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. Appellants, v MICHIGAN PUBLIC SERVICE COMMISSION, Appellee and, MICHIGAN ENERGY INNOVATION BUSINESS COUNCIL, INSTITUTE FOR ENERGY INNOVATION, CLEAN GRID ALLIANCE, and ADVANCED ENERGY UNITED, Proposed Intervening Appellees.	Court of Appeals No. 373259 *The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.*

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INTERVENING APPELLEES'
ANSWER TO MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

In bringing this appeal, Appellants collectively seek from this Court what they failed to obtain from the Legislature and at the ballot box: discretion to continue to obstruct the rights of individual landowners and energy project developers to cooperate freely and responsibly to construct and commercially operate new renewable energy and energy storage facilities. These facilities are indisputably needed to ensure that the State's retail electric providers, including its regulated utilities, are able to comply with the increased renewable energy portfolio and clean energy standards adopted by the Legislature in Public Act 235 of 2023 ("Act 235"). Appellants now seek to double down on their obstructionism, seeking to enjoin the October 10, 2024 Order of the Michigan Public Service Commission ("MPSC" or the "Commission") in Case No. U-21547 (the "October 10 Order"), which set out the application instructions and procedures for developers to apply for a certificate from the MPSC under Public Act 233 of 2023 ("Act 233"), a companion bill to Act 235.[1]

Appellants' Motion, like their underlying Appeal, must fail. Injunctive relief is an extraordinary remedy. While Appellants failed to provide even a single case in which injunctive relief was granted by this Court under any circumstances (as opposed to merely affirmed under an abuse of discretion standard), the requirements for obtaining an injunction are clear. Appellants must show (1) that they will suffer imminent irreparable harm absent injunctive relief; (2) that they are likely to succeed on the merits of their appeal; (3) that the balance of harms favors Appellants;

[1] The Legislature adopted Act 233 and Public Act 234 of 2023 ("Act 234") alongside Act 235. Act 233, the statute pursuant to which the Michigan Public Service Commission issued its October 10 Order, created a new Part 8 within Public Act 295 of 2008, MCL 460.1001, *et seq.* ("Act 295"), the "Clean and Renewable Energy and Energy Waste Reduction Act," whose purpose is "to promote the *development* and *use* of clean and renewable energy resources." MCL 460.1001(2). (Emphasis added). Act 234, in turn, amended the Michigan Zoning Enabling Act, Public Act 110 of 2006, MCL 460.3101 et seq. (the "MZEA") to make that act expressly subject to Part 8 of Act 295. See MCL 125.3205(1)(d).

and (4) that the public interest weighs in favor of granting the injunction. As outlined in greater detail below, Appellants motion fails under each factor.

While preliminary injunctions are generally entered after an evidentiary hearing at which a court can evaluate live testimony, Appellants do not even bother to attach an affidavit or other verified pleading evidencing that they will suffer any harm, much less imminent, irreparable harm. The good news for Appellants is that they will suffer no harm at all if their motion is denied, as it should be. At best, Appellants' motion is approximately one year and four months premature, which is the minimum time it will take for a decision to be rendered that will even potentially affect the rights and interests they claim are harmed by the October 10 Order. Unless and until that occurs, Appellants will suffer no harm that could possibly justify the extraordinary relief of a preliminary injunction on appeal.

Moreover, Appellants cannot show that they are likely to succeed on the merits of their claims. The MPSC is given express authority to administer Act 233 in order to implement its purpose. See MCL 460.1230(1). The October 10 Order does no more than reasonably exercise the MPSC's authority to do so under firmly established Michigan law. Appellants fail to establish that the MPSC acted unlawfully, unreasonably, or in violation of the public interest, and Appellants' appeal is therefore meritless.

Appellants fair no better on the final two factors. With regard to the balance of the harms, Appellants have not established that they will suffer any immediate, much less irreparable, harm from the October 10 Order itself. By contrast, renewable energy and energy storage developers, like those represented by Intervenor-Appellees, are at risk of losing otherwise viable projects simply because timelines for generator interconnection, permitting and financing do not line up. Likewise, the MPSC will likely face challenges to generation resource adequacy in the State if the

Act 233 process is preliminarily enjoined here. The MPSC is tasked with ensuring that renewable resource deployment keeps pace with the requirements of Act 235 and does not lag behind the major utilities' retirement of legacy coal generating capacity in keeping with their approved integrated resource plans.

Finally, with respect to the public interest factor, the Legislature has already determined by enacting Act 233, particularly in inserting it as a new part of 2008 Act 295, that local zoning preemption for renewable energy and energy storage projects is in the public interest and serves the Legislature's overall purpose "to promote the development and use of clean and renewable energy resources." MCL 460.1001(2).

Accordingly, for the reasons outlined herein, Intervening Appellees respectfully request that Appellants' motion be denied.

II. STATEMENT OF FACTS

A. ACT 233 WAS ENACTED TO ENSURE THAT LOCAL OPPOSITION TO DEVELOPMENT WOULD NOT PREVENT MICHIGAN FROM ACHIEVING ITS RENEWABLE ENERGY STANDARDS.

Act 233, Michigan's state siting law for renewable energy and energy storage projects, was included in a package of renewable and clean energy bills that the State of Michigan passed in November 2023. This legislative portfolio included new renewable energy standards for the State. Act 235 requires electric providers in Michigan to achieve a clean energy portfolio standard of 80% by 2035 and 100% by 2040, using renewable energy (wind, solar, and carbon-free sources). Act 233 is properly viewed as a necessary tool to assist the State in achieving those renewable energy standards. The Legislature was particularly troubled by the obstacles that utility-scale renewable energy projects faced when trying to obtain permitting though local government. This context, coupled with the State's ambitious renewable energy goals, is critical to understanding the legislative intent behind Act 233.

Act 233 was introduced in the House of Representatives as House Bill 5120 of 2023 ("HB 5120"). From its inception, HB 5120 was built around a key concern: if local governments were left to create their own subjective (and often exclusionary) standards for utility-scale renewable energy projects, Michigan would never meet its renewable energy goals. Prior to Act 233, developers in Michigan were left to endure the many tactics employed by municipalities that either opposed any development based on residents' "not in my backyard" opposition or, more fundamentally, political opposition to the very concept of clean energy. Examples abound of local governments enacting lengthy or repeated zoning moratoria, exclusionary zoning ordinances, or simply refusing to follow their existing ordinances to allow lawful developments to move forward. This phenomenon is not unique to Michigan. Several other states, including Ohio, Kentucky, Massachusetts, and Washington, have enacted laws that place renewable energy siting with a state body, recognizing that renewable energy development will simply not occur if it is subject to local control and approval. Michigan followed this trend, and Act 233 authorizes the Michigan Public Service Commission ("MPSC") to approve large-scale renewable energy projects where a local process does not exist or where a local ordinance would otherwise represent an unlawful or unreasonable obstruction.

The legislative history and analysis behind Act 233 makes clear that the act was passed out of a concern that the State would never meet its required renewable energy standards if large-scale renewable energy development remained subject to local approval:

> If enacted, the bill would *necessitate the buildout of more utility-scale renewable energy resources like solar, wind, and storage in the State*; however, according to testimony, *the current process for siting and permitting renewable energy resources in local governmental units has proven complex and has delayed the buildout of these resources.* Accordingly, it has been suggested that the siting and permitting of renewable energy resources be regulated by the MPSC unless local governmental units demonstrated that they had requirements for the buildout of these resources that were compatible with those proposed by Part 8.

Senate Fiscal Agency Bill Analysis, HB 5120 & 5121 (November 8, 2023), p 2 (emphasis added).

To address those concerns, the Legislature acted to preempt local zoning where development and land use standards exceeded the statutory requirements:

> House Bill 5120 would amend the Clean and Renewable Energy and Energy Waste Reduction Act to create a certification process, through the Michigan Public Service Commission (MPSC), of wind or solar energy facilities and energy storage facilities with a capacity of 100 megawatts or more. *The process would preempt local zoning or regulation of such facilities*.

House Legislative Analysis, HB 5120 & 5121 (October 17, 2023), p 2 (emphasis added); *see also* House Legislative Analysis, HB 5120 & 5121 (February 5, 2024), p 1 ("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") (emphasis added). In cases where local governments refused to follow the State's standards, the Legislature looked to the MPSC to control the permitting of utility-scale renewable energy projects. *See* 2023 Senate Journal 2454 (No. 99, November 8, 2023) ("It is important to understand that the Michigan Public Service Commission already has siting authority over critical infrastructure—that's gas and oil pipelines, oil and gas wells, the electrical transmission and distribution networks, as well as utility generation facilities. This legislation brings utility-scale renewable generation under the same existing siting authority.").

Thus, the legislative history makes clear that the Legislature wanted to ensure that local ordinances would not create additional barriers to projects that otherwise complied with the standards set forth in Act 233. For instance, HB 5120 "would require a provider or IPP to file for approval of a facility with an affected local government unit, instead of the MPSC, if that unit had

a renewable energy ordinance *compatible with the bill's requirements.*" Senate Legislative Analysis, HB 5120 & 5121 (November 7, 2023), p 1 (emphasis added).

