STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re, Implementing Provisions of Public Act 233 of 2023	MPSC Case No. U-21547
ALMER CHARTER TOWNSHIP, et al,	Court of Appeals No. 373259

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.
/

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION'S ANSWER IN OPPOSITION TO APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

Respectfully submitted,

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INTRODUCTION

Extraordinary relief requires extraordinary justification. Yet, Appellants' Motion for Preliminary Injunction asks this Court to grant immediate relief from valid interpretations of a valid Michigan law without providing even ordinary justification. Michigan caselaw is clear that any movant faces a heavy burden if it is to successfully request a preliminary injunction. Appellants' motion cannot meet this burden because of the procedural and interpretive deficiencies in both the motion and the underlying appeal. Even still, one would expect any attempt at meeting this heavy burden to at least engage in meaningful examination of the law and interpretations it seeks to enjoin. Appellants' motion fails at even this most basic task. As the Appellants' motion fails to justify the extraordinary remedy it seeks, it should be denied.

On November 8, 2024, several of the above-named townships and counties (Appellants) filed a Claim of Appeal in this case. Four days later, on November 12, 2024, Appellants filed an Amended Claim of Appeal naming additional appellants. On November 22, 2024, Appellants filed a Motion for Preliminary Injunction and a Motion for Immediate Consideration.[1] Pursuant to the deadline set by this Court,

[1] The Commission notes that, while it does not concede any of the statements or arguments raised in Appellants' Motion for Immediate Consideration, this Answer focuses its response on Appellants' Motion for Preliminary Injunction. Furthermore, the Motion for Immediate Consideration specifies that it pertains to Appellants' Motion for Preliminary Injunction & Brief in Support only. (Appellants' Motion for Immediate Consideration of Motion for Preliminary Injunction & Brief in Support, pp 1–3.) It does not purport to, nor does the Commission understand it to, make any arguments regarding the procedures governing the underlying appeal.

the Commission files the following Answer, which demonstrates that Appellants have not met their burden and that this Court should deny their request for a preliminary injunction.

COUNTER-STATEMENT OF FACTS

The Michigan Public Service Commission (Commission) provides this counter-statement of facts for the purpose of selectively responding to inaccurate or incomplete statements made in Appellants' Statement of Facts in its Brief in Support of its Motion for Preliminary Injunction (Appellants' Brief in Support). For the purposes of this Answer, the Commission will rely on the statement of facts in Appellants' Brief in Support where not otherwise addressed.

On November 28, 2023, Governor Gretchen Whitmer signed Public Act 233 of 2023 (Act 233) into law, which amended Public Act 295 of 2008 (Act 295). Act 233 prescribed the powers and duties of the Commission to provide certification before the construction of certain wind, solar, and energy storage facilities.

A. Act 233 provides discretion to electric providers and independent power producers to seek wind, solar, and storage certification and for local units of government to require a siting certificate.

Sections 222 (1) and (2) of Act 233 provide that before beginning construction of an energy facility with qualifying nameplate capacity "an electric provider or independent power producer may. . . obtain a certificate for that energy facility from

the commission." MCL 460.1222(2). Act 233 does not mandate that developers[2] obtain a certificate from the Commission to site an energy facility. As stated in a footnote by Appellants, "[e]ven if a proposed project meets the threshold capacity requirements of [Section] 222(1), the developer may choose to submit their application only to appropriate local units and seek local zoning approval regardless of whether the local units have CREOs." (Appellants' Brief in Support, p 9, n 5.)

Act 233 also provides that "[a] local unit of government exercising zoning jurisdiction may request the commission to require an electric provider or independent power producer that proposes to construct an energy facility in that local unit to obtain a certificate for that energy facility from the commission." MCL 460.1222(2). A developer can come to the Commission for a certificate at the request of an affected local unit.

Section 223(3) of Act 233 further requires that a developer must file for approval with each affected local unit if it is notified that each affected local unit has a compatible renewable energy ordinance (CREO). MCL 460.1223(3). The statutory exceptions to this section include three procedural paths that allow a developer to come to the Commission despite an affected local unit stating it has a CREO. A developer can submit an application to the Commission for a certificate after being notified that an affected local unit has a CREO if: (1) an affected local

[2] Like Appellants' Brief in Support, this Answer uses the terms "developers" or "applicants" to generally refer to the electric providers or independent power producers seeking to site energy facilities. (*See* Appellants' Brief in Support, p 9, n 4.)

unit fails to timely approve or deny an application; (2) an application with an affected local unit complies with the statutory requirements of Section 226(8) of Act 233 but is nonetheless denied; or (3) if an affected local unit amends its zoning ordinance after notifying a developer that it has a CREO and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those outlined in Section 226(8) of Act 233. *See* MCL 460.1223(3). Even under these limited circumstances, the decision to seek a certificate from the Commission remains at the discretion of either the developer or an affected local unit.

