agreement in November 2020. If the solar project is built, the easement payments will give Kevin the opportunity to pay off the debt on his farmland and help him to keep it in the family for future generations. Because the land will remain suitable for farming at the end of the solar easement, Kevin also believes that the solar project, if approved, will help to preserve farmland from residential sprawl.

INTRODUCTION

The Milan Township Landowners submit this Brief to provide an additional perspective on one of the main problems that PA 233 was designed to address—namely, the proliferation of onerous local zoning restrictions across the State, which infringed on the property rights of landowners like themselves. This Brief also provides information concerning ongoing efforts by local governments to evade PA 233's limits on the restrictions that can be included as part of a CREO. Further, this Brief explains why the October 10, 2024 Order will help to curb ongoing abuses of the PA 233 siting process.

For background, the Milan Township Landowners are individual landowners and farmers, each of whom has spent hundreds of hours over the last four years defending their right to allow solar panels to be installed on their land. In 2020, they signed agreements to grant easements on some of their farmland for a solar project. The easement payments they would receive when the

project was completed would provide much-needed income. However, in February 2023, Milan Township adopted a new zoning ordinance that banned large-scale solar projects in agricultural zoning districts, which effectively blocked the project.

While the restrictive local ordinance was a major impediment, the Milan Township Landowners' hopes for the project were revived in November 2023 when the Michigan Legislature enacted PA 233, which introduced significant reforms to the siting process for large-scale solar, wind, and battery storage projects. The law provided that, if a local government wished to retain control over the siting of such projects, it would be required to adopt a Compatible Renewable Energy Ordinance ("CREO") that does not include any provisions "more restrictive" than the requirements described in PA 233. If a local government adopted restrictions that exceeded those statutory limits, then the developer would have the option of bypassing local review and submitting its application directly to the Michigan Public Service Commission ("PSC"). The PSC, in turn, would be allowed to preempt any local restrictions that would otherwise apply. The zoning restrictions in Milan Township that banned solar from agricultural zoning districts were patently "more restrictive" than those allowed in a CREO—and therefore could not be included in a CREO.

However, almost as soon as PA 233 was signed, local governments across the State, including some of the Appellants, began taking steps to undermine the new law. In particular, as discussed in more detail at pages 12–16, local governments have continued to adopt restrictions that are patently "more restrictive" than those allowed in a CREO. In an October 10, 2024 Order, the PSC issued interpretive guidance to help eliminate any possible confusion about the meaning of key terms, including CREOs, and to discourage any further attempts at evading statutory limits on what can be included in a CREO. This Order will help to discourage the proliferation of invalid

CREOs and to ensure the successful implementation of the new siting process, as envisioned by the Legislature.

In the following section, this Brief will explain, through a counterstatement of facts: (A) how the siting process before PA 233 was enacted was dysfunctional, allowing onerous local restrictions to proliferate across the State; (B) how PA 233 provided a solution to this dysfunctionality, including by settings limits on the types of restrictions that local governments can impose as part of a CREO; (C) how the successful implementation of PA 233 is being thwarted by local governments, who are attempting to evade statutory limits on local restrictions; and (D) how the October 10, 2024 Order, which provides interpretive guidance on the meaning of a CREO and other key terms, will help to curb these attempts at evasion. Following the counterstatement of facts, this Brief will conclude with a concise argument that (I) the Order is not a rule subject to the Michigan Administrative Procedures Act ("APA"); and (II) the Order is lawful and reasonable under PA 233.

COUNTERSTATEMENT OF FACTS

A. Before PA 233, The Process For Siting Large-Scale Solar, Wind, And Battery Storage Projects Was Dysfunctional.

Appellants continue to provide no context about why PA 233 was adopted. The context is that the previous siting process, which gave local governments free rein to adopt restrictive ordinances, was dysfunctional. The Milan Township Landowners experienced this dysfunctionality firsthand when they attempted to grant easements on their land for a solar farm, which prompted the township government to adopt a restrictive ordinance that made the project impossible to build.

1. Extreme Local Zoning Restrictions Were Widespread, Killing Projects And Impeding The State From Achieving Its Clean Energy Goals.