The Legislature also considered whether utility-scale renewable energy projects should be restricted to certain zones within a municipality (presumably to allow local governments to control where projects would be located) and ultimately decided that *no such locational restrictions should exist*. For instance, in the House of Representatives Committee on Energy, Communications, and Technology, Representative David Prestin sought to amend HB 5120 to require that a developer applying to the MPSC must enter an agreement with the MPSC and each affected local unit "on the size and location of the energy project within that affected local unit." *See* October 18, 2023 Committee Meeting Minutes at Intv App 001. This proposed amendment was rejected. *Id*.

Similarly, Senator Ed McBroom attempted to amend HB 5120 to restrict the location of projects to areas with industrial zoning. 2023 Senate Journal 2447 (No. 99, November 8, 2023). As Senator McBroom explained: "my amendment seeks to correctly identify land that is taken and used for siting of solar projects as being the industrial operations that they are. It is wrong to pretend that these things are anything less than an industrial operation and they should be taxed thusly, they should be zoned thusly, and that should be a great benefit to the entirety of the state and our local communities to see that designation reflect that proper tax base that they would then be, and make sure these huge corporations that are seeking to build these places are paying their fair share." *Id*. at 2453. This amendment was likewise voted down. *Id*. at 2447. As a result, *Act 233 was intentionally enacted without any sort of restriction on the location of utility-scale projects, including that such projects should only be located in certain zoning districts.*

Thus, as this legislative history makes clear, the Legislature was concerned about local zoning of utility-scale renewable energy projects, including the issues and delays in permitting

projects that had taken place prior to Act 233. With that concern in mind, the Legislature enacted Act 233 to create a mechanism for utility-scale projects to be approved under uniform standards, either by the local government or the State of Michigan. And, in cases where local governments refused to fairly enforce such standards (or adopted standards that exceeded Act 233's requirements), the Legislature created a path for developers to obtain permitting from the MPSC.

B. ORDINANCES WITH OVERLY-RESTRICTIVE "OVERLAY DISTRICTS" ARE TARGETED AS PREVENTING UTILITY-SCALE PROJECTS FROM PROCEEDING AND ILLUSTRATE THE NECESSITY OF ACT 233.

As outlined above, in enacting Act 233, the Legislature intended to put a stop to certain municipalities' practices of preventing utility-scale renewable energy projects from being constructed "in their backyard" via exclusionary zoning, moratoria, and extensive delay tactics. After a failed attempt to gather signatures sufficient to place Act 233 on the ballot in the November 2024 election, municipalities,[2] including Appellants, turned to a new tactic in their fight to prevent renewable energy development: the creation of "renewable energy overlay districts" so restrictive that they make it impossible for any utility-scale renewable project to proceed. The history of the two particular Appellants highlighted in Appellants' brief underscores this effort.

First, the case of Appellant Fremont Township ("Fremont"), highlighted in Appellant's brief to support Appellants' claim of purported "irreparable harm," (see Motion at 31), is illustrative of the lengths to which municipalities will go to prevent the development of renewable energy. After receiving an application for a utility-scale wind project in September 2022, Fremont refused to even hold the required public hearing on the permit application until the developer instituted a lawsuit and the parties entered into a consent judgment. See *Algonquin Power, (MI*

[2] See Michigan League of Conservation Voters, "Press Release: Anti-Renewables Energy Ballot Initiative Fails to Qualify for 2024 Ballot" (May 29, 2024*), available at https://www.michiganlcv.org/anti-renewable-energy-ballot-initiative-fails-to-qualify-for-2024-ballot/*.

Energy Developments) LLC, d/b/a Liberty Power v Fremont Township, Circuit Court for Sanilac County Case No 23-40158-CH. After being forced to hold the public hearing, Fremont then sought to prevent the developer from appealing the Planning Commission's denial of the permit to the Zoning Board of Appeals ("ZBA") by enacting an illegal moratorium[3] pursuant to the Township's police power, resulting in two further lawsuits to force the ZBA to hear the developer's appeal. See *Algonquin Power, (MI Energy Developments) LLC, d/b/a Liberty Power v Fremont Township, Circuit Court for Sanilac County Case No 24-40544-CH*; *Algonquin Power, (MI Energy Developments) LLC, d/b/a Liberty Power v Fremont Township, Circuit Court for Sanilac County Case No 24-40545-AA.*

While these various lawsuits were pending and the November 29, 2024 effective date of Act 233 approached, Fremont took a different tack and enacted a new renewable energy ordinance that was ostensibly labeled a compatible renewable energy ordinance ("CREO") but restricted renewable energy development to a portion of a single section within the Township. The Overlay District created by Fremont restricts development to a limited area of 520 acres in a single area of the township (representing 2.25% of the land area within the township), eliminating 90% of the compliant wind turbine locations within the township and making it effectively impossible for a developer to construct a utility-scale renewable energy project in that jurisdiction.

Appellant White River Township ("White River") has gone even further to limit the development of renewable energy within its borders. While Appellants' Appendix includes the purported CREO enacted by White River, it *fails to include* the separately-enacted Ordinance that

[3] An identical moratorium enacted by Appellant Speaker Township was held to be unlawful by the Sanilac County Circuit Court. See *Algonquin Power, (MI Energy Developments) LLC, d/b/a Liberty Power v Speaker Township, Circuit Court for Sanilac County Case No 23-40257-CH*. That order is currently on appeal before this Court. See MI COA Case No 371424.

limits the Renewable Energy Overlay District *to a single 600-acre contaminated brownfield parcel*.[4] See White River Township Ordinance 60-2024, at Intv App 013. This means that the ability to develop any utility-scale renewable energy facility in White River is entirely dependent on (1) the decision of a single landowner to allow renewable energy development on its property; and (2) the ability to then obtain other regulatory approvals necessary for the development of the brownfield property that is still the subject of ongoing environmental remediation efforts and then safely construct such a development on a highly-contaminated parcel. If Appellants are successful, then White River Township will have effectively foreclosed the development of any renewable energy projects within its borders while at the same time proclaiming that is has complied with Act 233 by adopting its purported CREO.

Even a cursory review of these purported CREOs demonstrates that they do not conform to the purpose of Act 233: to streamline the permitting of renewable energy development to allow the state to comply with its renewable energy standards and to prevent municipalities from delaying and blocking such developments. As outlined in greater detail below, Appellants ask this Court to ignore the purpose and the plain language of Act 233 and to read into the statute loopholes that will allow municipalities to effectively render the statute a nullity via restrictive zoning

[4] The designated parcel is the contaminated site of a former Dupont plant where the company manufactured freon, acetylene, and neoprene, and includes a lime pit containing 580,000 cubic yards of hazardous lime waste. See *Corrective Action Consent Order Quarterly Projects Report for The Chemours Company FC, LLC Montague MI Facility*, available at https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/MMD/Hazardous-Waste/Corrective-Action/Chemours/2024-10-15-Progress-Report.pdf?rev=7c47d709baee4c6b822115f074322ab8&hash=A59510A4D7A94857DC19D26412823F22 (last visited December 1, 2024); Garrett Ellison, "White Lake Group wants Chemours site cleaned up," MLive, available at https://www.mlive.com/galleries/FJ3HQOWZKBH5HDC763QG2AZZCU/ (last visited December 1, 2024).

requirements. This approach directly contradicts the plain language and purpose of Act 233, and Appellants' motion must therefore be denied.

C. THE MPSC'S OCTOBER 10, 2024 ORDER AND APPLICATION FILING INSTRUCTIONS AND PROCEDURES.

Following the signing into law of Act 233 in November 2023, the MPSC issued an order on February 8, 2024 opening the docket U-21547 and directing the Commission Staff to file recommendations on application filing instructions, guidance relating to CREOs, and any other issues involving Act 233 by June 21, 2024. ("February 8 Order"). February 8 Order in Case U-21547 at Intv App 016. The U-21547 proceeding was opened "on the Commission's own motion" and was not opened as a contested case proceeding. Rather, the February 8 Order sought engagement with experts, local units of government, project developers, and other interested persons "in transparent open meetings to consider issues relating to application filing instructions or guidelines, the potential use of consultants and assessment of application fees, whether and how pre-application consultations with the Staff would be helpful to potential applicants, guidance for use in the development of compatible renewable energy ordinances, as well as any additional issues that may arise during the engagement process from potential applicants and local units of government." *Id.* at Intv App 018. The Commission also directed Staff to hold public meetings starting in March 2024 and to file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in the docket by June 21, 2024. *Id.* The Commission noted that it would accept comments on the Staff's recommendations until 5:00 p.m. on July 17, 2024, and reply comments until 5:00 p.m. on August 9, 2024. *Id.*

The MPSC also established a website where information on Act 233 and the Commission's actions could be found: https://www.michigan.gov/mpsc/commission/workgroups/2023-energy-legislation/renewable-energy-and-energy-storage-facility-siting. This website also hosted

documents from the MPSC Staff meetings such as presentations and agendas, comments requested and received, recordings of the meetings, and other resources such as frequently asked questions, in addition to an opportunity to sign up to be on the mailing list for all activities of this MPSC Staff effort. The MPSC Staff held meetings on the following dates in 2024: March 7, March 19, April 5, April 26, May 15, May 28, July 10, and September 4. Staff circulated various draft straw proposals for comment at the meetings on April 5, May 15, and May 28. MPSC Staff filed their Application Instructions and Procedures, Staff Draft, final straw proposal for comment in the docket on June 21 ("Straw Proposal"). Meetings continued into July and September to discuss concerns with and support for various parts of the Straw Proposal, and to bring attention to additional issues not addressed in the Straw Proposal. As ordered by the Commission, filed comments were received on the straw proposal until July 17 and reply comments until August 9.