Act 233 does not create "exemptions to local zoning regulations" but provides an alternate, discretionary path to wind, solar, and storage siting certification. (*See* Appellants' Brief in Support, pp 2, 8.) The circumstances under which a developer may seek a certificate from the Commission are enumerated and well defined by the statute. An affected local unit of government exercising zoning jurisdiction with a CREO may also request the Commission require a developer obtain a certificate from the Commission.

B. The Commission analyzed principles of statutory construction when interpreting terms in Act 233, including affected local unit.

Section 223 of Act 233 requires the developer hold a public meeting in each affected local unit with proper notice as outlined in that section. *See* MCL 460.1223(1). Under Section 221 of Act 233, " '[a]ffected local unit' means a unit of local government in which all or part of a proposed energy facility will be located."

MCL 460.1221(a). Under the same section, "local unit of government" or "local unit" means "a county, township, city, or village." MCL 460.1221(n).

Public Act 110 of 2006 (Act 110), the Michigan Zoning Enabling Act, provides that "a township that has enacted a zoning ordinance under this act is not subject to an ordinance, rule, or regulation adopted by a county under this act." MCL 125.3209. As stated in Appellants' Brief in Support, (Appellants' Brief in Support, p 8,) Act 234 of 2023, signed into law simultaneously with Act 233, amended Act 110 to state that a zoning ordinance is subject to "Part 8 of the clean and renewable energy and energy waste reduction act, 2008 PA 295, MCL 460.1221 to 460.1232." MCL 125.3205.

On October 10, 2024, the Commission published an order in Case No. U-21547 (October 10th Order) in which the Commission determined that it is "impossible for a county to have an applicable CREO if a township has enacted a CREO." (MPSC Case No. U-21547, 10/10/2024 Order, p 6, F# 0025.)[3] As such, the Commission stated it was interpreting Act 233 to be read in harmony with the Michigan Zoning Enabling Act and restricted the term "affected local unit" to mean "only those local units of government that exercise zoning jurisdiction." *Id*. at 9. The Commission found that "all the circumstances that trigger the Commission's

[3] The record in this matter appears in the MPSC's electronic docket found at https://mi-psc.my.site.com/s/case/5008y000009kJfbAAE/in-the-matter-on-the-commissions-own-motion-to-open-a-docket-to-implement-the-provisions-of-public-233-of-2023. "F# 0025" is the filing number where the cited order can be found on the e-docket. The Commission has included the F# consistent with MCR 7.212(J)(1)(f).

limited authority to site energy facilities necessarily require a local unit of government to exercise zoning jurisdiction." *Id.* at 10. The Commission went on to state that "although the statutory definition of [affected local unit] 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." *Id.* The Commission found that an affected local unit under Act 233 means only those local units of government that exercise zoning jurisdiction. *Id.*

Section 223(2) of Act 233 requires that a developer "planning to construct an energy facility shall offer in writing to meet with the chief elected official of each affected local unit . . . ." MCL 460.1223(2). Appellants state that "[a]fter the developer offers to meet with the chief elected official(s), the [affected local units] have a choice: they may decline or accept the offer." (Appellants' Brief in Support, p 9.) The statutory language provides a requirement for developers to offer to meet with each chief elected official of an affected local unit. Appellants' statement that the chief elected officials have the discretion to meet with a developer has no basis in the statutory language of Act 233.

Appellants also state that once an affected local unit notifies a developer that it has a CREO, "the developer *must* submit their application to the [affected local unit], not the PSC, and comply with the [affected local unit]'s CREO to obtain approval." *Id.* at 10. As outlined above, there are three paths that may bring a siting case before the Commission even if an affected local unit notifies a developer

that it has a CREO and the developer files with the affected local unit first. Appellants' statement, and added emphasis, fail to recognize these explicit exceptions.

In their Statement of Facts, Appellants also comment on Section 223(5) of Act 233 which states that "[i]f the Commission approves an applicant for a certificate submitted under subsection (3)(c), the local unit of government is considered to no longer have a compatible renewable energy ordinance, unless the commission finds that the local unit of government's denial of the application was reasonably related to the applicant's failure to provide information required by subsection (3)(a)." MCL 460.1223(5). Appellants argue that "once the [Commission] approves a certificate, in most situations the [affected local unit] is forever cut out of the decision-making process involving qualifying projects." (Appellants' Brief in Support, p 14.) This statement is incomplete and misleading. It fails to attribute post-certificate consequences to Section 223(5) and to acknowledge that facilities can continue to be sited outside of the PA 233 context. (*See* Appellants' Brief in Support, p 9, n 5.) It also fails to acknowledge the Commission's October 10 Order makes no attempt to undermine an affected local unit's authority to amend its ordinances and that any project could be constructed through the local siting process, regardless of the ordinance's CREO status.

While Act 233 does permit the Commission to place construction-related conditions on a certificate, (MPSC Case No. U-21547, 10/10/2024 Order, p 63, F# 0025,) it "does not exempt an electric provider or IPP from obtaining any other

permit, license, or permission to engage in the construction or operation of an energy facility that is required by federal law, any other state law or rule, or a local ordinance." (*Id.* at 64 (citing MCL 460.1231(5).) Appellants' broad statement is neither complete nor grounded in the statutory language of Act 233. The Commission will address the arguments related to these topics below.

