STATE OF MICHIGAN
IN THE COURT OF APPEALS

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| *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.

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

Court of Appeals No. 373259


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**Appellants' Motion for Preliminary Injunction**

Appellants, through their attorneys, FOSTER SWIFT COLLINS & SMITH, PC, move the Court under MCL 462.26(4) to issue a preliminary injunction against Appellee Michigan Public Service Commission (the "PSC"). Specifically, Appellants request the Court enjoin Appellee from

enforcing its October 10, 2024, order in PSC Case No. U-21547 pending the outcome of this Appeal for the following reasons and those outlined in the attached brief in support:

1. On November 8, 2023, the Michigan Legislature passed Public Act 233 of 2023 ("PA 233"). PA 233 takes effect on November 29, 2024.

2. Under limited circumstances, PA 233 creates exemptions to local zoning regulations for utility-scale alternative energy projects[1] and authorizes the PSC to review and approve certain applications for certificates for energy facilities.

3. PA 233 adds a new Part 8 to the Clean and Renewable Energy and Energy Waste Reduction Act, Act 295 of 2008.

4. Section 230 of PA 233 limits the PSC's jurisdiction to the powers and authorities granted to it under Part 8.

5. On October 10, 2024, the PSC issued an order in PSC Case No. U-21547 ("Order"), in which the PSC redefined key terms in PA 233 and expanded its own authority to approve applications for projects not covered by PA 233.

6. On November 8, 2024, Appellants timely appealed the Order.

7. On November 12, 2024, Appellants timely filed an amended appeal which added several additional Appellants.

8. Appellants seek an order preliminarily enjoining the Order from taking effect pending the outcome of this appeal.

9. Absent the requested preliminary injunction, Appellants will be imminently and irreparably harmed by the loss of local control over zoning decisions regarding utility-scale

[1] Many ordinances refer to energy facilities designed to provide power to the electric grid (instead of for on-site use) as "utility-scale" systems.

energy facilities in excess of the requirements of PA 233. The PSC would not be irreparably harmed by the issuance of a preliminary injunction.

10. The balance of the equities heavily favors issuing the injunction.

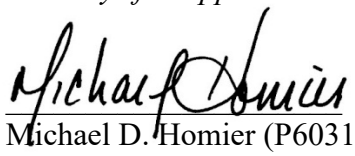
11. The public interest heavily favors issuing the injunction.

Accordingly, for these reasons and the reasons set forth in the accompanying Brief, Appellants respectfully request that the Court issue an order preliminarily enjoining the enforcement of the PSC's October 10, 2024 Order while this appeal remains pending.

Respectfully submitted,

FOSTER SWIFT COLLINS & SMITH, PC
*Attorneys for Appellants*

Dated: November 22, 2024

By: 

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MICHIGAN PUBLIC SERVICE COMMISSION,

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**APPELLANTS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**


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**Brief in Support of Appellants' Motion for Preliminary Injunction**

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## Introduction

This appeal arises out of the Michigan Public Service Commission's Order issued October 10, 2024, in PSC Case No. U-21547. The Order purports to establish instructions and procedures for certificate applications for renewal energy development projects, but in fact it ventures into rulemaking in violation of the Administrative Procedures Act and rewrites key statutory definitions of PA 233 of 2023. The Order undermines the authority of local communities, including Appellants, to regulate the siting of utility-scale renewable energy projects as permitted by PA 233.

PA 233 allows developers of utility-scale renewable energy development projects to bypass local approval processes and instead obtain project approval from the PSC unless the local municipality has adopted a "compatible renewable energy ordinance" (CREO) that meets specific minimum standards outlined in PA 233. A municipality with a CREO retains the power to regulate certain aspects of the project that are not covered by PA 233, such as the project's location, insurance requirements, and decommissioning procedures, among other things.

The PSC's Order, however, adopts a "narrow definition" of CREO and holds that "a CREO may only contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of [PA] 233 and *may not contain additional requirements*." (**Order,** 17-18, emphasis added.) The Order further creates a new category of facilities not contemplated by PA 233 (so-called "hybrid energy facilities") and narrows the definition of "affected local units" to communities with zoning, even though PA 233 contains no such restriction.

The PSC does not have the power to rewrite PA 233, and in doing so through the Order, the PSC has overstepped its limited authority. Its actions, if left unchecked, will irreparably harm Appellants and divest Michigan's municipalities of the local control that PA 233 and the Michigan

Zoning Enabling Act, PA 110 of 2006, are meant to preserve. For the reasons below, Appellants respectfully request this Court enjoin the PSC from enforcing the Order pending this appeal.

## Statement of Facts

*What is PA 233?*

In late 2023, the Michigan Legislature passed and the Governor signed Public Act 233 of 2023 ("PA 233"), which takes effect November 29, 2024, and Public Act 234 of 2023 ("PA 234"). PA 233 adds a new Part 8 to the Clean and Renewable Energy and Energy Waste Reduction Act, Act 295 of 2008. PA 234 amends Section 205 of the MZEA, to provide that local zoning ordinances are subject to the new Part 8.

Part 8 establishes exemptions to local zoning regulations for utility-scale renewable energy projects. Specifically, energy storage facilities, solar energy facilities, and wind energy facilities that meet threshold power capacity requirements may be authorized by the PSC, rather than by the municipality in which the facility is located, but only under limited circumstances like if the municipality does not have a "compatible renewable energy ordinance," or "CREO." A CREO is defined by PA 233 as "an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8)." § 221(f).[2] A "local unit of government is considered to not have a [CREO] if it has a moratorium on the development of energy facilities in effect within its jurisdiction." *Id*.[3]

In local units of government where a CREO is not in effect, the PSC may only review and consider applications for the following proposed facilities:

[2] References to PA 233 will simply cite to the relevant section.
[3] Moratoriums are temporary ordinances "used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy." Moratoriums "are an essential tool of successful development." *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 341; 122 S Ct 1465; 152 L Ed 2d 517 (2002).

a. Any solar facility with a nameplate capacity of 50 megawatts or more.

b. Any wind facility with a nameplate capacity of 100 megawatts or more.

c. Any energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more. [§ 221(1).]