Briefly, in the years leading up to the passage of PA 233, exclusionary zoning measures by township and county governments were proliferating across the State. These exclusionary zoning measures, such as local ordinances banning utility-scale solar projects in agricultural zoning districts, were *de facto* bans, which made it impossible to build renewable energy projects in many parts of the State. *See, e.g.*, Eisenson et al., *Opposition to Renewable Energy Facilities in the United States: June 2024 Edition*, Sabin Center for Climate Change Law (June 2024), pp 132–150 (describing examples of restrictive ordinances in Michigan, as well as contested projects that were killed by local opposition).

To provide one example of how restrictive these ordinances could be, consider LaSalle Township. In 2021, residents of LaSalle Township became aware of plans to construct a solar energy facility in the Township. The facility would be sited near existing transmission lines, and the electricity generated at the facility would help to replace the power that would be lost when an aging coal power plant nearby was retired.

While the plans may have been sensible, they sparked an aggressive campaign to pressure the Township Board to prohibit solar from agricultural zoning districts. The campaign paid off. In 2022, the LaSalle Township Board adopted a local ordinance that restricted utility-scale solar to the township's industrial districts, namely the "M-1, Light Industrial District and M-2, General Industrial District." LaSalle Township Zoning Ordinance, § 5.59(c)(2) (version adopted September 28, 2022).[2]

[2] This version of the Zoning Ordinance can be found here: https://lasalletwpmi.com/wp-content/uploads/2023/09/LaSalle-ZO-20230515.pdf. As discussed at pages 14, this ordinance was amended on November 29, 2024, replacing the provision that limited large-scale solar to industrial districts with a new provision that would limit such projects to an overlay district.

The 2022 ordinance in LaSalle Township was a *de facto* ban on utility-scale solar. At the time the ordinance was adopted, the Township's industrial districts contained fewer than 100 acres of land, and half of that land was already developed; the M-2 general industrial district contained two parcels total, while the M-1 light industrial district contained no land at all. *See* LaSalle Township Zoning Map (last updated October 20, 2018), https://lasalletwpmi.com/wp-content/uploads/2023/09/Zoning-map-102018-0905.pdf; *see also* McKenna, *2018 LaSalle Township Master Plan: Draft for Public Comment* (April 20, 2018), p 16 (showing that 50 acres of land were already being used for industrial purposes). By comparison, the Township's agricultural zoning districts, which were made off-limits by the ordinance, occupied more than 14,000 acres out of the Township's nearly 17,000 acres. *See id* at 16, 19. While there was ample farmland that could have supported a solar project, the ordinance made it impossible to use any of that farmland and effectively made LaSalle Township off-limits to utility-scale solar.

Unreasonably burdensome local restrictions like those in LaSalle Township were also making it very difficult for the State to meet its renewable energy targets. For context, Michigan's 2023 Clean Energy Legislation requires that any electric provider in the State must achieve a portfolio of 50% renewable energy by 2030 and 60% by 2035. *See* MCL 460.1028(1)(b)–(c). As of 2023, the State only received approximately 11% of its electricity from renewable sources. *See* U.S. Energy Information Administration, *Michigan: Profile Overview*, https://www.eia.gov/state/?sid=MI (accessed February 27, 2025).

2. The Milan Township Landowners Experienced The Dysfunctionality Of This Process Firsthand When They Tried To Participate In A Solar Project.

The Milan Township Landowners signed easement agreements in 2020 to participate in a solar project in Milan Township. Under the agreements, if the project was approved, the Milan Township Landowners would receive easement payments in exchange for allowing the developer

to install solar panels on their land. As described above at pages 2–4, these easement payments would help to provide the Milan Township Landowners with much-needed income to pay off their medical bills and allow them to keep their land in the family for future generations.

However, the solar project has not been built, and the Milan Township Landowners have not received the annual easement payments they were anticipating. At the time the Milan Township Landowners signed their easements, a zoning ordinance enacted on August 13, 2020, allowed solar on agricultural land like theirs, subject to common sense regulations. *See* Milan Township Zoning Ordinance, § 13.27(M) (version adopted August 13, 2020)[3] (allowing large-scale solar in industrial and agricultural districts). That ordinance gave them the confidence to move forward as part of the project. But as the project developer began doing outreach in the community, a few loud voices, who were principally concerned about the visual impacts of the project, began to spread misinformation. These loud voices created a website called "No To Solar," which claimed, without any factual basis, that the project would contaminate the environment, cause dangerous levels of electromagnetic radiation, and impair the global food supply. No To Solar, *How Solar Affects YOU!*, https://perma.cc/63GB-ZQ3B. Anti-solar activists also resorted to harassment at public meetings and other venues. One official who faced intense harassment was Teresa and Kevin's late brother, Philip (Phil) Heath, who was the Township Supervisor. Despite recusing himself from all decisions related to the solar ordinance, Phil was a target of relentless abuse. On October 18, 2022, Phil went to the Township Attorney's office to report that he would be resigning as Township Supervisor due to the stress and harassment he was facing in connection with the solar ordinance, which he believed was affecting his health.