C. The Commission provided application filing instructions and procedures.

Act 233 granted the Commission authorities which Appellants failed to include in a complete manner in their Statement of Facts. (*See* Appellants' Brief in Support, p 15.) Act 233 states that "the commission has only those powers and duties granted to the commission under this part." MCL 460.1230(1). Appellants state that Act 233 gives the Commission only specific powers as outlined in their Statement of Facts. The Commission agrees.

However, Appellants provided an abbreviated list of the duties assigned to the Commission that does not fully capture the extent of the Commission's powers. Most notably for the purposes of this motion, Section 224(1) explicitly grants the Commission the power to establish application filing requirements "**by commission rule or order to maintain consistency between applications**." MCL 460.1224(1) (emphasis added).

As stated in Appellants' Brief in Support, on February 8, 2024, the Commission opened a docket on its own motion (February 8th Order) to implement Act 233. In its February 8th Order, the Commission directed the Michigan Public

Service Commission Staff to "file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in this docket by June 21, 2024." (MPSC Case No. U-21547, 2/8/2024 Order, p 3, F# 0001.)

As the Commission-adopted Filing Instructions and Procedures state "[t]hese instructions have been developed to assist the applicant with the entire process associated with obtaining and complying with a Certificate." (MPSC Case No. U-21547, 10/21/2024 Errata, p 1, F# 0026.) Act 233 grants the Commission authority to establish application filing requirements by order.

Appellants state that "the PSC drafted application instructions and procedures, and a public comment process proceeded as outlined in the February 8 Order." (Appellants' Brief in Support, p 17.) The Commission speaks through its orders. *In re Mich Gas Utils Corp per Order U-14292*, unpublished per curiam opinion of the Court of Appeals, issued Jan 24, 2013 (Docket No. 301103), p 9 ("The principle that a court speaks through its orders, *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987), applies as well to the PSC.") (Attached as Appendix A to this Answer.)[4] The draft application instructions and procedures put forth for public comment were drafted by Michigan Public Service Commission Staff. (MPSC Case No. U-21547, 10/10/2024 Order, pp 2–4, F# 0025.) The Commission corrects

[4] The Commission cites this unpublished, and therefore non-binding, opinion for the limited purpose of demonstrating a prior instance in which this Court has recognized the accepted principle that the Commission speaks through its orders. The Commission is not aware of a published opinion addressing this principle.

Appellants' Statement of Facts to the extent it implies the Commission, and not Staff, prepared the draft version or engaged in the public comment process.

ARGUMENT

I. Appellants' motion, which seeks to stay the Commission's October 10th Order pending this appeal, is improper under MCR 7.209.

Rule 7.209(A)(2) of the Michigan Court Rules states that a motion for "a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court." MCR 7.209(A)(2). Appellants' Motion for Preliminary Injunction, in effect, seeks to stay the Commission's October 10th Order with respect to the challenged interpretations. (Appellants' Brief in Support, p 35 ("Appellants respectfully request that the Court issue an order preliminarily enjoining the enforcement of the PSC's October 10, 2024 Order while this Appeal remains pending.")) The Court has described Appellants' motion as a motion for a stay on its Case Information page. One Court of Justice, *COA 373259 Case Information*, https://www.courts.michigan.gov/c/courts/coa/case/373259 (last visited on Nov 30, 2024).

Because Appellants have not filed a motion to stay the October 10 Order with the Commission, moved to waive the requirements of MCR 7.209(A)(2), or otherwise demonstrated why this rule should not be applied, their motion should be denied.

II. Even if Appellants' motion was procedurally proper, this Court should deny Appellants' Motion for Preliminary Injunction because it cannot satisfy the standard for granting such relief.

A. Standard of Review

The standard for a preliminary injunction requires the moving party to justify relief under a four-part analysis: (1) whether the moving party will face irreparable harm; (2) whether the moving party is likely to prevail on the merits; (3) whether the harm to the moving party, if any, outweighs the harm it would cause to the adverse party; and (4) whether there will be harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n, IAFF Loc 344 v City of Detroit*, 482 Mich 18, 34 (2008); *State Emps Ass'n v Dep't of Mental Health*, 421 Mich 152, 158 (1984).

The Michigan Supreme Court has also explained that "[t]his inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant," *State Emps Ass'n*, 421 Mich at 158, and that "[i]njunctive relief is an extraordinary remedy that issues only when justice requires." *Pontiac Fire Fighters Union Loc 376 v City of Pontiac*, 482 Mich 1, 8 (2008) (quoting *Kernen v Homestead Dev Co*, 232 Mich App 503, 509 (1998)). The moving party bears the burden of proving that these elements favor issuance of a preliminary injunction. *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 648 (2012).