*The Process Under PA 233*

Under PA 233, a developer[4] of a proposed project that meets the threshold nameplate capacity requirements may, under limited circumstances, seek a certificate from the PSC.[5] A developer of a wind, solar, or energy storage facility must first perform a series of tasks in each "affected local unit" or "ALU." "Affected local unit" is defined by PA 233 to mean "a unit of local government in which all or part of a proposed energy facility will be located." § 221(a). A "local unit of government" or "local unit" "means a county, township, city, or village." § 221(n).

Specifically, the developer must schedule and hold a public meeting in each ALU. § 223. Such meeting must be properly noticed by the developer. *Id*. For example, at least 30 days before the meeting, the developer must provide written notice of the meeting to the clerk of the ALU and provide the clerk with the site plan (or a way to access it electronically). § 223(1).

Additionally, at least 60 days before the public meeting, the developer must offer to meet with the chief elected official of each ALU to discuss the site plan. § 223(2). After the developer offers to meet with the chief elected official(s), the ALUs have a choice: they may decline or accept the offer to meet. If the ALU meets with the developer, a 30-day window opens during which the local unit may inform the developer that it has a CREO. § 223(3). Once the ALU

[4] PA 233 at times refers to "independent power producers, "IPPs," and "electric providers" to describe different categories of electric providers. For simplicity, Appellants will refer to all electric providers and producers as "developers," or "applicants" when appropriate. A developer becomes an "applicant" when it submits an application to the PSC. See § 221(c), 226(5).

[5] Even if a proposed project meets the threshold capacity requirements of § 222(1), the developer may choose to submit their application only to appropriate local units and seek local zoning approval, regardless of whether the local units have CREOs.

provides this notice, the developer *must* submit their application to the ALU, not the PSC, and comply with the ALU's CREO to obtain approval. *Id*.

As PA 233's co-sponsor stated during a legislative hearing, "[f]or those municipalities that want to be more involved in the [permitting] process they now have the opportunity to come up with their own local permitting process, which must mirror tenets of the state process."[6]

Once an application is submitted to an ALU, the ALU has 120 days to approve or deny the application. § 223(3)(b). An application submitted to an ALU must comply with § 225(1), except for § 225(1)(j) and (s), and an ALU "may require other information necessary to determine compliance with the" CREO. §223(3)(a). Mandatory information under §225(1) includes, for example, a soil and economic survey report; a stormwater assessment; if the proposed site is undeveloped, a description of feasible alternative developed locations; a fire response and emergency response plan; and a decommissioning plan.

In limited circumstances, the developer may still submit its application to the PSC. Those circumstances are: (1) if the ALU does not approve or deny the application within 120 days; (2) if, after the chief elected official of the ALU notifies the developer that the ALU has a CREO, the ALU adopts an amended ordinance that "imposes additional requirements on the development of energy facilities that are more restrictive than those in [S]ection 226(8);" or (3) if "[t]he application complies with the requirements of Section 226(8), but the local unit denies the application." § 223(3)(c). If a proposed project includes multiple ALUs, the developer may also proceed to the PSC if just one ALU does not send notice that it has a CREO. See § 223(3).[7]

[6] Senate Committee on the Energy and Environment, Hearing, November 11, 2023, at 6:40, https://cloud.castus.tv/vod/misenate/video/654a810ef6b51700084a0c94?page=HOME (accessed November 22, 2024).

[7] "If, within 30 days following a meeting described in subsection (2), the chief elected official of each affected local unit notifies the electric provider or IPP planning to construct the energy facility that the affected local unit has a compatible renewable energy ordinance, then the electric provider or IPP shall file for approval with each affected local unit. . ."

When a developer files an application with the PSC, ALUs receive funds from the applicant to help cover the costs of intervention before the PSC. "Upon filing an application with the [PSC], the applicant shall make a 1-time grant to each affected local unit for an amount determined by the [PSC] but not more than $75,000.00 per affected local unit and not more than $150,000.00 in total." § 226(1). "Each affected local unit shall deposit the grant in a local intervenor compensation fund to be used to cover costs associated with participation in the contested case proceeding on the application for a certificate." *Id*.

ALUs also benefit from "host community agreements." Under § 227(1), an applicant before the PSC must "enter into a host community agreement with each affected local unit." Such an agreement must provide that the facility owner will pay the ALU $2,000 per megawatt of nameplate capacity located within the ALU. *Id*. The payment must "be used as determined by the affected local unit for police, fire, public safety, or other infrastructure, or for other projects as agreed to by the local unit and the applicant." *Id*.[8]

An application to the PSC (just like an application to an ALU) must include the several categories of information listed in § 225(1). Again, mandatory information includes, for example, a soil and economic survey report; a stormwater assessment; if the proposed site is undeveloped, a description of feasible alternative developed locations; a fire response and emergency response plan; and a decommissioning plan. *Id*.

To review an application, the PSC must conduct a contested case proceeding. § 226(3). ALUs and both participating and nonparticipating property owners may intervene in that proceeding by right. *Id*. When evaluating an application, the PSC must consider the feasible

[8] If an ALU and an applicant fail to enter to enter into a host community agreement, after good-faith negotiations, the applicant may choose to enter into a "community benefits agreement" and direct at least $2,000 per megawatt of nameplate capacity to community-based organizations. § 227(2). In short, a provider must grant the $2,000 per megawatt of nameplate capacity to either the ALU or community-based organizations in each ALU.

alternative developed locations described in the application and the impact of the proposed facility on local land use, including the percentage of land within the ALU dedicated to energy generation. § 226(6). The PSC may also condition a certificate on the applicant taking additional reasonable action related to the impacts of the proposed energy facility, including, but not limited to: establishing and maintaining for the life of the facility vegetative ground cover; meeting or exceeding pollinator standards throughout the lifetime of the facility; providing for community improvements in the ALU; and making a good-faith effort to maintain and take proper care of the property where the energy facility is proposed to be located during construction and operation of the facility. § 226(6)(a)–(d).