[3] This version of the Zoning Ordinance can be found here: https://milantownship.org/wp-content/uploads/2022/03/MTwp-ZONING_ORDINANCE-2008-1-updated-01-31-2022.pdf.

That same night, Phil died unexpectedly at only 67 years old, a death that Teresa attributes in part to the stress of the harassment that he faced in connection with the solar ordinance.

Upon Phil's untimely death, the Milan Township Board of Trustees appointed a new supervisor who was known to be opposed to solar development. On February 9, 2023, the Township Board voted 3–2 to adopt a restrictive ordinance that would prohibit utility-scale solar in agricultural zoning districts, much like the one adopted only months earlier in LaSalle Township.[4] These sweeping restrictions effectively stalled the project. *See* Milan Township Zoning Ordinance, § 13.27(M) (version adopted February 9, 2023)[5] (allowing large-scale solar in industrial districts only). These restrictions also severely infringed on the property rights of the Milan Township Landowners, unreasonably depriving them of the right to use their land in a safe, lawful, and productive manner. Meanwhile, the outlook for the Milan Township Landowners only worsened. Anti-solar activists launched a recall election to punish the two local officials who had voted against adopting new restrictions on solar. In May 2023, the recall campaign succeeded, and both of the officials who opposed the *de facto* ban on solar were removed from office and replaced with new officials who were known to support the ban.[6]

B. PA 233 Provided A Solution To This Dysfunctionality, Including By Setting Limits On The Types Of Restrictions That Local Governments Can Impose As Part Of A CREO.

When the Milan Township Landowners' project was blocked by onerous local restrictions that infringed on their property rights, they turned to the State Legislature for relief. The Milan

[4] Milan Township Board of Trustees, *Meeting Minutes* (February 9, 2023), p 3, https://milantownship.org/agenda-and-minutes/.
[5] This version of the Zoning Ordinance can be found here: https://milantownship.org/wp-content/uploads/2024/10/MTwp-ZONING_ORDINANCE-2008-19-updated-31DEC2023.pdf.
[6] Loren, *Monroe County Elections: Milan Township Voters Recall Two Officials*, The Monroe News (May 3, 2023), https://www.monroenews.com/story/news/politics/elections/local/2023/05/03/monroe-county-elections-milan-township-recall-two-officials/70179277007/.

Township Landowners emailed every state representative and senator—Democrat and Republican—to explain why local control, without meaningful safeguards against onerous zoning restrictions, was dysfunctional. In October 2023, when the bill that later became PA 233 was introduced, Clara Ostrander testified before both the House and Senate Committees. In November 2023, when the legislation passed, Clara spoke at the signing of the bill with Governor Gretchen Whitmer.

As a practical matter, PA 233 would stop local townships from banning wind and solar projects and allow farmers and property owners—like the Milan Township Landowners—to grant easements on their land and diversify their incomes. To achieve that aim, the law provides that, if a local government wishes to retain control over the siting of such projects, it is required to adopt a CREO. To qualify as a CREO, the ordinance must not include any provisions "more restrictive than the provisions included in section 226(8)." MCL 460.1221(f). While Section 226(8) establishes uniform standards for setbacks, fencing requirements, noise limits, and other design specifications for features that could affect public safety, the law does not explicitly address other types of potential restrictions, such as ordinances banning solar development from agricultural zoning districts. *See* MCL 460.1226(8). However, these onerous restrictions are clearly not allowed in a CREO, as they are "more restrictive" than the public safety standards described in Section 226(8).

The statute further provides that, if a local government fails to adopt a CREO, the developer is allowed to submit its application directly to the PSC. If the PSC decides to approve the project, the certificate issued by the PSC "preempt[s] a local policy, practice, regulation, rule, or other ordinance that prohibits, regulates, or imposes additional or more restrictive requirements than those specified in the commission's certificate." MCL 460.1231(3).