B. Appellants failed to establish any of the four elements in support of issuing a preliminary injunction in this case.

Fatal not only to Appellants' motion, but also their underlying appeal, is the fact that this case presents, at most, a hypothetical injury to the various appellants. Act 233 was neither in effect on November 8, 2024, nor November 22, 2024, the dates the appeal and Appellants' Motion for Preliminary Injunction were respectively filed. (*See* Appellants' Brief in Support, p 19 ("PA 233 takes effect on November 29, 2024.").) As such, no application for a certificate pursuant to Act 233 had been filed. To this date, no Appellant can point to an application for a siting certificate filed under Act 233. There are none. This lack of actual injury weighs against Appellants for three of the four preliminary injunction factors. Appellants cannot demonstrate any actual harm caused by an interpretation of such law, let alone one that is irreparable. Nor can Appellants demonstrate that any such harm outweighs the harm to the Commission or the public interest. Yet, the Commission and the public interest will suffer real harms if a preliminary injunction is granted. In addition, and as shown below, Appellants have failed to demonstrate that they are likely to prevail on the merits of the underlying appeal. Because Appellants have failed to demonstrate that relief is warranted under any of the four factors, the Commission requests this Court deny the Appellants' Motion for Preliminary Injunction.

1. Appellants cannot demonstrate any irreparable harm in this case.

Appellants cannot demonstrate that failure to issue a preliminary injunction presents any harm to the individual Appellants, let alone that such harm is irreparable. For this reason alone, their request for a preliminary injunction should be denied.

A moving party seeking a preliminary injunction must make a threshold showing that it will suffer irreparable harm absent the injunction. *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8–9; *Michigan Coal of State Emp Unions v Michigan Civ Serv Comm'n*, 465 Mich 212, 213 (2001). The Michigan Supreme Court has described this as "an indispensable requirement to obtain a preliminary injunction," *Michigan Coal of State Emp Unions*, 465 Mich at 225–226, and this Court has recognized that other factors of the preliminary injunction analysis need not be considered unless the movant can establish irreparable harm. *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148–149, 155 (2011) ("While we conclude that the lack of evidence of a particularized injury alone provides support for defendant's argument that the preliminary injunction should be reversed, we also find merit to defendant's challenges to other relevant factors."); *see also Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8–13; *see also Michigan Coal of State Emp Unions*, 465 Mich at 213.

To satisfy this necessary condition, the moving party must make a "particularized showing of irreparable harm." *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8–9. Such injuries must be "both certain and great" and must be based

on actual injuries rather than theoretical ones. *Slis v State*, 332 Mich App 312, 361 (2020) (quoting *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998)). It is not necessary that the injury has already occurred, but the moving party must show that it will suffer the irreparable harm without the injunction. *Michigan Coal of State Emp Unions*, 465 Mich at 228.[5] As the Michigan Supreme Court has explained, "[t]he mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 9. Moreover, this Court has explained that "[e]conomic injuries are not irreparable because they can be remedied by damages at law." *Slis*, 332 Mich App at 361 (quoting *Thermatool Corp*, 227 Mich App at 377).

An irreparable injury does not exist, and a preliminary injunction should not be issued, when an adequate legal remedy is available to the moving party. *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8. In this way, the court considers a

[5] The Commission notes that, in cases addressing ratemaking in which "it was asserted that the commission had erred in making factual determinations in setting rates" and in which a preliminary injunction was sought, the Michigan Supreme Court has stated "the circuit court must find probable cause to believe that the commission had erred in setting rates and must be able to state with 'preliminary certainty' how the commission had erred. A temporary injunction may not issue unless there is a clear showing of irreparable harm and of likelihood of prevailing on the merits." *Consumers Power Co v Michigan Pub Serv Comm'n*, 415 Mich 134, 153 (1982); *see also Michigan Consol Gas Co v Michigan Pub Serv Comm'n,* 389 Mich 624, 640 (1973)). Those cases also noted the prohibition on retroactive ratemaking that would prevent the issuance of a refund of "money properly collected under a prior commission order," which complicates the ability to remedy an erroneous ratemaking decision. *Consumers Power Co*, 415 Mich at 144, n 1; *Michigan Consol Gas Co,* 389 Mich at 640. The immediate case is not an appeal from a Commission order setting rates and, therefore, does not implicate the retroactive ratemaking doctrine.

motion for a preliminary injunction in light of the circumstances affecting, and alternatives available to, the moving party. *Michigan AFSCME Council 25*, 293 Mich App at 148–149. It is the moving party's responsibility to show that these circumstances "demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Slis*, 332 Mich App at 361 (quoting *Thermatool Corp*, 227 Mich App at 377).

Here, Appellants seek injunctive relief from a Commission order providing "guidance on the implementation of Act 233." (MPSC Case No. U-21547, 10/10/2024 Order, p 4, F# 0025.) At this time, there have been no applications for certificates filed pursuant to Act 233. None of the Appellants know whether an application impacting their respective jurisdictions will be filed under Act 233 or how the Commission's October 10 Order will impact any such application. Put simply, the harms alleged by Appellants are hypothetical. Appellants have not presented a particularized showing of irreparable harm. At this stage, any harm Appellants allege amounts to mere apprehension of potential injury in the future that could only come to pass if an application impacting a particular Appellant is filed, if at all.