Then, much like a local planning commission is required to do under a local zoning ordinance, if the application and site plan meet specific requirements, the PSC must grant the application. § 226(7). Specifically:

> The [PSC] shall grant the application and issue a certificate if it determines all of the following:
>
> (a) The public benefits of the proposed energy facility justify its construction. For the purposes of this subdivision, public benefits include, but are not limited to, expected tax revenue paid by the energy facility to local taxing districts, payments to owners of participating property, community benefits agreements, local job creation, and any contributions to meeting identified energy, capacity, reliability, or resource adequacy needs of this state. In determining any contributions to meeting identified energy, capacity, reliability, or resource adequacy needs of this state, the commission may consider approved integrated resource plans under section 6t of 1939 PA 3, MCL 460.6t, renewable energy plans, annual electric provider capacity demonstrations under section 6w of 1939 PA 3, MCL 460.6w, or other proceedings before the commission, at the applicable regional transmission organization, or before the Federal Energy Regulatory Commission, as determined relevant by the commission.

(b) The energy facility complies with the standard in section 1705(2) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.1705.

(c) The applicant has considered and addressed impacts to the environment and natural resources, including, but not limited to, sensitive habitats and waterways, wetlands and floodplains, wildlife corridors, parks, historic and cultural sites, and threatened or endangered species.

(d) The applicant has met the conditions established in section 227.

(e) All of the following apply:

(i) The installation, construction, or construction maintenance of the energy facility will use apprenticeship programs registered and in good standing with the United States Department of Labor under the national apprenticeship act, 29 USC 50 to 50c.

(ii) The workers employed for the construction or construction maintenance of the energy facility will be paid a minimum wage standard not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed as determined under 2023 PA 10, MCL 408.1101 to 408.1126, or 40 USC 3141 to 3148, whichever provides the higher wage and fringe benefit rates.

(iii) To the extent permitted by law, the entities performing the construction or construction maintenance work will enter into a project labor agreement or operate under a collective bargaining agreement for the work to be performed.

(f) The proposed energy facility will not unreasonably diminish farmland, including, but not limited to, prime farmland and, to the extent that evidence of such farmland is available in the evidentiary record, farmland dedicated to the cultivation of specialty crops.

(g) The proposed energy facility does not present an unreasonable threat to public health or safety. [*Id*.]

Regarding § 226(7)(g) specifically, the Legislature defined what "an unreasonable threat to public health or safety" is for qualifying facilities. Section 226(8) states that "[t]he proposed energy facility meets the requirements of subsection (7)(g) if it will comply with the following

standards. . .” Those standards are specific requirements for things like setbacks, fencing, noise, blade tip height for wind energy facilities, and dark sky lighting solutions.

If the PSC approves a certificate submitted under § 223(3)(c), “the local unit of government is considered to no longer have a [CREO], unless the [PSC] finds that the local unit of government’s denial was reasonably related to the applicant’s failure to provide” specific required information under § 223(3)(a). § 223(5). In other words, once the PSC approves a certificate, in most situations the ALU is forever cut out of the decision-making process involving qualifying projects.

This process is also summarized in the table below:

<table>
<tr><td colspan="2">Initial Local Unit Contact:<br>Applicant must “offer in writing to meet with the chief elected official of each affected local unit . . . to discuss the site plan.”</td></tr>
<tr><td colspan="2">Meeting with Local Unit Chief Elected Official:<br>Applicant meets with chief elected official to discuss site plan (unless local unit declines)<br>Local unit must provide notice of compatible ordinance <u>within 30 days</u> after this meeting.</td></tr>
<tr><td colspan="2">Next Step (Depending on ALU Action/Compatible Renewable Energy Ordinance)</td></tr>
<tr><td>No notice of CREO from within 30 days (PSC route)</td><td>Notice of CREO from local unit local unit within 30 days (local route)</td></tr>
<tr><td>Applicant must notify Clerk that a public meeting will be held in the local unit and provide site plan (at least 30 days before public meeting)</td><td>Applicant must file application for approval with local unit, pursuant to compatible ordinance</td></tr>
<tr><td>Applicant must publish notice of the public meeting (at least 14 days before public meeting)</td><td>Local unit must approve or deny application within 120 days (can be extended another 120 days with consent from provider)</td></tr>
<tr><td>Public meeting is held in local unit</td><td>Applicant can still go to the PSC if:<ul><li>Local unit fails to timely approve or deny the application</li><li>The application complies with statute [226(8)] but local unit denies it</li><li>Local unit amends ordinance so that it is no longer compatible</li></ul></td></tr>
</table>

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| | • Any individual affected local unit does not send notice of a CREO<br><br>PSC's review is whether the applicant supplied all required information to the local unit, and the PSC must grant a certificate if the application meets the requirements of § 226. |

*PA 233's grant of authority to the PSC*

PA 233 grants limited powers and duties to the PSC. To administer PA 233, the PSC has only those powers that are granted to it by PA 233. § 230(1). PA 233 gives the PSC only the following specific powers:

a. prescribe the format and content of the notice required for certain public meetings. § 223(1).

b. establish application filing requirements. § 224(1).

c. reasonably require information to be contained in an application. § 225(s).

d. conduct proceedings on applications. § 226(3).

e. assess reasonable application fees. § 226(4).

f. grant or deny applications and issue certificates. § 226(5).

g. issue orders to protect the confidentiality of certain information. § 228(2).

h. consolidate proceedings. § 230(2).

*PA 233's Relationship with Other Laws*

The Legislature made clear its intent regarding PA 233's relationship with other laws. PA 233 provides that, except in one circumstance, it controls in any conflict between it and any other law of this state. § 230(3).[9] As discussed above, PA 234 of 2023 expressly amended the MZEA so that the MZEA is subject to PA 233. But PA 233 also contains other qualifying language,

[9] "However, the electric transmission line certification acct, 1995 PA 30, MCL 460.561 to 460.575, controls in any conflict with" PA 233. § 230(3).

including both limits on its own reach and limits on local control. Regarding local control, PA 233 states that "[a] local ordinance shall not prohibit or regulate testing activities undertaken by [an electric provider or producer] for purposes of determining the suitability of a site for the placement of an energy facility." § 231(1). It also provides that "a zoning ordinance or limitation imposed after" an applicant applied to the PSC may "not be construed to limit or impair the construction, operation, or maintenance of the energy facility." § 231(2). It provides that "[i]f a certificate is issued, the certificate and [PA 233] preempt a local policy, practice, regulation, rule, or other ordinance that prohibits, regulates, or imposes additional or more restrictive requirements than those specified in the" certificate. § 231(3). Additionally, it provides that:

> this part does not exempt [a provider] to whom a certificate is issued from obtaining any other permit, license, or permission to engage in the construction or operation of an energy facility that is required by federal law, any other law of this state, including, but not limited to, the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, any rule promulgated under a law of this state, or a local ordinance. [§ 231(5).]