Finally, the law makes clear that, regardless of what types of restrictions can or cannot be included in a CREO, local governments cannot *enforce* any restriction other than those specified in Section 226(8) when reviewing an application submitted pursuant to PA 233. Specifically, the law provides that, if "[t]he application complies with the requirements of section 226(8), but an affected local unit denies the application," then the developer can submit its application to the PSC, which would have the authority to preempt the restriction. MCL 460.1223(3)(c)(ii).

C. Local Governments Are Thwarting The Implementation Of PA 233 By Attempting To Evade The Statutory Limits On The Restrictions That Can Be Included In A CREO.

In their Statement of Facts, Appellants paint a highly misleading picture of the Townships' purported efforts to comply with PA 233. Appellants argue that they "spent most of 2024" trying to adopt CREOs that would comply with PA 233. Appellants' Br on Appeal, p 12. Appellants further argue that, in adopting these purported CREOs, they "relied on PA 233's definition of what a CREO is." *Id* at 13. In effect, Appellants want the Court to believe that they had been doing their best to faithfully comply with the new law and investing significant resources into those efforts. They also want the Court to believe that the PSC then pulled the rug out from underneath them by issuing a brand-new definition of CREO in the October 10, 2024 Order that was inconsistent with the statutory definition. *See id* at 13.

None of this is accurate. In reality, Appellants were never trying to comply with the text or intent of the law. Instead, they spent all of 2024 trying to *undermine* PA 233, by devising new ways to evade PA 233 and continue to block solar, wind, and battery storage projects. While PA 233 provides that a CREO cannot include requirements that are "more restrictive than the provisions included in section 226(8)," MCL 460.1221(f), many local governments have

continued to adopt sweeping restrictions, such as overlay districts, that are patently more restrictive than any of the parameters set out in Section 226(8).

Since November 2023, at least five townships have adopted CREOs with invalid restrictions. Intervening Appellees described two of these examples in their Brief: (1) Appellant Fremont Township, which has created a renewable energy overlay district that restricts development to a 520-acre area that occupies 2.25% of land in the township; and (2) Appellant White River Township, which created an overlay district that limits all to one 600-acre contaminated brownfield. *See* Intervening Appellees' Br on Appeal, pp 8–9.

Three other examples of townships with invalid CREOs include Appellant Ida Township, as well as non-parties LaSalle Township and Raisinville Township. Ida Township, for its part, initially restricted battery storage projects to commercial and industrial districts, but later created an overlay district that limited *all* large-scale renewable energy and battery storage projects to 32 parcels in the northeast corner of the Township. *See* Ida Township Ordinance No. 123-24, § 6.53(B)(3) (providing that utility-scale battery energy storage projects "are permitted in the Township only as a special land use in the Commercial and Industrial District"); Ida Township Ordinance No. 128-24, § 6.53(B)(3) (providing that utility-scale battery energy storage projects "are permitted in the Township only as a special land use in the [Renewable Energy Overlay ('REO')] District"); Ida Township Ordinance No. 126-24, § 2(E) (providing that "once PA 233 of 2023 is in effect . . . Solar Energy Systems with a nameplate capacity of 50 megawatts or more shall only be permitted as a special land use in the REO District"); Ida Township Ordinance No. 127-24, § 2(G) (providing that "once PA 233 of 2023 is in effect, then . . . [Wind Energy Conversion Systems] with a nameplate capacity of 100 megawatts or more shall only be permitted

as a special land use in the REO District"); Ida Township Ordinance No. 125-24, § 3 (delineating the REO District).

Likewise, on November 29, 2024, LaSalle Township replaced the 2022 ordinance described above at pages 7–8 with an overlay district that limits solar development to a specified area "bounded by the westerly Railroad Track #1 of the Detroit Line owned by Norfolk Southern Railway and Interstate 75 to the east." *See* LaSalle Township Zoning Ordinance, § 5.59(d)(8) (version adopted November 29, 2024)[7] (note that the Zoning Ordinance erroneously includes two separate Section 5.59(d)s at page 107 and page 111, respectively). That overlay district spans approximately 1,100 acres total, but the actual amount available for development is significantly less after accounting for setbacks and lands submerged under water, according to an analysis performed on AcreValue.com.

Finally, Raisinville Township recently adopted an ordinance that limits the aggregate amount of land used for solar development, including large-scale solar and small-scale solar, to a total of 1,000 acres in the township. *See* Raisinville Township Ordinance No. 61-U, § 3.31(6)(H).