On October 10, 2024, the Commission issued an Order in this docket, adopting final Application Filing Instructions and Procedures to be used by electric providers and independent power producers seeking to obtain a certificate from the Commission for authority to site an energy facility pursuant to Act 233 of 2023. The Commission's 77-page Order discussed the Straw Proposal and the comments received on the many issues addressed in the months of meetings, and it appended a much reworked version of the Application Filing Instructions and Procedures from the Staff's Straw Proposal. On October 21, 2024, the Commission issued an Errata in this docket approving corrected Application Filing Instructions and Procedures.

III. STANDARD OF REVIEW

"An injunction represents an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *UAW v City of Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996). The Michigan Supreme Court summarized the principles the Michigan courts must consider in their evaluation of a motion for a preliminary

injunction in *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1; 753 NW2d 595 (2008). According to the Court, "Injunctive relief is an *extraordinary* remedy that issues only when justice requires, there is *no adequate remedy at law*, and there exists a *real* and *imminent* danger of *irreparable* injury." *Id.* at 8 (emphasis added). Under MCR 3.310(4), "[T]he party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued." More particularly, in reviewing a motion for a preliminary injunction, the

> court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued.

Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit, 482 Mich 18, 34; 753 NW2d 579 (2008)). The party seeking injunctive relief must satisfy all four of these elements. See, e.g., *id.* If the moving party failes to establish even a single element, the court must deny the request for injunctive relief. See *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 452; 528 NW2d 778 (1995) (concluding that trial court properly denied motion for injunctive relief where plaintiff failed to establish a likelihood of success on the merits).

Specifically with respect to the first factor, the Court in *Pontiac* recognized "the longstanding principle that 'a *particularized* showing of irreparable harm is an *indispensable* requirement to obtain a preliminary injunction.'" *Pontiac*, 482 Mich at 9 (quoting *Michigan Coal of State Employee Unions v Michigan Civil Serv Comm'n*, 465 Mich 212, 225–226; 634 NW2d 692 (2001)) (emphasis added). While Appellants rely on this Court's decision in *Johnson v Mich Minority Purchasing Council* to claim that the "the four factors governing consideration of injunctive relief are meant to simply guide the discretion of the court [and] are not meant to be rigid and unbending requirements," the Court's ruling in that case nevertheless recognized *Pontiac's* requirement that "'a particularized showing of irreparable harm is an indispensable

requirement to obtain a preliminary injunction.'" 341 Mich App 1, 21, 25; 988 NW2d 800 (2022) (quoting *Pontiac,* 482 Mich at 9). Thus, *Johnson* cannot be read to support a conclusion that a preliminary injunction may still issue absent a "particularized showing of irreparable harm." See also *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148–49; 809 NW2d 444 (2011) (citing *Pontiac*, 482 Mich at 13 n 21) ("We note that our Supreme Court has declined to consider a party's likelihood of success on the merits when the irreparable-harm factor was not established."). In addition, "The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Id.*

IV. ARGUMENT

A. APPELLANTS FAIL TO SHOW THAT THEY WILL SUFFER PARTICULARIZED IRREPARABLE HARM ABSENT THE ISSUANCE OF A PRELIMINARY INJUNCTION.

To establish irreparable injury, "[t]he 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). Injury must also be real and imminent. *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). *See also UAW*, 218 Mich App at 270 (denying preliminary injunction preventing vote on new city charter because "the harm, if any, to plaintiffs is at least two removes from actuality.") Furthermore, Michigan law is abundantly clear that "an injunction [cannot] lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Michigan AFSCME Council 25*, 293 Mich App at 149. Moreover, irreparable harm must be shown by "specific facts shown by affidavit or by a verified complaint, or following an evidentiary hearing." MCR 3.310.

Appellants have failed to make a particularized showing that they will suffer irreparable harm absent the issuance of a preliminary injunction against the October 10 Order. Their

arguments are either complaints against the consequences of Act 233 itself or are premature, because the October 10 Order itself would not be the cause of the harm alleged.

1. The First Injury Alleged by Appellants is a Feature of Act 233 Itself Rather Than of the October 10 Order.

Appellants first allege that they will suffer "the usurpation of their rights . . . to retain local control over the siting of alternative energy facilities that are otherwise protected by Act 233 and Michigan law." Motion at 30. This usurpation, they argue, results from the fact that, 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." *Id.* at 31.

The problem with Appellants' argument is that this purported harm may take place whether or not the October 10 Order is in place and regardless of whether Fremont (or any other) Township truly does have a CREO in place. In other words, this alleged "harm" is a feature of Act 233 rather than the October 10 Order. A developer could "start the PA 233 process" on November 29, including by sending "the required offer to meet with the chief elected official," without relying on the Commission's Order.

Section 223 lays out the pre-application steps required of a developer "that, at its option . . . proposes to obtain a certificate for and construct an energy facility." MCL 460.1223(1). Among these steps is a requirement to "offer in writing to meet with the chief elected official of each affected local unit." MCL 460.1223(2). Nothing in the October 10 Order shortcuts the process laid out in Act 233 or otherwise expedites any injury to Appellants. Regardless of the definition of CREO in the October 10 Order, the chief elected official retains the right under Section 223(3) to "notif[y] the [developer] . . . that the affected local unit has a compatible renewable energy ordinance," MCL 460.1223(3). And as the October 10 Order made clear, Act

233 requires a developer to go through the local process if this notice is given, whether or not the developer agrees with the local official as to the compliance of the CREO with Act 233's requirements. October 10 Order at 25; see also MCL 460.1223(3) ("If . . . the chief elected official of each affected local unit notifies the [developer] . . . that the affected local unit has a [CREO], then the [developer] *shall file for approval with each affected local unit*" (emphasis added).) In fact, the Commission expressly *disclaims authority* to intervene in or act as an appellate body reviewing an affected local unit's ("ALU") CREO claim:

> The Commission serves not as an appellate court reviewing the decisions of ALUs, but rather considers applications filed by electric providers or IPPs that meet these minimum statutory size requirements and which are filed with the Commission consistent with these statutory pathways.
>
> [. . .]
>
> Accordingly, the Commission disagrees with commenters and finds that the plain language of Act 233 does not support creation of a CREO dispute resolution process *that would enable electric providers or IPPs to forego filing for approval for an energy facility through the local siting process if the [chief elected official] in each ALU determines that the ALU has a CREO*. Additionally, due to the Commission's limited jurisdiction over the siting of energy facilities, the Commission agrees with the Staff Draft and strongly discourages electric providers and IPPs from filing an application with the Commission while engaged in the local siting process required by and under the timelines stipulated by Section 223(3) of Act 233. The Commission further finds that *resolving disputes between applicants and ALUs regarding CREOs is not within the Commission's jurisdiction.*

October 10 Order at 24–25 (emphasis added).

It is therefore incorrect to argue that the October 10 Order, rather than Act 233 itself, allows the "developer [on November 29 to] start the PA 233 process and send the required offer to meet with the chief elected official of the ALUs." Motion at 31. Furthermore, a developer's "attempt to bypass the regulatory framework established by [a] Township" is by no means nefarious nor dependent on the Commission's Order; it is the entire purpose of Act 233. See Sec. II.A, supra.

Appellants similarly allege that those ALUs with ordinances that exceed the Order's CREO requirements will "lose all zoning authority for these projects if a developer *applies* to the PSC." Motion at 31 (emphasis added). However, an ALU would lose its zoning authority only if the Commission approves the filed application and if it makes a finding that the ALU's denial was not reasonably related to the applicant's failure to provide information required by subsection (3)(a) of Section 223 of Act 233. MCL 460.223(5). Appellants cannot assume that the Commission must or will invariably grant applications and refuse to find that the ALU's denial of an application was reasonably related to the applicant's failure to provide required information under the Act. Rather, the Commission retains authority to deny an application under the standards set in Section 226 and to find that the application does not in fact "compl[y] with the requirements of section 226(8)" and, as such, was improperly filed. This alleged harm is therefore speculative and would occur only on a case-by-case basis depending on the outcomes of proceedings that have yet to happen and on Commission determinations that have yet to be made. Such proceedings may result in the Commission's *denial* of a developer's application, and Appellant's claim of irreparable harm would evaporate. See MCL 46.1231(4).

Thus, the alleged harms claimed by Appellants do not arise from the October 10 Order but are simply a function of Act 233 itself, which has not been challenged here. Further, even if these alleged harms stemmed from the October 10 Order (they do not), they would nevertheless be speculative and not ripe for review because they are dependent upon future Commission proceedings and determinations. Granting Appellant's request for a preliminary injunction would at best be premature and at worst would fail to address the harm alleged.