Assuming actual harm was demonstratable at this stage, Appellants' motion would still not satisfy their burden to demonstrate irreparable harm. There are alternative legal remedies available if an application is, in fact, filed that impacts an Appellant. Under Act 233, the Commission must evaluate all applications through a contested case pursuant to the Public Act 306 of 1969, the Administrative

Procedures Act (APA). MCL 460.1226(3). Act 233 specifies certain interested parties' ability to intervene in the contested cases, *Id.*, and the APA, applicable statutes, and the relevant Administrative Hearing Rules establish the administrative and legal processes. MCL 24.201, *et seq*., MCL 462.26; Mich Admin Code R 792.10101–792.10137, 792.10401–792.10448. In short, there exists a robust legal framework to challenge and appeal Commission determinations stemming from contested cases. *See* MCL 24.281 (opportunity to file exceptions to a proposal for decision); MCL 24.287 (opportunity to requests for rehearing); MCL 24.301 (opportunity for judicial review of administrative decisions); MCL 24.304(1) (opportunity to request a stay); MCL 462.26 (opportunity to file certain appeals of Commission decisions by right to Court of Appeal). Until a case exists and an actual injury is presented, a motion for preliminary injunction, as well as this appeal in general, is premature.

While Appellants purport to address the irreparable nature of the alleged harm, they do so largely with conclusory statements. The analysis also appears to take issue with certain features of Act 233 itself, rather than the October 10th Order, and fails to adequately discuss alternative remedies available to a local unit of government if an application is actually filed for a project in an affected local unit.

Appellants claim:

> The impending harm is not speculative: several Appellants have been approached by developers who intend to place such facilities in Appellants' jurisdictions or are already in the process of applying for zoning approval from Appellants with the underlying threat to apply

> the PSC under the October 10 Order. [Appellants' Brief in Support, p 30.]

Appellants go on to describe one potential wind energy facility in Fremont Township that was denied siting at the local level because it violated the noise restrictions of the Township's zoning ordinance. (*Id.* at 31.) Appellants claim:

> Now, under the Order's limited definition of a "CREO," on November 29, the developer could start the [Act] 233 process and send the required offer to meet with the chief elected official of the [affected local units] and attempt to bypass altogether the regulatory framework established by the Township under [Act] 233. [*Id.*]

This describes the apprehension of an uncertain future injury contingent on future events, which is not an appropriate basis for preliminary injunction. This is not to say that Fremont Township may never have the opportunity to present these arguments. It is merely that an assertion of an irreparable harm before an application is filed pursuant to Act 233 is premature and inconsistent with the preliminary injunction standard.

Regarding the specific example described above and in Appellants' Brief in Support, Fremont Township, individually, may have an opportunity to present these arguments when a particularized showing of a great and certain harm can be made. This is because there are, in fact, alternative and adequate legal remedies available to the Township in that instance. As discussed above, the contested case process includes a legal framework to challenge and appeal Commission determinations. However, Appellants do not address these alternative remedies, despite their importance in the preliminary injunction jurisprudence. The most extensive examination of these alternatives appears to be the blanket statement

that "once the PSC approves a project that, under the plain language of [Act] 233, should have gone through Appellants for approval, a future invalidation of the Order through this Appeal or otherwise would be too late." (Appellants' Brief in Support, p 33.) Presumably the word "otherwise" here is meant to encompass all of the rights and procedures to contest and appeal Commission determinations if an actual application is filed. *See* MCL 24.281, 287, 301, 304(1); MCL 462.26. However, it is unclear because Appellants' Brief in Support does not specifically acknowledge any of those rights and procedures.

Appellants go on to claim that once a certificate is issued, a developer could begin construction and vest their interest in the land use. (Appellants' Brief in Support, p 33.) Appellants provide no explanation for why a motion for preliminary injunction, like the one filed in this case, only with the potential ability to identify and address a particularized and alleged harm, could not prevent such an occurrence. Appellants failure to address the alternative adequate remedies is a fatal flaw in their claim of irreparable harm.

Demonstrating an irreparable harm is a fundamental and necessary showing if a movant is to be successful in obtaining a preliminary injunction. Appellants have not demonstrated an irreparable harm here. Given that no applications have been filed under Act 233, Appellants cannot make a particularized showing of a harm that is both certain and great. Furthermore, there are adequate alternative remedies available that Appellants have failed to address, yet which preclude the

extraordinary remedy they seek. Without a particularized showing of irreparable harm, this Court should deny Appellants' Motion for Preliminary Injunction.