In addition to these five townships that have completed the process of adopting invalid CREOs, others are considering similar restrictions. To provide one example, on June 27, 2024, the Planning Commission of Appellant Deerfield Township (Lenawee County) voted to recommend a so-called CREO that would: (a) limit utility-scale wind and solar projects to within 1,250 feet of one existing transmission line; (b) limit battery storage systems to "the Northeast quadrant of Section DE0-225 and no closer than 700 feet from the centerline of Carroll Road nor closer than 175 feet from the centerline of Pieh Hwy"; and (c) prohibit utility-scale solar projects

[7] This version of the Zoning Ordinance can be found here: https://lasalletwpmi.com/wp-content/uploads/2024/12/LaSalle-ZO-20241129.pdf.

from any properties enrolled in the PA 116 program. *See* Ostrander Br Opposing Prelim Inj, Ex 1, Deerfield Township Draft Ordinance Nos. 20-24-1, 20-24-2, & 20-24-3 (June 27, 2024). All of these restrictions could place a significant amount of land off-limits to development. The prohibition on the use of land enrolled in the PA 116 farmland and open space preservation program is also inconsistent with a state law that explicitly allows PA 116 land to be used for solar development. *See* MCL 324.36104e. As of February 27, 2025, these draft ordinances are being promoted online by the Interstate Informed Citizens Coalition as a model for other townships to follow.[8]

In adopting the restrictive ordinances described above, all of these townships have insisted—incorrectly—that these ordinances are CREOs. In so doing, they appear to have taken the position that, as long as they are adopting restrictions that are different in *type* from the enumerated requirements in Section 226(8)—which established uniform standards for setbacks, fencing requirements, noise limits, and other design specifications that implicate public safety—they can safely ignore the explicit statutory prohibition on the inclusion of "more restrictive" measures in a CREO. This is incorrect as a matter of statutory interpretation for the reasons discussed at length in the briefs of the State and Intervening Appellees.

Moreover, as a practical matter, adopting invalid CREOs is a monumental waste of time. There is no benefit to the township or county that attempts to do so, other than to cause a delay. As described above at page 12, Section 223(3)(c)(ii) allows a developer to file an application with the PSC if "[t]he application complies with the requirements of section 226(8), but an affected local unit denies the application." MCL 460.1223(3)(c)(ii). Thus, if a local government denies an

[8] *See* Interstate Informed Citizens Coalition, Inc, *Ordinances! Ordinances! Ordinances!* (January 22, 2025), https://iiccusa.org/townships/ordinances-ordinances-ordinances/.

application for any reason unrelated to Section 226(8), such as a project's non-compliance with one of these illegitimate restrictions, then the developer can appeal that denial to the PSC, which then can preempt those restrictions.

D. The October 10, 2024 Order, Which Provides Interpretive Guidance On The Meaning Of A CREO, As Well As Other Key Terms, Will Help To Curb These Attempts At Evasion.

To curb ongoing efforts to undermine the PA 233 process, the PSC issued interpretive guidance that clarified what can and cannot be included as part of a CREO. For background, PA 233 authorized the PSC to issue "application filing requirements," either by "commission rule or order" to "maintain consistency between applications." MCL 460.1224(1). On June 21, 2024, the PSC staff posted a document for public comment with draft application instructions and procedures. The PSC received over 100 comments on the draft. *See* PSC Order, p 3. Among other topics, commenters alerted the PSC to ongoing abuses of the CREO process and asked for interpretive guidance on what can or cannot be included in a CREO. *See id* at 12 (describing comments that "many local units are placing additional restrictions in their ordinances that amount to exclusionary zoning or are imposing onerous conditions that, in practice, impede the development of energy facilities within that local unit's jurisdiction").

The PSC recognized the need for interpretive guidance. On October 10, 2024, the PSC issued an Order that promulgated final application instructions and procedures. Importantly, this Order provided interpretive guidance on the meaning of a CREO and other key terms. The PSC's interpretive guidance clarified that a CREO "may only contain the . . . requirements expressly outlined in Section 226(8)." *Id* at 18.

The Order eliminated any possibility of confusion about what is allowed—and what is not allowed—in a CREO. Most importantly, it made clear that the restrictive ordinances

described above at pages 12–16 are not valid CREOs. A decision by this Court upholding the Order will help to discourage efforts to replicate those invalid CREOs and help to ensure that the PA 233 siting process is faithfully and effectively implemented.