2. The Second, Third and Fourth Injuries Alleged by Appellants are Neither Imminent nor Irreparable Absent a Preliminary Injunction Against the October 10 Order.

Appellants' other claims of irreparable harm also fail. The second harm Appellants allege results from the October 10 Order is the specter that they will be "forever bar[red] . . . from being deemed to have a CREO, based solely on the PSC's unlawfully narrow definition of a CREO." Motion at 32. The third harm alleged is that the Commission's decision that Act 233 requires them to review an entire project, including "the portions that are located in an ALU that has a CREO," (Order at 31), will mean that "Appellants can be negatively impacted by other local units that do not follow the PSC's definition of a CREO," Motion at 32. The fourth harm alleged is that absent a preliminary injunction, a developer could, "certificate in hand," "begin substantial construction and vest their interest in the land use." Motion at 33. Such *potential* consequences would not result directly from the October 10 Order, but rather require a number of intervening circumstances and, significantly, *at least a year* of intervening time from November 29, 2024 to occur.

At the outset, it must be kept in mind that the first consequence—a once-for-all loss of the ability to claim to have a CREO—is based on but one interpretation of language in Section 223(5) of Act 233 that the October 10 Order nowhere explicitly endorses. Contrary to Appellant's arguments, the Commission's October 10 Order did not definitively resolve the question of whether Section 223(5) forever bars an ALU from claiming to have a CREO if the ALU makes that claim with respect to one particular ordinance prior to the granting of a Commission certificate. Appellants point to the Commission's comments to the effect that Section 223(5) "essentially establishes a 'one-strike' policy by which an ALU can claim to have a CREO only up to the point where it denies or fails to timely approve or deny an application . . . at which point the ALU would be considered to no longer have a CREO," claiming that they imply that an ALU may *never* make another attempt at adopting a CREO by amending its zoning ordinance. (See Motion at 32.) But

the October 10 Order does not expressly preclude an ALU from later amending its ordinance to attempt to bring it into compliance with Act 233. The Commission could certainly resolve this question later, as part of a final order in a proceeding for a certificate under Act 233 or otherwise, but it has not yet done so. It is therefore by no means clear at this juncture that this alleged harm would be irreparable rather than curable simply by adopting an amended, compatible ordinance. This issue too, then, is not ripe for review nor is any such action by the Commission imminent such that a preliminary injunction is required to address it.

Even if Appellants were interpreting the October 10 Order correctly (they are not), the consequence Appellants fear would still occur *only if* "the commission approves an applicant for a certificate submitted under subsection (3)(c) [MCL 460.1223(3)(c)]" and affirms that the ALU may not cure its ordinance in order to attain CREO status. MCL 460.1223(5). Appellants themselves appear to acknowledge at least part of this, stating that "*once the PSC approved an applicant for a certificate*, the relevant municipality is considered to no longer have a CREO." Motion at 32 (emphasis added). It is thus not true, as Appellants suggest elsewhere, that they "will lose all zoning authority for these projects *if a developer applies to the PSC*." Motion at 31 (emphasis added). Such loss of authority requires both intervening circumstances and intervening time. The same is true in the case of the harm allegedly stemming from the Commission's treatment of projects spanning multiple jurisdictions and in the case of the specter of a project's achieving "substantial construction" and vesting land use rights under a certificate. None of this can happen without additional Commission process and an additional order, which may itself be subject to appeal and possible injunction.

With respect to intervening circumstances, the October 10 Order itself in no way triggers the potential harms Appellants allege here. Nothing in the October 10 Order guarantees the

granting of a certificate to any particular project, including the project proposed for Fremont Township, the sole example Appellants present. Furthermore, Act 233 expressly grants Appellants the right to appeal any Commission order granting a certificate (and, by implication, to seek a preliminary injunction in this Court against such an order). See MCL 460.1229. To the extent that the issues raised by this appeal, including Appellants' claims regarding the definition and scope of a CREO and the appropriate treatment of multi-jurisdiction projects, have not been resolved by such time a certificate is granted, therefore, Appellants may seek to enjoin the issuance of the *certificate* pending the outcome of this appeal. This would freeze any legal consequences of the issuance of the certificate—including the fate of future CREO claims, the fate of CREO-claiming jurisdictions brought before the Commission on account of their neighbors' failure to adopt a CREO, and any possibility of substantial construction or vested land use rights—until their claims are fully adjudicated.

With respect to intervening time, a significant period—in excess of one full year—is required as both a legal and a practical matter for a certificate to issue. Under the express terms of Act 233, subsection 3(c) is triggered only when an ALU claims to have a CREO, which in turn triggers a local approval process that an ALU may require to last up to four months (120 days).[5] Furthermore, even if a developer were to file an application with the Commission on the day it either receives a denial from the ALU or on the 120th or 121st day following the filing of its application with the ALU, the Commission has a year under Section 226(5) to grant or deny the application (provided the initially filed application was determined to be complete. See MCL 460.1225(2)). And given the requirement that the certification proceeding be conducted as a

[5] This does not include the time required for an applicant to fulfill the prerequisites in subsections (1) and (2) of Section 223), which would potentially add several additional months.

contested case, MCL 460.1226(3), the Commission cannot realistically grant a certificate much earlier than one year from the filing of an application in any case. At a minimum, therefore, it is likely to be *at least* a year and four months before a certificate might issue from the Commission approving an application submitted under subsection 3(c) of Section 223.

Because the October 10 Order takes no firm stance on the legal consequences of Section 223(5), because the October 10 Order itself would by no means directly cause any of the three consequences Appellants allege on pages 31–33 of their Motion to occur but instead would require additional Commission action and orders, and because the time required for the actual potential cause of such consequences, the issuance of a certificate, to occur is in excess of sixteen months, Appellants' claim represents no more than "[t]he mere apprehension of future injury or damage," which "cannot be the basis for injunctive relief." *Pontiac*, 482 Mich at 9. The alleged harm is neither imminent nor irreparable and cannot justify a preliminary injunction here.

B. APPELLANTS ARE NOT LIKELY TO PREVAIL ON THE MERITS

Because Appellants have failed to make a "particularized showing of irreparable harm," which, as the Michigan Supreme Court recognized in *Pontiac*, is "an indispensable requirement to obtain a preliminary injunction," *Pontiac*, 482 Mich at 9, it is not necessary for this Court to reach the second, third and fourth factors before denying Appellants' Motion. See *Michigan AFSCME Council 25*, 293 Mich App at 148–49 (citing *Pontiac*, 482 Mich at 13 n 21) ("We note that our Supreme Court has declined to consider a party's likelihood of success on the merits when the irreparable-harm factor was not established.") Intervening Appellees will nonetheless address all three in what follows, including Appellants' likelihood of success on the merits, which is addressed in this Section.

Appellants cite *Niedzialek v Journeymen Barbers, Hairdressers & Cosmetologists' Intern Union*, 331 Mich 296, 302; 49 NW2d 273 (1951), for the proposition that this factor requires only

a "real and substantial question between the parties." Motion at 20. Appellants leave out the following, however, which precedes the above-quoted language in *Niedzialek*:

> A[] [preliminary] injunction . . . should not usurp the place of a final decree *neither should it reach out any further than is absolutely necessary* to protect the rights and property of the petitioner from injuries *which are not only irreparable, but which must be expected before the suit can be heard on its merits.*

Niedzialek, 331 Mich at 301–302. In other words, this purportedly low standard of likelihood of success on the merits depends on a showing of harm that is both "irreparable" and which "must be expected before the suit can be heard on the merits." *Id.* As Intervening Appellees have already shown in Section A, *supra*, Appellants are at risk of neither.

1. Appellants are Not Likely to Succeed in Their APA Challenge

Appellants argue that the MPSC did not comply with the required rulemaking process under the Administrative Procedures Act, MCL 24.201 *et seq.* (the "APA") before issuing its order. While Appellants note that the order is binding on persons appearing before the MPSC for an Act 233 proceeding, Motion, pp. 21–22, this, in and of itself, is not determinative. An administrative agency can act to interpret a statute (Section 207(h)) or to exercise a permissive statutory power (Section 207(j)) without following the formal rulemaking process, despite impacts on private rights. See MCL 24.207(h) and (j); *O'Halloran v Secretary of State*, 2024 WL 3976495, __ NW3d__ (Mich S Ct 2024) (addressing interpretive rules), *Michigan Trucking Association v MPSC*, 225 Mich App 424; 571 NW2d 734 (1997) (addressing permissive statutory power).

The APA defines a "rule" in relevant part as follows:

> "'Rule' means 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 thereof, but does not include any of the following:
>
> ***

> "(h) 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.
>
> ***
>
> "(j) a decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected."

MCL 24.207 (emphasis added).

As explained below, the Commission's exercise of the authority granted it by Act 233 was an exercise of statutory interpretation and permissive statutory power and was therefore exempt from the rulemaking requirements of the APA.