2. Appellants are unlikely to prevail on the merits of this case.

In order to be granted a preliminary injunction, the moving party must demonstrate that it not only can prevail on the merits of the case, but that it will likely do so. *State Emps Ass'n*, 421 Mich at 157–158. This does not require the moving party's rights to be "clearly established" or that the court find the moving party is entitled to ultimately prevail, but due to the extraordinary nature of a preliminary injunction, the burden is on the moving party to demonstrate a likelihood that it will succeed in the underlying case. *Niedzialek v Journeymen Barbers, Hairdressers & Cosmetologists' Int'l Union of Am, Loc No 552 (A.F.L.)*, 331 Mich 296, 301–302 (1951); *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859 (2006). The Michigan Supreme Court has indicated that failure to meet this burden is grounds for denying a motion for preliminary injunction. *See Northern Warehousing, Inc*, 475 Mich 859; *Scott v Michigan Dir of Elections*, 490 Mich 888 (2011); *contra Johnson v Michigan Minority Purchasing Council,* 341 Mich App 1, 25 (2022) (affirming a preliminary injunction where most of plaintiff's claims are unlikely to prevail out of deference to the Circuit Court's grant of this extraordinary remedy.)

a. Appellants are unlikely to prevail on the merits of any of their claims because this case is not yet ripe for adjudication.

Appellants' claims are not yet ripe for review. This Court has explained that "[t]he doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *King v Michigan State Police Dept*, 303 Mich App 162, 188 (2013) (quoting *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615 (2008)). If a claim is premised on contingent future events, it is not ripe for appellate review. *Id.* For this reason, the timing of an appeal is the primary focus of a ripeness review. *City of Huntington Woods*, 279 Mich App at 616.[6]

This Court has further explained that the ripeness analysis asks whether a claim is sufficiently mature to warrant judicial intervention. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich App 207, 218 (2018), rev'd on other grounds, 505 Mich 97 (2020). The Court explained that it must "balance any uncertainty about whether a party will actually suffer future injury against the potential hardship of denying anticipatory relief" in making that assessment." *Id. 218.* At the same time, the ripeness doctrine still requires "that an actual injury be

[6] Since 2010, the Michigan Supreme Court opted for a more "limited, prudential approach" to standing. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 353 (2010). The dissent in *Lansing Sch Educ Ass'n* questioned whether the case would undermine the related mootness and ripeness doctrines. *Id.* at 460 (Corrigan, J., dissenting, joined by Young and Markman, JJ.). Yet, the Commission is aware of no case undermining or invalidating the ripeness doctrine on this basis, and this Court has continued to cite cases such as *City of Huntington Woods* to evaluate the ripeness doctrine. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich at 217.

sustained." *Id.* at 217. In *In re Reliability Plans of Elec Utilities for 2017-2021*, this Court rejected arguments from the Commission that a claim challenging an order regarding a local clearing requirement (a requirement on all electric providers to obtain a certain amount of their capacity within a certain geographical area)[7] was not yet ripe until the Commission actually imposed the local clearing requirement. *Id.* Contrary to the Commission's arguments, the Court found that the Commission had done more than merely announcing it had authority to implement a local clearing requirement on certain electric suppliers. It found that the Commission had announced its decision to assert that authority. *Id.* at 218–219. In other words, the Commission had decided to impose an affirmative obligation on the electric providers. The Court explained that it would find the issue ripe "when it is a 'threshold determination,' the resolution of which is not dependent on any further decision by the [Commission]." *Id.* at 218.

At the time of filing the instant appeal, no injury had occurred yet. The underlying law was not effective until November 29, 2024. (MPSC Case No. U-21547, 10/10/2024 Order, p 1, F# 0025; Appellants' Brief in Support, p 19.) As such, there were no applications for energy facility certificates filed at the time of this appeal, and no such applications have been filed even at this time. Nothing in Act 233 prohibits the continued siting of energy facility projects through the local

[7] MCL 460.6w(12)(d) ("'Local clearing requirement' means the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)."

process, MCL 460.1221, *et seq*., and Act 233 explicitly contemplates the continued processing of project applications at the local level even after the effective date of Act 233. MCL 460.1223(3); (*see also* Appellants' Brief in Support, p 9, n 5.) None of the Appellants, therefore, can be certain that an energy facility application will be submitted to the Commission for a project located within their jurisdiction, let alone that they will be injured by the guidance issued in the Commission's October 10th Order.

Because none of the Appellants can demonstrate an actual injury, this appeal is one that seeks adjudication of a hypothetical claim that is contingent on several future events, not least of which is the filing of an application at the Commission for a project impacting the specific Appellants. This is not to say that none of the Appellants will eventually have an opportunity to present their arguments against the interpretations in the Commission's October 10 Order. As discussed above, the procedures governing the contested cases that will accompany any application provide for a robust opportunity to do so. Yet, as this Court has explained, the timing of a claim should be the primary focus of a ripeness analysis, and it is simply not time for this Court to evaluate these arguments.

These ripeness deficiencies are distinguishable from those raised by the Commission in the local clearing requirement case described above. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich App at 217–220. While one might argue that the Commission has declared its intent on how it plans to administer the applicable statutes in both cases, there are crucial distinctions. The

local clearing requirement is one that applied to all relevant providers. No matter the specific circumstances surrounding an individual provider, the provider would be subject to the requirement if it provided service to Michigan customers. In the instant case, the Commission certificate process is optional, not mandatory. MCL 460.1222(2). Furthermore, the Commission's local clearing requirement decision asserted that it would impose an affirmative obligation on electric providers. Here, Appellants' challenge the Commission's lawful interpretation of a statute it is obligated to administer. (*See* Section III.B.2.b.i of this Answer.) None of these interpretations, on their own, impose an affirmative obligation.