*The PSC Opens a "Docket" on its Own Motion*

On February 8, 2024, the PSC opened a "docket," on its own motion, to implement PA 233. That day, it entered an order in that docket that stated the following:

> THEREFORE, IT IS ORDERED that:
>
> A. The Commission Staff shall engage with interested person in transparent open meetings, as described in this order.
>
> B. The Commission Staff shall file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in this docket by June 21, 2024.
>
> C. Any interested person may file comments regarding the Commission Staff's recommendations in this docket. Comments shall be filed no later than 5:00 p.m. (Eastern time) on July 17, 2024, and reply comments shall be filed no later than 5:00 p.m. (Eastern time) on August 9, 2024. [February 8, 2024 Order, **Exhibit A**.]

Over the following few months, the PSC drafted application instructions and procedures and a public comment process proceeded as outlined in the February 8 Order.

*Appellants' Work Toward Compatibility*

Between the adoption of PA 233 and today, many Appellants adopted CREOs based on the statutory definition of that term in PA 233 (see, e.g., **Exhibit B**, White River Township Solar Ordinance; **Exhibit C**, Ida Township Wind Ordinance). Adopting CREOs is not a quick or simple process. CREOs are zoning ordinances, and approval must follow the process outlined in the MZEA. Many other Appellants are either in the process of adopting a CREO or intend to do so.

Zoning ordinance adoption formally begins with publishing notice at least 15 days before a planning commission holds a public hearing on the draft ordinance. MCL 125.3103(1). After the hearing, the planning commission may choose to recommend that the jurisdiction's legislative body either approve or deny the ordinance. MCL 125.3305, 3306. Then, in some jurisdictions, a 30-day window opens during which the county or regional planning commission may comment on the draft ordinance. MCL. 125.3307. After that 30-day window expires, the jurisdiction's legislative body may adopt the ordinance, but only following another hearing if one is requested or if it chooses to hold one. MCL 125.3401. The legislative body must then publish a notice of adoption. MCL 125.3401. If after the expiration of 7 days following the publishing of the notice of adoption no notice of intent to file a petition for referendum has been filed, the ordinance takes effect. MCL 125.3401(6). If a notice of intent is filed, the referendum petitioner has 30 days following publication to file an adequate petition. MCL 125.3402(2). If an adequate petition is filed, the ordinance cannot take effect until after the next regular election or after a special election called for the purpose of approval or rejection of the ordinance. MCL 125.3402(3)(c).

This process may take several months. Indeed, many Appellants have spent most of 2024 preparing, reviewing, and adopting CREOs. The public hearings regarding CREOs were

extensive and thorough, with several Appellants' planning commissions receiving public comment for several hours. At least two Appellants, Speaker and Fremont Townships, had their CREOs petitioned for referendums. In both Townships, voters overwhelmingly approved the CREOs. (**Exhibit D**.) The underlying rationale for Appellants adopting CREOs was to retain local control over qualifying projects. If they did not adopt CREOs, they would cede all control over the siting of qualifying facilities to the PSC as outlined in PA 233.

When drafting their CREOs, Appellants relied on PA 233's definition of what a CREO is. Many Appellants copied the plain language of § 226(8) of PA 233 related to the restrictions found therein, while continuing to exercise the zoning authority granted to them by the Legislature in adopting other requirements that do not conflict with that Subsection, such as locating PA 233 qualifying facilities in specific zoning districts.

*The October 10, 2024 Order*

Despite its limited authority under PA 233, on October 10, 2024, the PSC issued an order in Case Number U-21547 in which the PSC redefined statutory definitions of PA 233 and improperly expanded its authority to approve applications for projects not covered by PA 233. The PSC, in the Order, stated that a CREO "may *only* contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and *may not contain additional requirements* more restrictive than those specifically identified in that section." (**Order**, 18) (emphasis added). The PSC further added "hybrid facilities" to the list of alternative energy projects it has authority to approve. (**Order**, 4). Such facilities, which the PSC characterizes as combinations of wind, solar, or energy storage facilities that only together can meet the power capacity threshold of PA 233 for PSC authorization, are not defined or contemplated in PA 233. The Order also redefines "affected local unit" to include "only those local units of government that exercise zoning jurisdiction," or "a unit of local government

exercising zoning authority in which all or part of a proposed energy facility will be located." (**Order**, 10, 83).

In other words, the PSC has purported to both narrow the statutory definition of "CREO" such that Appellants' CREOs are no longer "compatible" and expand the types of projects that it can authorize, so that even municipalities with CREOs, as PA 233 defines them, will lose zoning control over smaller facilities that band together to be "hybrid facilities." Additionally, jurisdictions without "zoning authority," under the Order, such as Appellant Ogden Township, are cut out of the process entirely and deprived of the financial benefits provided for by the Legislature in PA 233.

PA 233 takes effect on November 29, 2024. Without a preliminary injunction against the Order, Appellants—who went to great lengths to comply with a state law with which many of them disagree—will nonetheless have incompatible ordinances and lose their limited control over the siting of these utility-scale projects in their own backyards.

## Standard of Review

Appellants are entitled to a preliminary injunction pending the outcome of this Appeal. A preliminary injunction is "a form of equitable relief that has the objective of maintaining the status quo pending a final hearing concerning the parties' rights." *Slis v State*, 332 Mich App 312, 336; 956 NW2d 569 (2020). The party requesting "injunctive relief has the burden of establishing that a preliminary injunction should be issued[.]" MCR 3.310(A)(4). "[A] preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008).