While there are a number of exceptions to the rulemaking process under MCL 24.207, Appellants note only one, the contested case process at MCL 24.207(f). The proceeding below was not a contested case, so this exception is irrelevant here.[6] Appellants express concern about the binding nature of the Order on persons appearing before the Commission in an Act 233 proceeding. But to the extent that private interests are affected by the MPSC's order, these effects are either due to the actions of the underlying statute which the MPSC is simply interpreting or else they are

[6] So too is *In re Pub Serv Comm'n for Transactions Between Affiliates*, 252 Mich App 254, 264; 652 NW2d 1 (2002), which is the only APA case involving the MPSC that Appellants cite. In that case, the MPSC "invoked its general ratemaking authority" as the basis for its implementation of "guidelines," which were purportedly issued by order in a contested case proceeding, regarding transactions between regulated utilities and nonregulated affiliates. *Id.* at 265. The court first found that the MPSC's general ratemaking authority could not support it opening a contested case that was "neither a rate case nor an investigation of rates" but rather for the "sole purpose" of revising its existing guidelines on affiliate transactions. *Id.* at 266 (internal citation omitted). The court next took issue with the proceeding itself, finding that it did not comport with the requirements of a contested case proceeding. *Id.* Because here the MPSC neither purported to act by a contested case nor did it rely on its general ratemaking authority, *In re Pub Serv Comm'n* is inapposite.

valid exercises of statutory authority that the Legislature granted to the MPSC. Thus, the appropriate exceptions to the definition of a rule are those found in MCL 204.207(h) and (j).

The exception found in MCL 24.207(j) applies to "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." The Commission's actions complained of here are plainly exercises of a permissive statutory power, or else are merely interpretations of statutory requirements necessary to implement its role in the statutory scheme. See MCL 24.207(j).

Michigan's Supreme Court has long recognized that "agencies have the authority to interpret the statutes they are bound to administer and enforce." *Clonlara, Inc v State Board of Education*, 442 Mich 230, 240; 501 NW2d 88, 93 (1993). And courts recognize actions of and interpretations by an agency as being within the Section 207(j) exception where "explicit or implicit authorization for the actions in question has been found." *Detroit Base Coalition for the Human Rights of the Handicapped v DSS*, 431 Mich 172, 187-188; 428 NW2d 335 (1988); see also *Michigan Trucking Association*, 225 Mich App 424, 429; (APA Sec. 7(j) applied when the statute permitted the adoption of a safety rating system by rule or order).

In an analogous situation to this one, this Court upheld an order of the MPSC interpreting for the first time the requirements of Act 341 of 2016. That order was challenged, in part, on grounds of a failure to use the APA rulemaking process. See *In re Reliability Plans of Electric Utilities for 2017-2021*, 2020 WL 7089873, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2020 (Docket Nos. 340600 and 340607) ("*In re Reliability Plans*").[7] In reviewing the MPSC's actions and the governing statute, the court found the necessary authority

[7] A copy this opinion is unpublished cases are included in Intervenor-Appellees' Appendix at Intv App 287.

for the MPSC's actions in the statute: "Section 6w requires the MPSC to establish the format for electric provider resource adequacy filings, and authorizes it to determine local clearing requirements and planning reserve margin requirements for electric providers." *Id*. at *4. The court further noted that in some sections of Act 341 the Legislature specifically told the MPSC to act via contested case or consultation with another body. *Id.* The court found it significant that "[t]he Legislature's specification of procedural methodology … indicates that, where the Legislature did not specify how to proceed, it expected the MPSC to do so within its own discretion." *Id.* at *5. Finally, the court observed that the timeline for implementation was too "compressed" for the MPSC to act to promulgate rules pursuant to the APA, which the court has previously found to be an indication that the Legislature did not intend APA rulemaking. *Id*. at *5, see also *Michigan Trucking Assoc'n*, 225 Mich App at 430 (safety rating system likely to be hotly contested and so time to promulgate it through formal rulemaking procedures would be impossible, and unreasonable results are to be avoided when construing a statute).

The lack of explicit legislative direction to use rulemaking has also been found significant in the past by Michigan courts. In *Michigan Trucking Ass'n v Michigan Public Service Commission*, a trucking association appealed from an MPSC order implementing a safety rating system for motor carrier vehicles. *Id.* at 426. The appellant complained that the order amounted to a rule and that the MPSC failed to follow proper procedures for promulgation of rules before issuing its order. *Id.* There, the statute explicitly authorized the MPSC to implement either by rule or order a safety rating system for motor carriers. *Id.* The court found that "the safety rating system is clearly an exercise of permissive statutory power," and so it is exempt from formal adoption and promulgation under the APA. The court found that this finding "is buttressed by the fact that the statute does not expressly require the PSC to promulgate the rating system before implementation."

Id. at 430. Finally, the court found it telling that there was not enough time to go through the full formal rulemaking process before the law was effective, holding that "it is reasonable to assume that any safety rating system would be hotly contested by the regulated carriers and that subjecting the safety rating system to a formal hearing and promulgation requirements of the APA would make it impossible for the PSC to have the system in place within twelve months, the time frame prescribed by the statute." *Id.*

In the case at hand, Act 233 authorizes the MPSC to do the following:

(1) to prescribe the format and content of public notices (Sec. 233(1));

(2) to set application filing requirements, which may be established by rule or order (Sec. 234(1));

(3) to set the site plan requirements by rule or order (Sec. 234(1)(c));

(4) to determine the contents of an application before the Commission (Sec. 225(s));

(5) to determine reasonable application fees (Sec. 226(4));

(6) to determine reasonable pollinator standards as necessary (Sec. 226(6)(b));

(7) to decide what proceedings at the MPSC, the regional transmission organization, or the FERC are relevant to determining the contribution of the proposed energy facility to meeting the identified energy, capacity, reliability, or resource adequacy needs of this state (Sec 226(7)(a));

(8) to set more stringent zoning requirements for solar (Sec. 226(8)(a)(vi)), for wind (Sec. 226(8)(b)viii), and for energy storage (Sec. 226(8)(c)(v); and

(9) to issue orders necessary to protect information in an application for a certificate (Sec. 228(2)).

The MPSC is told to use a "rule or order" only with respect to application filing requirements and requirements for a site plan (Sec. 234(1)) and is required to use an order only with respect to

protection of confidential information (Sec. 228(2)). It is never told to use the formal rulemaking process. Thus, in all other cases the means by which the Commission may choose to act is discretionary.

The same considerations that were found to be determinative in the cases above apply here. In Act 233, the statute explicitly requires that some few actions be taken by "rule or order" and leaves the rest to be addressed as the Commission may find best. The Appellants complain that the Commission interpreted key terms in the statute that are necessary for determining who may be a party to an Act 233 proceeding and what actions trigger such a proceeding. The Act established this new proceeding before the Commission, and it is plain that the Legislature intended the Commission to lay out the details of the process and interpret the key terms in accordance with that process. The MPSC's actions are plainly an exercise of permissive statutory authority.

As in the *Michigan Trucking Association* and *In re Reliability Plans* cases, the statutory timeline here requiring the law to go into effect in 12 months is insufficient time for the Commission to go through the process of soliciting and obtaining stakeholder input, and then promulgating rules through the formal process. Because the Commission's Order establishes the requirements for filing an application in an Act 233 proceeding before the Commission, it was necessary to have these requirements in place by November 29, 2024, when the Act went into effect and parties were able to file under the statute. This compressed timeline plainly shows that the Legislature did not contemplate a rulemaking proceeding.

Because the authority granted to the MPSC by the Legislature in Act 233, and the exercise of that authority via an order of the Commission here, are so similar to statutes and agency actions in previous cases upholding agency action under permissive statutory authority, Appellants are not likely to succeed in their APA-based claims.

2. Appellants are Not Likely to Succeed in Their Arguments Regarding the Commission's Interpretation of Public Act 233.

Appellants' claims regarding the Commission's interpretation of certain terms in Act 233 will also fail. Appellants argue that the Commission exceeded its authority under Act 233 in issuing its October 10 Order, (see Motion at 22–25), specifically with respect to its interpretations of the definitions of "compatible renewable energy ordinance" and "affected local unit" and its determination with regard to the treatment of hybrid facilities (*i.e.*, those composed of more than one technology). Appellants characterize the former as "redefin[ing] terms in Act 233 that the Legislature has already clearly defined." Motion at 24. They characterize the latter as "expand[ing] the types of alternative energy facilities over which it has siting authority." *Id.* The October 10 Order did neither of these things.

Under Section 26 of Public Act 300 of 1909, "[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). Furthermore, "Agency interpretations of the statutes they are charged with implementing are generally given 'respectful consideration' so long as they are consistent with the plain language of the statute." *Vectren Infrastructure Servs Corp v Dept of Treasury*, 512 Mich 594, 613–14; 999 NW2d 748 (2023) (citing *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 93; 754 NW2d 259 (2008)).

It is undisputed that the Commission has been given responsibility to administer Act 233. See MCL 460.1230(1). As such, its interpretations are entitled to the respectful consideration afforded administrative agencies under *Vectren* and, "if persuasive, should not be overruled without cogent reasons." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich at 108. Appellants have failed to show by "clear and satisfactory evidence," as required in MCL 462.26(8), that the October 10 Order is "unlawful or unreasonable" under these standards.

i. The Commission Appropriately and Necessarily Construed the Definitions of "Affected Local Unit" and "Compatible Renewable Energy Ordinance."