Because this appeal is premised on hypothetical claims contingent on future events, it is not ripe for judicial review. This Court should not be made to decide these issues before an actual injury has been sustained. This flaw in Appellants' case demonstrates that they are unlikely to prevail on the merits. Therefore, the requested preliminary injunction should be denied.

b. Appellants are unlikely to prevail on their claim that the Commission exceeded its authority to interpret Act 233.

Commission interpretation of the statutes it administers is a routine aspect of the Commission's responsibilities. *See In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93 (2008); *Att'y Gen v Michigan Pub Serv Comm'n,* 206 Mich App 290, 298 (1994). The Commission's authority to make these interpretations is not controversial. *In re Reliability Plans of Elec Utils For 2017-2021*, 505 Mich 97, 119 (2020) ("The MPSC has the authority to interpret the

statutes it administers and enforces."). The standard of review for such interpretation or construction, which Appellants themselves articulate, also recognizes the Commission has a role to play in statutory interpretation. (Appellants' Brief in Support, pp 22–23); *In re Michigan Consol. Gas Co to Increase Rates Application*, 293 Mich App 360, 365 (2011) ("A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference."). While this standard is less deferential than the one this Court gives to the Commission's administrative expertise, *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich App 204, 211 (2015), the standard nonetheless recognizes the Commission's authority to make such interpretations and even grants those interpretations respectful consideration.

As the Michigan Supreme Court has recognized, although courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation, courts give "respectful consideration" to an administrative agency's interpretation of a statute that it administers, and courts do not overturn that interpretation without "cogent reasons." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich at 103. In fact, as long as an agency's "interpretation does not conflict with the Legislature's intent as expressed in the language of the statute at issue, there are no such cogent reasons to overrule it." *Younkin v Zimmer*, 497 Mich 7, 10 (2014) (citation and quotation marks omitted).

This Court has a history of affirming Commission orders in recognition of the Commission's administrative expertise. *See Attorney Gen v Michigan Pub Serv Comm'n*, 249 Mich App 424, 433 (2002). It has also made clear that the burden is significant for a party challenging the Commission's statutory interpretations. *Id.* ("[G]iven our historically deferential treatment of MPSC rulings, appellants have failed to overcome the heavy burden of demonstrating by clear and satisfactory evidence that the challenged dismissal orders were unlawful or unreasonable."). Appellants appear to acknowledge this heavy burden. (Appellants' Brief in Support, pp 22–23.)

Any statutory interpretation must center on ascertaining the legislative intent of the statute. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156 (2011). One can hardly dispute or overstate the importance of the plain language in this endeavor. *See Wilmore-Moody v Zakir*, 511 Mich 76, 82 (2023). The plain language constitutes the "most reliable evidence of that intent." *Id.* (quoting *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 410 (2022). One must first review the statutory language itself, giving the words therein the statutorily defined meaning or their ordinary meaning when no such definition exists. *Krohn*, 490 Mich at 156. The ordinary meaning of words should consider the context in which they are used and can be informed by dictionary definitions. *Id.*

Appellants' claim the Commission redefined key terms and concepts in violation of Act 233's clear intent and that Act 233 provides the Commission no authority to do so. (Motion for Preliminary Injunction, ¶ 5; Appellants' Brief in

Support, pp 28–29.) Not only does this argument mischaracterize routine statutory interpretation as redefinition, but it also appears to ignore the Commission's well-established ability and obligation to interpret the statutes it administers. Appellants' attempts to frame what are, in fact, interpretations entitled to respectful consideration as attempts to "redefine" and "rewrite" the statute lack support and are not likely to prevail on the merits. Not only are the Commission's interpretations consistent with the rules for statutory interpretation, but Appellants' arguments are even less likely to prevail when considering the respectful consideration this Court will give to the Commission's interpretations.

i. Appellants are unlikely to succeed on the merits of their claim that the Commission impermissibly provided guidance without engaging rulemaking procedures under the APA.

Appellants are unlikely to prevail on their claim that the Commission impermissibly provided guidance without engaging in the rulemaking process under the APA. The Commission acted well within its authority under Section 7(h) of the APA to provide interpretive statements, guidelines, and explanatory materials through its October 10th Order. MCL 24.207(h). It also acted within its statutory authority pursuant to Section 7(j) of the APA and Section 224(1) of Act 233 by adopting its Application Filing Instructions and Procedures.

Rules developed under the APA do not include interpretive statements, guidelines, or explanatory materials.

The Commission agrees with Appellants' contention that an agency is generally obligated to employ formal rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority" but rather, "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 404 (1998); (*see also* Appellants' Brief in Support, p 20.) The Commission also agrees that under the APA, a rule is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207; (*see also* Appellants' Brief in Support, p 21.) Yet, none of these principles solely validate Appellants' arguments that the Commission must engage in APA rulemaking to implement the provisions of Act 233.