Michigan courts take into account four factors when considering whether to issue a preliminary injunction: (1) whether the movant has demonstrated that irreparable harm will occur without the issuance of an injunction, (2) whether the movant is likely to prevail on the merits,

(3) whether the harm to the movant absent an injunction outweighs the harm an injunction would cause to the non-moving party, and (4) whether the public interest will be harmed if a preliminary injunction is issued. *Slis*, 332 Mich App at 336–337. "Importantly, the four factors governing consideration of injunctive relief are meant to simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *Johnson v Mich Minority Purchasing Council*, 341 Mich App 1, 25; 988 NW2d 800 (2022) (cleaned up).

## Argument

### I. Appellants are likely to prevail on the merits.

"It is not necessary that the [movant's] rights be clearly established, or that the court find [movant] is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity, and in order to prevent irremedial injury to the [movant], before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the property and of the parties during the litigation." *Niedzialek v Journeymen Barbers, Hairdressers & Cosmetologists' Intern Union*, 331 Mich 296, 302; 49 NW2d 273 (1951) (cleaned up).

The Appeal makes two basic claims: (1) that the PSC did not comply with the required rulemaking procedures of the Administrative Procedures Act, MCL 24.201 *et seq*. (the "APA"), and (2) that the PSC exceeded its limited authority pursuant to PA 233. Appellants are likely to prevail on the merits of both aspects of the Appeal.

#### A. Appellants are likely to succeed on the merits of the Appeal under the APA.

An agency is obligated to employ formal APA rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 404; 591 NW2d 314 (1998). Under the APA,

a rule is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207. The PSC is required to promulgate rules to the extent it intends to make its policies binding on all persons dealing with it or interested in any matter or proceedings pending before it. *In re Pub Serv Comm'n for Transactions Between Affiliates*, 252 Mich App 254, 264; 652 NW2d 1 (2002).

Although there is an exception to the above-quoted definition for "[a] determination, decision, or order in a contested case," **the Order does not arise from a contested case**. A "contested case" is a "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3).

> The typical contested case proceeding involves an individual named party and a disputed set of facts—e.g., a license denial, a denial of benefits, or a statutory violation—from which results an agency order that adjudicates the specific factual dispute and operates retroactively to bind the agency and the named party. *[In re Pub Serv Comm'n*, 252 Mich App at 267.]

This Court has explained that "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *Id*. at 263. It has also "note[d] that the PSC must promulgate rules for the conduct of its business and the proper discharge of its functions to the extent it intends to make its policies binding on all persons dealing with the commission or interested in any matter or proceeding pending before it." *Id*. at 264 (cleaned up). The Order arose from PSC Case Number U-21547, "In the matter, on the Commission's own motion, to open a docket to implement the provisions of Public 233 of 2023." There were no named parties and there was no evidentiary hearing. The Order binds all persons

and entities dealing with the PSC in any proceeding initiated under PA 233. In short, the Order is simply a rule under another name and is subject to the rulemaking process. See *id*. Additionally, before initiating rulemaking, an agency must file with the Michigan Office of Administrative Hearings and Rules ("MOAHR") a request for rulemaking in a format prescribed by MOAHR. MCL 24.239(1). The PSC did not file such a request before issuing the Order. Therefore, the PSC violated the APA by issuing a rule without abiding by the APA's process for lawful rulemaking. Appellants are likely to succeed on the merits of the Appeal regarding the APA.

**B. Appellants are likely to succeed on the merits of the appeal with regard to PA 233.**

"An agency rule is substantively invalid when the subject matter of the rule falls outside of or goes beyond the parameters of the enabling statute, when the rule does not comply with the intent of the Legislature, or when the rule is arbitrary or capricious." *Slis*, 332 Mich App at 340; see also *Ins Inst of Mich v Commr, Fin & Ins Servs, Dept of Labor & Econ Growth*, 486 Mich 370, 385; 785 NW2d 67 (2010). While an agency's construction of a statute "is entitled to respectful consideration," a "court's ultimate concern is a proper construction of the plain language of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). "[T]he agency's interpretation cannot conflict with the plain meaning of the statute." *Id*.

*1. Michigan law limits the PSC's authority.*

"The standard of review applicable to orders of the Commission is narrow and well defined." *In re Michigan Cable Telecommunications Ass'n Complaint*, 239 Mich App 686, 689; 609 NW2d 854 (2000). Under MCL 462.25, "[a]ll rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until found otherwise[.]" "[T]he burden of proof shall be upon the appellant to show by clear and satisfactory

evidence that the order of the commission complained of is unlawful or unreasonable." MCL 462.26(8).

"The PSC's determination regarding the scope of its authority is one of law," which this Court reviews de novo. See *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148, 157; 596 NW2d 126 (1999). "In construing the statutes empowering the PSC," Michigan courts do "not weigh the economic and public policy factors that underlie the action taken by the PSC." *Id*. at 156. As our Supreme Court has explained generally, "the power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Id*. at 155 (cleaned up). It "strictly construes the statutes which confer power on the PSC." *Id*. Although "respectful consideration" is given to the PSC's construction of a statute it is empowered to execute and a court must have "cogent reasons" to overturn the PSC's interpretation, appellate courts should on de novo review give no greater consideration to the PSC's judgment than it would that of a circuit court judge. *In re Complaint of Rovas*, 482 Mich at 108. "Respectful consideration is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions." *Id*. (cleaned up).[10]

PA 233 expressly grants the PSC limited authority in administering its provisions. As discussed above, "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *In re Public Service Comm'n*, 252 Mich App at 263. Under PA 233, the PSC may only do the following:

1. Prescribe the format and content of the notice required for certain public meetings. § 223(1).

[10] Our Supreme Court never adopted the now-defunct federal framework commonly known as "*Chevron* Deference." The Court explained that "the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles. . .by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government. For these reasons, we decline to import the [now defunct] federal regime into Michigan's jurisprudence." *In re Complaint of Rovas*, 482 Mich at 111.