Appellants claim that the Commission allowed "industry comments and policy reasons" to "reshape the Legislature's intent." Motion at 25. According to Appellants, the definitions of "affected local unit" and "compatible renewable energy ordinance" are clear on their face. (See Motion at 25–26.)

This is not the position Appellants' respective associations took before the MPSC. Comments on the Commission Staff's straw proposal filed by the Michigan Association of Counties ("MAC") in Case No. U-21547, like those filed by the "energy industry," called for the Commission to "explicitly state what can and cannot be included in a compatible renewable energy ordinance (CREO),"[8] clearly looking to the Commission to construe the statute to resolve perceived ambiguities. Even more significantly, in comments filed by the Michigan Townships Association ("MTA"), the MTA appeared to urge the Commission to expand the scope of what would be allowed in a CREO beyond what it thought was permitted in the statutory definition:

> These guidelines must *clear up ambiguity in the statute*—and not create its own ambiguities.
>
> [. . .]
>
> [A] revision should be made to integrate later interpretation [in Staff straw proposal] that a CREO can contain any provision in PA 233 as long as the requirement utilized by the affected local unit is not more restrictive than the requirement of the Commission outlined in the statute. *This is a broader concept than just complying with MCL 460.1226(8) which is provided for in the statute*.
>
> [. . .]
>
> We are fully supportive of the guideline that any provision in PA 233 is an acceptable provision in a CREO, as long as the requirement utilized by the ALU is not more restrictive than the requirement for the Commission outlined in the statute.

[8] Intv App 024, Comments of the Michigan Association of Counties, Case No. U-21547, Filing No. U-21547-0008 (July 17, 2024), Intv App 024.

> . . . *The problem, however, is the definition states no more restrictive than Section 226(8)*. Again, while supportive, how does the MPSC justify this *expansion* so that ALU CREOs aren't all subject to challenge if they include considerations contained in Section 226(7)?[9]

The MTA likewise implicitly agreed that there was an inherent tension between defining the term "affected local unit" or "ALU," see MCL 460.1221(a), as including *all* nested local units of government regardless of zoning authority (as the Staff straw draft first proposed). They agreed with Staff's initial proposal to adopt that definition generally but to create a second, more limited definition for use only in Section 223 of Act 233 (MTA comments on top of original Staff straw draft in strikethrough and underlined):

> To harmonize PA 233 with provisions of the Michigan Zoning Enabling Act (MZEA), ~~in a project spanning multiple jurisdictions,~~ only ALUs with zoning jurisdiction will be required to have a CREO to require applicants to use the local siting process under Section 223(3) of Act 233. The Michigan Zoning Enabling Act states that a township that has enacted a zoning ordinance under the MZEA is not subject to an ordinance adopted by a county under the MZEA. (For example, only the township would be required to have a CREO for a project located in a township that has a zoning ordinance (township not subject to county zoning ordinance). The corollary would also be true that only a county with zoning jurisdiction would be required to have a CREO for a project located in the township that does not have its own zoning ordinance.
>
> An unzoned area cannot have a CREO since a CREO is effectuated through zoning jurisdiction.
>
> For a project that is being sited in an area that horizontally crosses multiple jurisdictional boundaries, only ALUs with zoning jurisdiction will be required to have a CREO to require applicants to use the local siting process under Section 223(3).[10]

This proposal, which the Commission ultimately rejected, see October 8 Order at 9-10, would have resulted in two *different* definitions of ALU for use in different portions of the same statute. Given that the Michigan courts have held that "[i]dentical terms in different provisions of the same act

[9] Intv App 031, 034-35, Comments of the Michigan Townships Association, Case No. U-21547, Filing No. U-21547-0088-CC (July 17, 2024), (emphasis added).

[10] *Id.* at Intv App 034-035.

should be construed identically," *Cadle Co v Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009) (citing *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 426 n 16; 565 NW2d 844 (1997)), it is hard to sustain any argument that the definition of ALU in Act 233 is so clear as to require no administrative or judicial construction.

As the agency tasked with implementing Act 233, the Commission appropriately construed the critical terms that give it jurisdiction, such as the meaning and scope of ALU and CREO, in a way that is entirely consistent with the plain language of the statute. See *Vectren*, 512 Mich at 613–14.

1) The Commission appropriately construed the definition of "Affected Local Unit."

In the case of the definition of ALU, Act 233 states that an ALU is "a unit of local government in which all or part of a proposed energy facility will be located." MCL 460.1221(a). The October 10 Order "finds that an ALU under Act 233 is limited to include only those local units of government that exercise zoning jurisdiction." See October 10 Order at 10. This conclusion is well supported both by authority *internal to Act 233* and with reference to the underlying purpose of Act 233.

Act 233 represents a transfer, under certain circumstances, of authority for zoning approvals from a local unit of government to the state. This is made clear by the legislative intent expressed in both Act 233 and its tie-bar to Act 234, which amended the MZEA. Many provisions within Act 233 demonstrate that the Commission's new authorities are an exercise of zoning authority specifically, including:

- Act 233 itself refers specifically to units of government "exercising zoning jurisdiction." See MCL 1222(2). It is only those units that can request the state issue a certificate, which signals that the state's certificate process is understood to be an alternative zoning process.

- The Commission is given jurisdiction over a project essentially in only two circumstances: (1) if a local unit of government exercising zoning jurisdiction so requests, see MCL 460.1222(2), or (2) if an electric provider or independent power producer is unable to obtain a zoning approval from a local unit of government exercising zoning jurisdiction despite the project's being in compliance with Section 226(8) of Act 233, see MCL 460.1223(3)(c)(i)–(iii).

- The description of an ordinance that deprives the Commission of jurisdiction (*i.e.*, a CREO) is a long list of items that are part of zoning ordinances almost exclusively (*e.g.*, setbacks, height restrictions). See MCL 460.1221(f); MCL 460.1226(8).

These points clearly illustrate that Act 233 was intended to provide a new, alternative path for zoning approval rather than a different approval process outside of the zoning context. It is therefore to be read in the context of Michigan's established zoning law and interpreted to harmonize with the MZEA.

Doing so is also consistent with the principle of statutory construction known as "*in pari materia*" which requires that "statutes that relate to the same subject or share a common purpose should, if possible, be read together to create a harmonious body of law." See *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015). Since the process created by Act 233 is fundamentally a zoning approval, it makes sense that the "affected local units" that Act 233 references are those with zoning jurisdiction—especially because the law specifically references local units that "exercise zoning jurisdiction." The MZEA itself makes plain in two places that local units cannot have overlapping zoning jurisdiction. See MCL 125.3209; MCL 125.3102(x). This fundamental principle of zoning should be understood to be effective in the Act 233 context as well.

Just as Act 233 speaks broadly about a "local unit of government" and an "affected local unit," the MZEA speaks broadly in its definitions of a "local unit of government" and of a "legislative body." The MZEA uses those terms to refer only to those local units of government or legislative bodies that have zoning authority over a project. Under the MZEA, there is no confusion in the zoning context as to which local units of government are implicated. A

fundamental principle of zoning, so fundamental that it is stated twice in the MZEA, is that when a township has zoning authority, it divests a county of any zoning authority over the area of the township. See MCL 125.3102(x); MCL 125.3209.

The Commission recognized this line of reasoning in their October 10 Order, finding that

> all the circumstances that trigger the Commission's limited authority to site energy facilities require a local unit of government to exercise zoning jurisdiction. As such, although the statutory definition of ALU does not reference zoning jurisdiction, reading the term in light of the entire context of Act 233's statutory scheme to provide a limited transfer of siting authority to the Commission reveals that such a restriction is not only reasonable, but necessary. *See, Honigman Miller Schwartz & Cohn LLP v City of Detroit*, 505 Mich 284, 307; 952 NW2d 358 (2020), quoting *Sweatt v Dep't of Corr*, 468 Mich 172, 179, 661 NW2d 201 (2003) ("A statute should be interpreted in light of the overall statutory scheme, and '[a]lthough a phrase or statement may mean one thing when read in isolation, it may mean something substantially different when read in context.'").

October 10 Order at 10.

The Commission thus did not "redefine" ALU in its October 10 Order as Appellants allege but rather construed it reasonably "in light of the overall statutory scheme" as directed by the Michigan Supreme Court.

2) <u>The Commission appropriately construed the definition of "Compatible Renewable Energy Ordinance."</u>

In the case of the definition of CREO, Act 233 states in relevant part that a CREO is "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)*." MCL 460.1221(f). This is in contrast to how Appellants are seeking to define a CREO, in that they argue that the Legislature intended that "CREOs may contain additional, but not more restrictive, regulations," Motion at 27–28 or "other requirements that do not conflict," Motion at 18. However, the Appellants change the meaning of the statutory language when they argue that "additional" or "other requirements" beyond those in Section 226(8) may be included.

The statutory definition of CREO contains no such words. Section 221(f) is, furthermore, not the only portion of Act 233 that is germane to the concept of a CREO.