ARGUMENT

I. THE OCTOBER 10, 2024 ORDER IS NOT A RULE.

Appellants assert that "[t]he Order is . . . unlawful because it is a rule not adopted in compliance with the Administrative Procedures Act ('APA')." Appellants' Br on Appeal, p 27. This claim is wrong for at least two reasons.

First, the text of PA 233 expressly allows the PSC to create "application filing requirements . . . by commission rule or order." MCL 460.1224(1). Thus, the PSC need not follow the APA rulemaking procedures in issuing the "Application Filing Instructions and Procedures." Contrary to Appellants' argument, an order of this type need not arise in a contested case, *see* Appellants' Br on Appeal, p 28, because MCL 460.1224(1) does not require that the order arise out of a contested case, or it would have so stated. Moreover, the PSC frequently issues orders on instructions, procedures, forms, and the like on its own motion without a contested case, as it did here. *See, e.g.*, Case No. U-18238 (2024) (revising rate application filing forms and instructions); Case No. U-18238 (2023) (revising rate application filing forms and instructions); Case No. U-18461 (2017) (approving instructions and filing requirements for Integrated Resource Plans).

Appellants' APA argument fails for a second reason. The APA specifically excepts from its requirements:

> A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.

MCL 24.207(h); *see also, e.g.*, *O'Halloran v Secretary of State*, ___ Mich ___, ___; ___ NW2d ___ (2024) (Docket Nos. 166424 & 166425); slip op at 22 (applying MCL 24.207(h)'s exceptions to forms issued by the Secretary of State). The parts of the Order that Appellants are challenging, including the definitions of CREO and other terms, constitute "interpretive statement[s]" that are exempt from APA rulemaking requirements under MCL 24.207(h).

II. THE OCTOBER 10, 2024 ORDER IS LAWFUL AND REASONABLE.

Appellants argue that the Order "unlawfully and unreasonably redefines 'compatible renewable energy ordinance' and 'affected local unit' and creates a new category of 'hybrid facilities.'" Appellants' Br on Appeal, p 18. All of these claims fail.

A. "Compatible Renewable Energy Ordinance."

In the Order, the PSC interpreted MCL 460.1221(f)'s language that a CREO can only have "requirements . . . which are no more restrictive than the provisions included in section 226(8)" to mean that a CREO "may only contain [the] requirements expressly outlined in Section 226(8)." PSC Order, p 18. Appellants argue that this definition exceeds the PSC's authority and is unlawful and unreasonable because nothing in PA 233 "prohibits local units [of government] from imposing additional reasonable regulations on energy facilities." Am Claim of Appeal, ¶¶ 21–24.

This argument fails because the definition is both lawful and reasonable. In adopting that definition, the PSC reasonably adhered to several recognized canons of statutory interpretation, including the plain language and whole text canons of statutory interpretation, as well as the canon that statutes must be interpreted to avoid their evasion.

In concluding that a CREO cannot include any requirements other than those in Section 226(8), the PSC simultaneously applied the plain language and whole text canons of interpretation. As the PSC reasoned:

> The Commission finds that the plain language of the definition of a CREO in Act 233 expressly limits a CREO to requirements that "are no more restrictive than the provisions included in section 226(8)." MCL 460.1221(f). Other provisions in Act 233 reinforce this limitation. Specifically, Section 223(3)(c)(ii) of Act 233 permits an electric provider or IPP to submit an application to the Commission if "the application complies with the requirements of section 226(8), but an [ALU] denies the application." MCL 460.1223(3)(c)(i) (emphasis added). Similarly, Section 223(3)(c)(iii) of Act 233 provides that an electric provider or IPP may submit an application to the Commission if "[a]n [ALU] amends its zoning ordinance after the [CEO] notifies the electric provider or IPP that it has a [CREO], and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in section 226(8)." MCL 460.1223(3)(c)(iii) (emphasis added). The plain language of these provisions demonstrates that a CREO may only contain those requirements expressly outlined in Section 226(8) of Act 233. *Had the Legislature intended to permit local units to include additional requirements beyond those identified in Section 226(8) of Act 233, it would not have restricted the Commission's authority to site energy facilities, in part, on the basis that a local unit denied an application for reasons beyond "the requirements of section 226(8)."*