2. Establish application filing requirements. § 224(1).

3. Reasonably require information to be contained in an application. § 225(s).

4. Conduct proceedings on applications. § 226(3).

5. Assess reasonable application fees. § 226(4).

6. Grant or deny applications and issue certificates. § 226(5).

7. Issue orders to protect the confidentiality of certain information. § 228(2).

8. Consolidate proceedings. § 230(2).

As this Court has explained,

> The language of the statute expresses the legislative intent. The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.* We may not speculate regarding the intent of the Legislature beyond the words expressed in the statute. Once the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction. Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there. The omission of a provision should be construed as intentional. It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws. [*GMAC, LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009).]

In § 230 of PA 233, the Legislature unequivocally stated that "[i]n administering this part, the commission has only those powers and duties granted to the commission under this part." Nowhere in PA 233 is the PSC authorized to expand the types of alternative energy facilities over which it has siting authority. Nor does PA 233 permit the PSC to redefine terms in PA 233 that the Legislature has already clearly defined. Yet the Order purports to do both by adding "hybrid facilities" to the explicit and limited list of solar, wind, and energy storage facilities to which PA

233 applies and by limiting and changing the definitions of "compatible renewable energy ordinance" and "affected local unit" in ways which further strip Appellants and all municipalities of their zoning and police powers.

2. *Industry comments and policy reasons cannot reshape the Legislature's intent.*

Prior to the issuance of the Order, leaders in the energy industry submitted comments to the PSC urging the PSC to limit "affected local unit" to only include units of governments that exercise zoning jurisdiction. These organizations believe that any other interpretation "would be inconsistent with the purpose of" PA 233. (Order, 7). For example, Great Lakes Renewable Energy Association encouraged the PSC to "simply defin[e] an 'ALU' as the local unit of government with zoning jurisdiction[.]" (Filing #U-21547-0070-CC, p 2; **Exhibit G**). Notably, the Michigan Conservative Energy Forum commented that limiting the definition of "affected local unit" would better reflect the legislative intent of PA 233. (Filing #U-21547-0094-CC, p 4; **Exhibit H**). The Michigan Conservative Energy Forum also commented that doing so would "best position[]" the PSC to carry out "its assigned mission[.]" *Id*. The PSC, in the Order, agreed with those comments and that "the term ALU should be restricted[.]" (**Order**, 9.) But it is not the PSC's role to determine how legislation *should* have been written; rather, the PSC must administer the law as it *is* written by the Legislature.

The pressure for the PSC to cave to the energy industry and act unlawfully is demonstrated by the public comments themselves. For example, DTE Electric argued, admitting its position was contrary to law, that the plain language of PA 233 "expressly states that the requirements of a CREO can be 'no more restrictive than the provisions included in Section 226(8)[,]' " but that the PSC should specify that "a local ordinance cannot contain *any* requirements or restrictions of those listed in Section 226(8)[.]" (Filing #U-21547-0013, p 2 (emphasis in original) (**Exhibit I**)). On this issue, the Michigan Conservative Energy Forum agrees with Appellants that:

> a local ordinance addressing energy projects comprised only of the limited specifications in PA 233, Section 226 (8) would be inadequate and irresponsible given the normal obligations local officials have under the MZEA to assure that development in their community is safe and appropriate. Verification for this assertion is found in the many other elements of energy projects that PA 233 directs the Commission to consider when an application is adjudicated (e.g. environmental impacts, ground cover, visual screening, drainage, agriculture land use, etc.). [**Exhibit H**.]

DTE Electric then turned to scare tactics by warning the PSC that if it did not limit the scope of "CREO," then "CREO-related disputes will proliferate, which will lead to permitting delays, added costs, and burdensome and avoidable litigation" for developers, affected local units, and the PSC. *Id*. But fear of delays, costs, and litigation does not give the PSC permission to ignore the plain language of PA 233 or overstep its limited authority in administering PA 233.

The PSC appears to believe that its need for clarity grants it additional powers to re-legislate PA 233: "the Commission notes that nearly all commenters that commented on [the CREO] issue agree that clarity and guidance are needed regarding the scope and definition of a CREO under Act 233." (**Order**, 17.) However, a need for clarity in legislation should and can only be addressed by the Legislature. An unelected administrative agency is not entitled to rewrite public law to make its job—and its supporters' jobs—easier. Public policy reasons for why the PSC may have seen fit to redefine key terms and create new defined terms are irrelevant to whether the PSC's action is unreasonable or unlawful. See *Consumers Power Co*, 460 Mich at 156. More importantly, the Legislature's defined terms in PA 233 are clear and unambiguous and "clarifying" (or more aptly put, redefining) already defined terms was unreasonable and unlawful.

3. *The PSC's interpretation of PA 233 is unreasonable and unlawful in light of the statutory scheme.*

The decisions contained in the Order are well outside the scope of the PSC's authority granted by the Legislature under PA 233. The PSC's interpretation of PA 233—giving it broad

rulemaking authority—is well beyond the plain language of the statute. Therefore, the subject matter of the rule "goes beyond the parameters of the enabling statute" and is substantively invalid. *Slis*, 332 Mich App at 340. Moreover, the Order is unreasonable and unlawful when the entire statutory scheme is considered. Indeed, PA 233, as PA 234 suggests, must be read in context with the MZEA.

The Legislature knows how to limit local zoning authority: the MZEA limits local control over home occupations (MCL 125.3204); oil and gas wells and the extraction of natural resources (MCL 125.3205); amateur radio service station antenna structures (MCL 125.3205(a)); commemorative signs (MCL 125.3025(d)); and state licensed residential facilities, qualified residential treatment programs, family child care home, group child care homes, adult foster care small group or large group homes and facilities offering substance use disorder services (MCL 126.3206). In particular, the MZEA states that state-licensed residential facilities and qualified residential treatment programs that provide service for 10 or fewer individuals are residential, permitted uses in all residential zoning districts and are not subject to special use or conditional use permits. MCL 125.3206(1). Yet, PA 233 does no such thing and never expressly states that qualifying energy projects are permitted in any zoning district, or even any particular type of district (like commercial, agriculture, or industrial districts). Neither does PA 234. And the Legislature did not amend the MZEA to state that. So, at a minimum, there is no "clear and unmistakable language" granting the PSC authority to impose its narrow definition of CREO on Appellants. See *Consumers Power Co*, 460 Mich at 155.