Although Act 233, as interpreted in the October 10 Order, requires developers to first seek a local approval if an ALU "notifies the [developer] . . . that the [ALU] has a [CREO]," MCL 460.1223(3); see also October 10 Order at 22, the developer is permitted to file an application with the Commission in three circumstances, two of which are directly relevant to the allowable scope of a CREO: (1) if the developer's "application *complies with the requirements of section 226(8)*, but an [ALU] denies the application," and (2) if "an [ALU] amends its zoning ordinance after the chief elected official notifies the [developer] . . . 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).*" Because these scenarios trigger Commission jurisdiction just as well as if the ALU never had a CREO in the first place, they are key to understanding the proper scope of a CREO as being limited to the requirements stated in MCL 460.1226(8). Since no basis other than a failure to comply with the requirements of MCL 460.1226(8) is permitted to support a local denial, see MCL 460.1223(3)(c), an ALU may not attempt to include requirements beyond those contained in MCL 460.1226(8) and still call that ordinance a CREO.

The Commission did no more than follow this same textual analysis, reasonably construing the statute to ensure its internal consistency:

> 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)." Other provisions in Act 233 reinforce this limitation. Specifically, Section 223(3)(c)(ii) of Act 233 permits [a developer] to submit an application to the Commission if "the application *complies with the requirements of section 226(8)*, but an [ALU] denies the application." 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 [developer] 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).*" 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)."

October 10 Order at 17–18 (emphasis in original; internal citations omitted).

The MPSC's October 10 Order is not the power grab it is characterized as in Appellants' Motion but is instead nothing more than a reasonable and defensible interpretation of the statutory definition of CREO as understood against the backdrop of Act 233 as a whole.

ii. ***The Commission Appropriately Construed the Jurisdictional Thresholds in MCL 460.1222(1) as Applied to Hybrid Energy Facilities.***

Appellants also claim that the Commission exceeded its authority under Act 233 by the "creation of hybrid facilities," Motion at 30, by which Appellants claim the Commission "expand[ed] the types of alternative energy facilities over which it has siting authority." Motion at 24. This is incorrect. Rather, in a similar way to how it interpreted the definitions of ALU and CREO, the Commission simply sought to harmonize the various provisions of Act 233 in construing Act 233's application to hybrid facilities.

Hybrid facilities are, as the Commission explained, "energy facilities comprised of multiple technology types." October 10 Order at 4. Although Appellants are correct that Act 233 nowhere includes the specific term "hybrid facility," the Commission correctly pointed out that the definitions of both "solar energy facility" and "wind energy facility" in Act 233 "expressly include 'energy storage facilities' as part of these facilities." October 10 Order at 5–6 (citing MCL 460.1221(w) & (x)). The Commission thus by no means "created" hybrid facilities; its Order merely *named* a concept already present in the statute.

The Commission's decision to adopt its Staff's proposal for applicability thresholds followed Act 233 in requiring any solar facility, including solar facilities that incorporate storage, to meet the 50 MW threshold established in MCL 460.1222(1)(a) and requiring any wind facility, including wind facilities that incorporate solar and/or storage, to meet the 100 MW threshold established in MCL 460.1222(1)(b). In each case, the Commission required a facility to comply with the higher of the two thresholds, depending on whether or not the facility qualified as a wind energy facility (with or without storage).

Once again, rather than conjuring up additional authority for itself, the Commission in its October 10 Order hewed closely to the language of Act 233 and construed that language reasonably to give effect to the statute as a whole. Appellants argument therefore fails on this point also.

iii. Preemption of Local Zoning Authority Requires No "Talismanic Words."

Although demonstrating the inaccuracy of Appellants' characterization of the Commission's actions in reasonably construing portions of Act 233, a statute they are responsible to administer, "in light of the overall statutory scheme," *Honigman*, 505 Mich at 307, is more than sufficient to establish that Appellants cannot succeed on the merits of their arguments as to the substance of the Commission's determinations under Act 233, it is nonetheless worth responding to their arguments addressing the scope of Commission authority specifically as concerns the issue of preemption of local authority.

The Michigan Supreme Court case of *People v Llewellyn,* 401 Mich 314; 257 NW2d 902 (1977) is the seminal case concerning the preemption of local ordinances by state statutes. In *Llewellyn*, the Michigan Supreme Court found that:

> a municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality

> seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.

Id. at 323. In reaching this conclusion, the court noted that a "direct conflict exists . . . when the ordinance permits what statute prohibits *or ordinance prohibits what statute permits*." *Id.* at 322 n 4 (emphasis added) (citing *Builders Ass'n v Detroit*, 295 Mich 272, 277; 294 NW 677 (1940)); see also *Walsh v River Rouge*, 385 Mich 623, 637; 189 NW2d 318 (1971); *Miller v Fabius Twp Board*, 366 Mich 250, 258; 114 NW2d 205 (1962).

A local unit of government has no inherent power to regulate land use through zoning. Instead, zoning authority must be specifically authorized by the Legislature and exists only to the limited extent authorized by that legislation. *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 515; 838 NW2d 915 (2013). The MZEA governs the creation and administration of local zoning ordinances. With respect to Act 233, the Legislature provided that Part 8 "shall control in any conflict" with the MZEA, MCL 460.1230(3), and that, if the Commission issues a certificate, it preempts all local policies, practices, regulations, rules, or other ordinances that prohibit, regulate, or impose additional or more restrictive requirements than those specified in the Commission's certificate. MCL 460.1231(3). Under Act 234, the Legislature amended the MZEA to provide that a local zoning ordinance is "subject to" Part 8. The Legislature thus expressly preempted any local land use regulation of energy facilities unless "local governmental units demonstrated that they had requirements for the buildout of these resources that were compatible with those proposed by Part 8." Senate Legislative Analysis, HB 5120, HB 5121, at 2 (November 8, 2023).

In the present case, Appellants assert the right to supplement the requirements of Act 233 by adding "overlays" that are designed to impose zoning control over the location of renewable energy projects within Appellants' geographic boundaries. See, e.g., White River Township

Ordinance 60-2024 at Intv App 013. Appellants claim that "[a] municipality with a CREO retains the power to regulate certain aspects of the project that are not covered by Act 233, such as the project's location, insurance requirements, and decommissioning procedures, among other things." Motion at 7. This despite the fact that Act 233 plainly does cover project location (Sec. 224(1)(a) and Sec. 226(9)) and decommissioning (Sec. 225(1)(r)). Appellants also clearly reserve the right *to deny an application if it does not comply with these additional requirements*. See, e.g., White River Township Ordinance 60-2024 at Intv App 013. Accordingly, it is hard to reconcile Appellants' argument that the October 10 Order is somehow flawed for agreeing with what our Supreme Court has clearly stated in *Llewellyn* and its progeny: that if the Appellants' CREOs "prohibit what statute permits" then their CREOs are preempted by Act 233 and a Certificate that may be issued by the MPSC.

This conclusion is buttressed by the Michigan Supreme Court's decision in *Pittsfield Charter Twp v Washtenaw County*, 468 Mich 702, 709; 664 NW2d 193 (2003), wherein the Court stated that "in resolving a conflict between units of government the legislative intent 'where it can be discerned' controls the question whether a governmental unit is subject to the provisions of another's . . . ordinances" and that therefore a reviewing court must "look for guidance to the statutes themselves to see if there are any textual indications that would convey the Legislature's intent on the issue of priority." *Id.* And, specifically, in determining the applicability of a local zoning ordinance the Court noted that "there are no 'talismanic words' that convey the Legislature's intent to create immunity from local zoning. Rather, the Legislature 'need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive.' *Id.*

Here, the Appellants' claim of authority to adopt ordinances regulating renewable energy projects within their geographic boundaries is purportedly derived from the powers granted to

them under the MZEA. But this claim is quickly debunked by looking at the plain language of Act 234, which—as admitted by Appellants—"expressly amended the MZEA so that the MZEA is subject to PA 233." Motion at 15.

Appellants argue that somehow the language in Section 231(3) of Act 233, which states that "[i]f a certificate is issued, the certificate and [Act 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 [MPSC's] certificate" somehow expands, rather than limits, the Appellants' authority under the MZEA. Motion at 27–28. Setting aside for a moment that the most basic purpose of Act 233 is to address the fact that "the current process for siting and permitting renewable energy resources in local governmental units has proven complex and has delayed the buildout of these resources," "textual indications [in Act 233 and Act 234] convey the Legislature's intent on the issue of priority" as between the MZEA and Act 233 and "convey the Legislature's intent to create immunity from local zoning." See Senate Fiscal Analysis of HB 5120 & 5121 as reported from Committee, p 2; *Pittsfield Charter Twp v Washtenaw County*, 468 Mich at 709. Accordingly, Appellants' nonsensical reading of Act 233 cannot stand under *Llewellyn* and *Pittsfield.*

Because Appellants fail to show any likelihood of success on the merits of their claims on appeal, this factor also weighs heavily against their Motion.

C. THE HARM TO APPELLANTS ABSENT A PRELIMINARY INJUNCTION DOES NOT OUTWEIGH THE HARM TO APPELLEES, INCLUDING INTERVENING APPELLEES.

Appellants' treatment of this factor is perfunctory, in that they only consider the effect of a preliminary injunction on the Commission and not on any other adverse party, including the

developers present in the proceedings below, who are explicitly contemplated in the October 10 Order[11] and who are "part[ies] in interest" as contemplated in MCL 462.26(1).