PSC Order, p 17 (emphasis added). In short, the PSC found that the statutory definition of a CREO plainly prohibited any provisions "more restrictive" than those in Section 226(8). The PSC further found that the plain language of other provisions of the statute makes clear that a local government cannot *enforce* any restriction beyond the requirements of Section 226(8). Most importantly, the statute provides that an electric provider may submit an application to the PSC if "[t]he application complies with the requirements of section 226(8), but an affected local unit denies the application." *See* MCL 460.1223(3)(c)(ii). If the PSC can assume jurisdiction over any application that is rejected for any reason that is not directly related to compliance with requirements of Section 226(8), then it logically follows that a CREO—which a local

government must adopt to retain jurisdiction and prevent the PSC from stepping in—also cannot include any restrictions beyond those requirements.

The PSC's careful consideration of these interrelated statutory provisions is consistent with the "whole text" canon of statutory interpretation required by this Court's decision in *TruGreen Ltd Partnership v Dep't of Treasury*, 338 Mich App 248; 979 NW2d 739 (2021), *lv den* 511 Mich 945; 989 NW2d 234 (2023):

> Rather than plucking words from the statute, we focus on the whole textual landscape. We endeavor to harmonize *all* the words, thereby cultivating a coherent reading that promotes the Legislature's goals.
>
> "[T]he meaning of statutory language, plain or not, depends on context." *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Id.* (cleaned up). Our Supreme Court stressed in *TOMRA*, 505 Mich at 349, that "'[c]ontext is a primary determinant of meaning . . . .'" (Citations omitted; alteration in original.)
>
> This focus on the big picture echoes a primary canon of statutory construction: the individual, discrete words of a statute must be read holistically "with a view to their place in the overall statutory scheme." *Davis v Mich Dep't of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."); *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367-368; 917 NW2d 603 (2018) ("However, we do not read statutory language in isolation and must construe its meaning in light of the context of its use."); *TOMRA*, 505 Mich at 351 ("This interpretation reflects a holistic reading of the statutory text and gives each provision its appropriate meaning and function.").

Id at 257–258. Moreover, as *TruGreen* requires, the PSC's interpretive guidance on the definition of a CREO accomplishes a legislative goal of the underlying statute. Here, the PSC's interpretive

guidance accomplishes the Legislature's goal of preempting local regulation of energy facilities unless local ordinance requirements "do not exceed" PA 233's requirements. As the House Legislative Analysis provided:

> Generally speaking, the MPSC certification process preempts local regulation of those facilities, although a local government with an ordinance whose requirements do not exceed the bill's certification standards can act as a permitting authority in some circumstances.

House Legislative Analysis, HB 5120 (February 5, 2024), p 1.

Furthermore, the PSC's interpretation of a CREO also comports with the canon that statutes must be interpreted to avoid their evasion. *See, e.g.*, *People v McIntosh*, 23 Mich App 412, 417–418; 178 NW2d 809 (1970).

As described above at pages 12–16, many local governments, including some Appellants, are attempting to evade the strict requirements of PA 233 so that they can continue to block the construction of energy facilities. For example, as recently as November 2024, Raisinville Township adopted an ordinance that limits the aggregate amount of land used for solar development, including large-scale solar and small-scale solar, to a total of 1,000 acres in the Township. *See* Raisinville Township Ordinance No. 61-U, § 3.31(6)(H). Likewise, Appellant Ida Township has recently attempted to limit renewable energy and battery storage systems to a restrictive overlay district. *See* Ida Township Ordinance No. 125-24, § 3; No. 126-24, § 2(E); No. 127-24, § 2(G); No. 128-24, § 6.53(B)(3).

The PSC's CREO definition—which makes clear that a township cannot ignore the explicit statutory prohibition on provisions that are "more restrictive" than those in Section 226(8) by simply adopting restrictions that are different in *type* from those in Section 226(8)—will help to discourage these evasions of PA 233 and ensure that the statute is implemented as the Legislature intended.

The CREO definition is also reasonable. Under the statute governing this appeal, Appellants must "show by clear and satisfactory evidence that the order . . . complained of is . . . unreasonable." MCL 462.26(8). An order of the PSC is "unreasonable" if it is "arbitrary, capricious, an abuse of discretion, or not supported by the record." *Mich Exch Carriers Ass'n v Mich Pub Serv Comm*, 210 Mich App 681, 692; 534 NW2d 234 (1995) (*per curiam*). The CREO definition is amply supported by the record, *see* PSC Order, pp 12–18, and because it comports with recognized canons of statutory construction, it is not arbitrary, capricious, or an abuse of discretion.