Even in PA 233 itself, the Legislature expressed its intent that providers granted a certificate by the PSC must comply with local ordinances. § 231(5). The language of the statute as a whole and of § 226(8), in particular, demonstrates the Legislature's intent that CREOs may

contain additional, but not more restrictive, regulations. Section 226(8) explicitly relies on § 226(7)(g) to explain that a "proposed energy facility does not present an unreasonable threat to public health or safety" if it complies with the enumerated requirements of Subsection (8). Put another way, Subsection (8) merely defines what does not constitute "an unreasonable risk to public health or safety" as a matter of law. Read in context, Subsection 8, and Subdivision 7(g), are only a small piece of the total information required by an application presented to the PSC. The application must also contain the information described in § 226(6) and (7), and through §223(3)(a), most of the information described in §225(1). Section §223(3)(a) also requires an ALU to "require other information necessary to determine compliance with the" CREO.

By the PSC's logic, applications submitted to the PSC and to ALUs must contain the information required by §223(3)(a), §225(1), the rest of § 226, and the PSC must consider all pertinent categories of information described in that Section, but ALUs are prohibited from considering or reviewing the various categories of information required outside of § 226(8). This simply defies simple logic, and it would render §223(3)(a), among other provisions, nugatory and without a remedy to enforce them. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) ("Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory."). When § 226(8) is viewed in this light, not only does the Order add words to the definition of "CREO" already chosen by the Legislature, but the Order's interpretation also is an unreasonable and unlawful reading of the entire context of § 226, of PA 233, and of zoning law in general.

In other words, the PSC may not redefine CREO to mean that a local ordinance may contain no other restrictions than those found in §226(8) because such an action violates basic tenets of administrative law in Michigan, including precedent directly tied to the PSC. Again, the

PSC's authority is limited and it must rely on clear and unmistakable language when executing statutes it is charged to enforce. *Consumers Power Co*, 460 Mich at 155–157. PA 233 contains no clear and unmistakable language allowing it to redefine CREO, ALU, or to create new terms like "hybrid facilities."

Indeed, other statutory schemes shed light on these concepts, and a look to preemption jurisprudence is helpful. Our Supreme Court has long held that "an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the [state] statute." *DeRuiter v Byron Twp*, 505 Mich 130, 147; 949 NW2d 91 (2020). It has explained that "[t]he mere fact that the State, in the exercise of its police power, has made certain regulations does not prohibit a municipality from exacting additional requirements." *Id*. (cleaned up). "So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand." *Id*. (cleaned up). "The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription." *Id*. (cleaned up).

In *DeRuiter*, our Supreme Court analyzed whether MCL 333.26423(d) of the Michigan Medical Marihuana Act, which states that medical marijuana must be cultivated in an "enclosed, locked facility" preempted a local ordinance that restricted *where* such a facility could be located (including through zoning). *Id*. at 143–144. The Court held that the ordinance was not preempted, and that because the statute was silent as to where "enclosed, locked facilities" had to be located, local ordinances could regulate the "where."

Here, many Appellants have exercised their authority under the MZEA to determine where qualifying energy facilities may be located by copying the provisions of §226(8) into their CREOs

while also specifying the zoning districts where such facilities may be located. Like the statute at issue in *DeRuiter*, PA 233 is silent on the issue of "where." Accordingly, the PSC's redefining of CREO and ALU and the creation of hybrid facilities would run afoul of Michigan's preemption jurisprudence.

For the reasons stated above, the Order is unlawful and unreasonably further limits the power of municipalities to reasonably regulate land uses within their borders, well beyond what the Legislature intended. Appellants are likely to succeed on the merits of this Appeal.

**II. Appellants will suffer irreparable harm without the issuance of an injunction.**

The goal of a preliminary injunction is to preserve the status quo so that, on final hearing, the rights of the parties can be determined without injury to either. See *Pharm Research & Mfr of America v Dep't of Community Health*, 254 Mich App 397, 402; 657 NW2d 162 (2002). "In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical." *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998).

On November 29, when PA 233 and the Order take effect, Appellants will be irreparably harmed by the usurpation of their rights—granted by the Legislature—to retain local control over the siting of alternative energy facilities that are otherwise protected by PA 233 and Michigan law. The impending harm is not speculative: several Appellants have been approached by developers who intend to place such facilities in Appellants' jurisdictions or are already in the process of applying for zoning approval from Appellants with the underlying threat to apply the PSC under the October 10 Order.

For example, Appellant Fremont Township's Planning Commission denied an application for a utility-scale wind energy system because the application did not comply with the noise restrictions of the Fremont Township Zoning Ordinance. (**Exhibit E**). The Township's Zoning Board of Appeals recently denied the appeal from that decision. (**Exhibit F**). The project in question meets the nameplate capacity requirements for PA 233. The Township has adopted a CREO that will take effect on November 29, but the ordinance sites facilities, like every other proposed land use, in certain zoning districts within the Township. Now, under the Order's limited definition of a "CREO," on November 29, the developer could start the PA 233 process and send the required offer to meet with the chief elected official of the ALUs and attempt to bypass altogether the regulatory framework established by the Township under PA 233.

As discussed, after PA 233 was enacted, Appellants began developing CREOs. Many have enacted CREOs. Those Appellants with CREOs—based on state law and the Legislature's express intent—were assured that, after November 29, they would maintain authority over the siting of qualifying energy projects, subject to their ordinances being "no more restrictive than the provisions included in section 226(8)." If the Order is enforced, then those municipalities with PA 233 CREOs that have ***any*** additional requirements, like appropriate zoning districts to avoid adverse impacts on other land uses, minimum acreage for solar energy facilities, or landscaping screening to shield battery storage containers, will lose all zoning authority for these projects if a developer applies to the PSC even though none of those areas are regulated by PA 233. Pursuant to PA 233, when the chief elected official of an ALU sends notice that the municipality has a CREO, then the developer must go through the municipality's application process. But if an ALU denies an application even though "[t]he application complies with the requirements of section

226(8),” or if an ALU does not grant an application within 120 days, the developer may submit its application for a certificate to the PSC.