As for the harms to the Commission, Appellants claim that "the PSC's primary interest is the enforcement of political renewable energy goals that can still be pursued even if an injunction is issued" and that "the PSC will suffer no harm by an injunction." Motion at 33–34. Even this is untrue, however, in that the Commission is among those responsible for resource adequacy and electric reliability in Michigan. See *In re Reliability Plans of Electric Utilities for 2017–2021*, 505 Mich 97, 127; 949 NW2d 73 (2020) ("While MISO oversees the wholesale markets and the MPSC oversees the retail markets, the two regulatory bodies work cooperatively *to ensure grid reliability and work together on capacity planning in particular, relevant to both*" (emphasis added).). Given the fossil fuel plant retirements already approved as part of both Consumers Energy Company's[12] and DTE Electric Company's[13] respective integrated resource plans ("IRP"), and the fact that the execution of each utility's IRP, particularly considering the recent enactment of Act 235, depends heavily on a rapid deployment of renewable energy resources, the Commission clearly has an interest in the responsible and sustainable development of renewable energy resources in the state, including an obligation to address any capacity shortfalls that may result from delays in electric generation facilities' commencing operation that are a result of a preliminary injunction preventing

[11] See Ordering Paragraphs B and C on page 77 of the Order: "This order applies to electric providers and independent power producers filing for a certificate from the Commission pursuant to Public Act 233 of 2023, MCL 460.1221 *et seq.*, on or after November 29, 2024."

[12] See *In the matter of the application of Consumers Energy Company for Approval of an Integrated Resource Plan under MCL 460.6t, certain accounting approvals, and for other relief*, order of the Public Service Commission, entered June 23, 2022 (Case No. U-21090), Exhibit A at § 4, at Intv App 090-091.

[13] See *In the matter of the Application of DTE Electric Company for approval of its Integrated Resource Plan pursuant to MCL 460.6t, and for other relief*, order of the Public Service Commission, entered July 26, 2023 (Case No. U-21193), Exhibit A at Intv App 131-132.

the timely siting and construction of such facilities through the process the Legislature created under Act 233.

Beyond this, however, Intervening Appellees, as organizations whose members include renewable energy developers whose projects hang in the balance, stand to suffer immediate harms if a preliminary injunction were granted here. Developers have spent multiple years negotiating with municipalities in an attempt to reach agreement on reasonable ordinances that protect local communities while allowing responsible development of renewable energy resources. See, *e.g.*, Comments of Liberty Power in Case No. U-21547, at Intv App 172. Energy project development, furthermore, relies on a complex network of logistics involving multiple parties beyond the zoning authority and the developer. Critically, certain aspects of energy project development are time-sensitive, particularly the generator interconnection process, which requires developers who are seeking the right to interconnect with the bulk electric system (which includes 100% of the larger projects eligible to apply for a certificate under Act 233, see MCL 460.1222(1)) to follow a lengthy generator interconnection process. This process, as laid out in Appendix 9,[14] can span multiple years and require millions of dollars in deposits at particular "decision points." Once through the interconnection process, generator interconnection agreements include deadlines for commercial operation, which are not easily amended and which, if a developer fails to meet them, can cause a developer to forfeit its interconnection rights. See MISO Tariff, Attachment X, Appendix 6, Generator Interconnection Agreement, at Intv App 180.

In short, the injunction requested here would unnecessarily delay project development for many months, adding significant expense and possibly making some projects no longer viable,

[14] MISO Generator Interconnection Process Flowchart at Intv App 176-179.

depending on required timelines for financing and contractual commercial operation dates, thus potentially interfering with the State's resource adequacy planning for the regional electric grid.

With respect to Appellants' alleged harms, Intervening Appellees have already shown above that Appellants will in fact suffer no immediate or irreparable harm absent a preliminary injunction here and that any of the harms they allege[15] would only occur, if at all, *after* the Commission were to issue a certificate to a particular project, at which point they might appeal and seek an injunction. MCL 460.1229; see also Section IV.A.1., supra.

On balance, therefore, the harms that would be done to the Commission and Intervening Appellees by the issuance of a preliminary injunction here far outweigh the harms that would be borne by Appellants absent a preliminary injunction, which are none.

D. THE PUBLIC INTEREST WOULD BE HARMED BY THE GRANTING OF AN INJUNCTION.

Act 233 was enacted as a new Part 8 to Public Act 295 of 2008. Act 295 clearly states the purpose of that act in Section 1(2), MCL 460.1001(2), which, according to the Legislature:

> is to promote the development and use of clean and renewable energy resources and the reduction of energy waste through programs that will cost-effectively do all of the following:
>
> (a) Diversify the resources used to reliably meet the energy needs of consumers in this state.
>
> (b) Provide greater energy security through the use of indigenous energy resources available within this state.
>
> (c) Encourage private investment in renewable energy and energy waste reduction.
>
> (d) Coordinate with federal regulations to provide improved air quality and other benefits to energy consumers and citizens of this state.

[15] That is, aside from the harm(s) they allege that occur not as a result of the October 10 Order but on account of the operation of Act 233 itself even absent the October 10 Order. See Section IV.A.1.1, *supra*.

> (e) Provide more reliable and resilient energy supplies during periods of extreme weather.

MCL 460.1001(2)(a)–(e). The Legislature's decision to adopt Act 233 as Part 8 of PA 295 clearly means that Act 233 must be read against the backdrop of the overall public interest expressed in the purpose of PA 295. This public interest was made all the more acute by the increase in the renewable portfolio standard and the creation of the clean energy standard by Public Act 235 of 2023. See MCL 460.1028(1); MCL 460.1051(1). The Senate Fiscal Agency, which prepared a legislative analysis of Act 233 as reported from the Senate Energy and Environment Committee, concluded as much:

> The Legislature could soon send to the Governor Senate Bill 271 [*i.e.*, Act 235 of 2023], which would require MPSC-regulated utilities to generate more electricity from renewable energy resources and ultimately achieve a clean energy portfolio of 100% clean energy by 2040. If enacted, the bill would necessitate the buildout of more utility-scale renewable energy resources like solar, wind, and storage in the State; however, according to testimony, the current process for siting and permitting renewable energy resources in local governmental units has proven complex and has delayed the buildout of these resources. Accordingly, it has been suggested that the siting and permitting of renewable energy resources be regulated by the MPSC unless local governmental units demonstrated that they had requirements for the buildout of these resources that were compatible with those proposed by Part 8.

Senate Legislative Analysis, HB 5120, HB 5121, at 2 (November 8, 2023) (internal citation omitted).

The history leading to the enactment of Act 233, set forth earlier in this Brief, (see Statement of Facts, Sec. II, supra) clearly demonstrates the legitimacy of these concerns. Appellants' attempt to frame Act 233 as "protect[ing]" their "rights . . . to retain local control over the siting of alternative energy facilities," Motion at 30, is disingenuous and merely attempts to re-litigate policy debates that were before the Legislature and settled by the enactment of Act 233 and Act 234. In passing Act 233 and Act 234, the Legislature clearly determined that the public interest is served by *preempting* local control, which was being improperly used to block

renewable energy development, to undermine state energy policy, and to jeopardize energy supply in Michigan. Obstructive local control was the presenting problem the Legislature enacted Act 233 to solve, not the virtue it sought to protect.

Furthermore, it must also be said that the approval standard applicable to the settlement agreements resolving the IRP cases already cited above includes a determination that they are in the public interest:

> The commission may approve a settlement agreement if all of the following conditions are met:
>
> [. . .]
>
> (c) The commission finds *that the settlement agreement is in the public interest*, represents a fair and reasonable resolution of the proceeding, and, if the settlement is contested, is supported by substantial evidence on the record as a whole.

Mich Admin R 792.1031(5)(c). In the case of Consumers Energy's 2022 IRP, this determination was affirmed by the Court of Appeals. See *In re Application of Consumers Energy Company for Approval of an Integrated Resource Plan*, unpublished per curiam opinion of the Court of Appeals, issued March 23, 2023 (Docket No. 362294). Therefore, it is in the public interest that the state's utilities are able to fulfill their planned buildouts of renewable energy and storage facilities, as set forth in their IRPs, and which is threatened by Appellant's requested injunction.

Because no harm will occur to Appellants if a preliminary injunction specifically against the October 10 Order (as opposed to against a future order granting a certificate under Act 233) is not granted (see Sections IV.A.1. & IV.A.2, supra), the status quo from the perspective of Appellants' legal interests will in fact be maintained even absent a preliminary injunction at this stage in the proceeding. Thus, while it may well be in the public interest to "hold[] administrative agencies to the limited authority they are granted by statute," Motion at 34, that interest would not

be served by a preliminary injunction here and now, even if Appellants were correct on the merits in this case.

This factor thus also weighs against Appellants' Motion.

V. CONCLUSION AND REQUEST FOR RELIEF

Wherefore, for the foregoing reasons, Intervening Appellees respectfully request that Appellants' Motion be denied.

Respectfully submitted,

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Dated: December 2, 2024

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WORD COUNT STATEMENT

I certify that Intervening Appellees' Answer to Motion for Preliminary Injunction contains 14,508 words, including headings, footnotes, citations and quotations, according to the word count in Microsoft Word 365 (2019).

Dated: December 2, 2024

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