For all of these reasons, the Order's CREO definition is lawful and reasonable.

B. "Affected Local Unit."

The Legislature defined an Affected Local Unit ("ALU") as "a unit of local government in which all or part of a proposed energy facility will be located." MCL 460.1221(a). The Order clarifies that ALUs are those local units of government "exercise[ing] zoning jurisdiction" where the proposed energy facility is to be located. PSC Order, p 10. Appellants claim that "the PSC took a term clearly defined by PA 233 and limited its meaning in a manner unnecessary and inconsistent with PA 233." Appellants' Br on Appeal, p 20.

Appellants' objections fail for the same reasons as their objections to the interpretive guidance on the meaning of a CREO.

In developing its ALU definition, the PSC was again applying the "whole text" canon of statutory interpretation. In its Order, the PSC explained how the added language would help to harmonize the ALU definition with other PA 233 provisions and interrelated laws. *See* PSC Order, pp 6–10. The PSC explained, for example, that the additional language was necessary to make clear that, consistent with the Michigan Zoning Enabling Act, the "zoning jurisdiction of a

county does not include areas subject to a township zoning ordinance." *Id* at 6. In effect, the clarification simply reflects the fact that it is "impossible for a county to have an applicable CREO if a township has enacted a CREO." *Id* at 6–7.

Moreover, the ALU definition is reasonable because it is supported by the record. *See id* at 6–10.

C. "Hybrid Facility."

Finally, Appellants argue that "the Order creates a completely new category of facilities, 'hybrid facilities,' that are not contemplated by PA 233." Appellants' Br on Appeal, p 22. While it is true that the words "hybrid facilities" do not appear in PA 233, it is demonstrably untrue that the concept of hybrid facilities that combine multiple technology types was "not contemplated" by the statute. Indeed, the statutory definitions of "solar energy facility" and "wind energy facility" *explicitly include* any "energy storage facilities" that are part of those facilities. *See* MCL 460.1221(w) (definition of solar energy facility); MCL 460.1221(x) (definition of wind energy facility). Thus, the Order simply created a new label for a concept that already existed under the statute.

While Appellants now admit that "the Legislature allowed energy storage facilities to be included in solar and wind facilities," they attempt to manufacture a new controversy on the basis that the statute "did not include a provision allowing solar and wind facilities to be combined." *See* Appellants' Br on Appeal, p 22. Appellants further assert, somewhat cryptically, that "[t]he absence of such a provision is telling." *Id.* But neither the purpose nor the result of this Order was to create new types of projects for the PSC to permit or to expand the PSC's jurisdiction in any way. The purpose and effect were to ensure that, when multiple technology types are combined, the appropriate capacity threshold is applied to assess whether the PSC may assume

jurisdiction. In that respect, the Order helps to clarify that, when wind and solar are combined, the higher capacity threshold for wind will apply. Specifically, PA 233 provides that the PSC can only assume jurisdiction over solar facilities of at least 50 megawatts and wind facilities of at least 100 megawatts. The Order specifies that, if those two technologies are combined, the higher threshold, 100 megawatts, prevails, thus limiting the PSC's jurisdiction to the largest projects. *See* Errata to October 10, 2024 Commission Order (October 21, 2024), Application Instructions and Procedures, pp 2–3.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, the Milan Township Landowners urge the Court to dismiss the appeal.

Respectfully submitted,

/s/ Mark Brewer

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com
rconybeare@goodmanacker.com

MATTHEW EISENSON
Admitted Pro Hac Vice
Senior Fellow, Renewable Energy Legal Defense Initiative
Associate Research Scholar
Sabin Center for Climate Change Law
Columbia Law School
435 W. 116th Street
New York, NY 10027
(508) 397-8177
matthew.eisenson@law.columbia.edu

Attorneys for Proposed *Amici Curiae*

Dated: February 28, 2025

Certificate of Compliance

I certify that this brief complies with the word volume limitation set forth in MCR 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 7,072.

Respectfully submitted,

/s/ Mark Brewer

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com
rconybeare@goodmanacker.com

Dated: February 28, 2025

Attorneys for Proposed *Amici Curiae*

Proof of Service

The undersigned certifies that on February 28, 2025, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System, which will send notification of such filing to all attorneys of record.

/s/ Rowan Conybeare
Rowan Conybeare