At this point, the definition of “CREO” and what it means to be “no more restrictive” than § 226(8) becomes immediately consequential. Even according to the PSC, a developer may only apply to the PSC if certain conditions are met, one of which is that a municipality denied an application that complies with § 226(8). (**Order**, 24.) Furthermore, § 223(5) implements a “one strike” policy, stating that, unless under one narrow circumstance, once the PSC approves an applicant for a certificate, the relevant municipality is considered to no longer have a CREO for the purposes of any future application “unless the commission finds that the local unit of government’s denial of the application was reasonably related to the applicant’s failure to provide information required by subsection (3)(a).” So, under the Order, the PSC has given itself authority to receive and approve an application and forever bar an Appellant from being deemed to have a CREO, based solely on the PSC’s unlawfully narrow definition of a CREO.

Moreover, the PSC has unilaterally determined that Appellants can be negatively impacted by other local units that do not follow the PSC’s definition of a CREO. In the Order, the PSC found “that when a project is located in multiple ALUs and one or more ALUs have CREOs, and one or more ALUs do not have CREOs, or after attempts to site the project in an ALU have failed, the Commission will review the entire proposed project, including the portions of the project that are located in an ALU that has a CREO.” (**Order**, 31.) The PSC found it “reasonable and appropriate for the Commission to review an entire project when the proposed energy facility spans multiple ALUs with zoning jurisdiction.” (**Order**, 30.) Based on these findings, all affected local units, Appellants and others, are subject to losing local siting authority if any other affected jurisdiction in a project does not immediately comply with the PSC’s rewriting of PA 233 (or is

unzoned). As discussed, amending a zoning ordinance is often a months-long process because of the requirements and procedures of the MZEA. But the PA 233 process can begin on November 29, less than two months after the PSC released its Order. Appellants do not have sufficient time to amend their ordinances to comply with the PSC's Order, even if the Order were lawful.[11]

Moreover, once the PSC approves a project that, under the plain language of PA 233, should have gone through Appellants for approval, a future invalidation of the Order through this Appeal or otherwise would be too late. With a certificate in hand, a developer could begin substantial construction and vest their interest in the land use, potentially making an Appellant liable for a Takings claim if proceedings ultimately invalidate the certificate and a special use permit is denied. See, e.g., *Dorman v Clinton Twp*, 269 Mich App 638, 649; 714 NW2d 350 (2006).

These scenarios are far from speculative. On November 29, developers will be able to start the process to obtain a PSC certificate, and Appellants, who followed the plain language of PA 233, will have the authority granted to them by the Legislature effectively stripped away by the PSC. Appellants have no adequate remedy at law if a development is approved by the PSC under the unlawful Order. The genie, as they say, cannot be put back in the bottle. Accordingly, Appellants will suffer irreparable harm if the Order takes effect while this Appeal is pending.

### III. The harm to Appellants absent an injunction outweighs the harm an injunction would cause to the PSC, which is none.

The PSC will not be harmed by the issuance of an injunction. A preliminary injunction would in no way undercut the PSC's authority to approve energy facilities that wish to be located in municipalities that do not have a CREO—as defined by PA 233. But without an injunction,

[11] Further, this was during a general election for all members of township boards and county commissioners and in some instances, a majority of the township board or county commission are new members with limited experience.

Appellants will be irreparably harmed by the loss of local zoning control and the inability to exercise the zoning authority given to them under Michigan law. The PSC itself acknowledges that PA 233 has a "one strike" policy by which an Appellant can claim to have a CREO only until it denies or fails to timely make a decision on an application that is subsequently granted by the PSC. (**Order**, 24). At that point, the relevant Appellant would no longer be able to claim it has a CREO. If the Order stands while this Appeal is under consideration, then Appellants will be harmed by a premature and unlawful determination that their CREOs are not actually compatible. Moving forward, energy providers would no longer be subject to Appellants' processes or lawful zoning regulations. In contrast, the PSC's primary interest is the enforcement of political renewable energy goals that can still be pursued even if an injunction is issued. Because the PSC will suffer no harm by an injunction while Appellants will lose their statutory right to regulate certain land uses, the harm to Appellants outweighs any perceived harm to the PSC.

**IV. The public interest will be served by a preliminary injunction.**

The public interest lies in maintaining the status quo under PA 233 while this Appeal is pending. More broadly, holding administrative agencies to the limited authority they are granted by statute is in the public's interest. By preventing the enforcement of the Order until and unless this Court deems such Order authorized by law, a preliminary injunction will ensure that the executive branch does not unlawfully legislate. See *In re Complaint of Rovas*, 482 Mich at 111.

Additionally, the public interest will be served by a preliminary injunction because local governments will retain the control granted to them by the Legislature over the siting of alternative energy facilities. This includes local governments who comply with PA 233, either on their own terms or based on the Order, and yet would lose control over siting decisions because another municipality affected by a project does not have a CREO as defined by the Order.

Lastly, an injunction will not harm the public's interest in clean, renewable energy sources. Utility-scale renewable energy facilities may still proceed either through municipalities with CREOs or those without—just as PA 233 and the Legislature intended.

## Conclusion

For the foregoing reasons, Appellants respectfully request that the Court issue an order preliminarily enjoining the enforcement of the PSC's October 10, 2024 Order while this Appeal remains pending.

Respectfully submitted,

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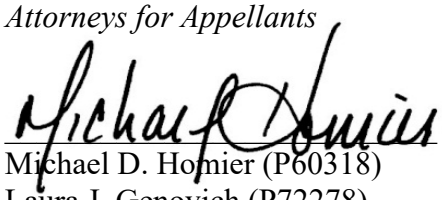
*Attorneys for Appellants*

Dated: November 22, 2024

By: 

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## WORD COUNT CERTIFICATION

This brief contains 9,435 words, in compliance with MCR 7.212(B).

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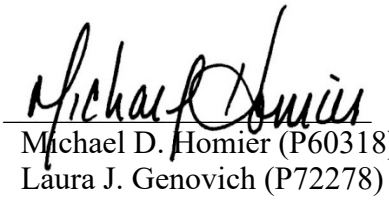
By: 

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