"An executive agency's power derives from statute. Yet an agency has the authority to interpret the statutes it administers and enforces." *O'Halloran v Sec'y of State*, ____ Mich ____ (2024) (Docket Nos. 166424 and 166425), slip op at 8 (internal citations omitted) (Attached as Appendix B to this Answer). The Michigan Supreme Court has confirmed this authority with respect to the Commission explicitly. *See In re Reliability Plans of Elec. Utils. For 2017-2021*, 505 Mich 97, 119

("The MPSC has the authority to interpret the statutes it administers and enforces.")

Appellants' arguments recognize one exception to the rulemaking process under the APA, for "[a] determination, decision, or order in a contested case." MCL 24.207(f). The Commission does not claim here that the October 10 Order arose from a contested case. The Commission docketed Case No. U-21547 on its own motion. (MPSC Case No. U-21547, 2/8/2024 Order, pp 1–3, F# 0001.) The case did not involve any named party or disputed set of facts. Michigan Public Service Commission Case No. U-21547 was neither established nor conducted as a contested case proceeding. (*Id.*)

However, Appellants' Brief in Support fails to address, or even mention, any of the other enumerated exceptions to the rulemaking process. In particular, Appellants omit the language of the APA stating that rules do not include any of the following: "[a] form with instructions, an interpretive statement, a guideline . . . or other material that itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h).

The Michigan Supreme Court and this Court have provided guidance on what constitutes an interpretive statement in comparison to a rule that must be promulgated under the APA. The Michigan Supreme Court has recently stated that "[a]n interpretive statement, for instance, in itself lacks the force and effect of law because it is the underlying statute that determines how an entity must act, i.e., that alters rights or imposes obligations." *Mich Farm Bureau v Dep't of Env't, Great*

Lakes, & Energy, ____ Mich ____ (2024) (Docket No. 165166); slip op at 13 (citing *Clonlara, Inc v State Bd of Ed,* 442 Mich 230 (1993)) (Attached as Appendix C to this Answer). Here, Act 233 determines that an application submitted under Part 8 of Act 233 must comply with the statutory requirements outlined therein. The Commission's interpretative statements regarding the terms of Act 233 do not impose obligations on affected local units, electric providers, or IPPs. Nor do they bind an administrative law judge to sanction an entity in an enforcement action or a court in judicial review. *Mich Farm Bureau*, slip op at 13.

The Michigan Supreme Court articulated that "statements explaining how an agency plans to exercise a discretionary power are usually considered to lack the force and effect of law" and "statements announcing a policy the agency plans to establish in future adjudications generally lack the force and effect of law." *Id. a*t 14.

The Court of Appeals has rejected the argument that a "policy constituted a rule because it altered the status quo and substantially affected the rights of the general public." *Faircloth*, 232 Mich App at 403. The Court of Appeals has further stated that "where an agency policy interprets or explains a statute or rule, the agency need not promulgate it as a rule even if it has a substantial effect on the rights of a class of people because an interpretive statement is not, by definition, a rule under the APA." *Id.*at 404 (citing *Michigan Farm Bureau v Bureau of Workman's Compensation, Dep't of Labor*, 408 Mich 141, 148 (1980)).

In the case at hand, a rulemaking proceeding was unnecessary with respect to the Commission's interpretations of the terms "CREO", "affected local unit", and "hybrid facility," as the Commission was not developing a regulation or policy with the force of law. Even if the interpretive statements provided by the Commission altered the status quo or affected the rights of a class of people, they are explicitly excluded from the definition of a rule under the APA. It would have been inappropriate for the Commission to file a request for rulemaking with the Michigan Office of Hearings and Rules for these interpretations, as rules developed under the APA do not include interpretive statements, guidelines, or explanatory materials. For the reasons outlined above, the Appellants are unlikely to succeed on the merits of their argument that the Commission impermissibly provided interpretive statements without engaging in rulemaking procedures under the APA.

The Commission was expressly authorized to establish filing requirements in an order by Act 233.

As stated by Appellants, the Michigan Court of Appeals has explained that "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *In re Pub Serv Comm'n for Transactions Between Affiliates,* 252 Mich App 254, 263(2002). Yet, the Appellants failed to acknowledge in any capacity in their Brief in Support that rules, as defined by the APA do not include 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(j).

Act 233 authorized the Commission to establish application filing requirements by order. Specifically, Section 224(1) of Act 233 states "[a] site plan required under section 223 or 225 shall meet application filing requirements established by commission rule or order to maintain consistency between applications." MCL 460.1224(1). Act 233 provides the permissive statutory power for the Commission to provide filing requirements by either rule or order. The Commission's decision to exercise its permissive statutory power to develop application filing requirements by order is addressed in the APA.

The Court of Appeals has provided that when a statute directly and explicitly authorizes the Commission to implement the law, either by rule or order, and the Commission is acting under an exercise of permissive statutory authority, it is exempted from formal adoption and promulgation under the APA. *Michigan Trucking Ass'n v Michigan PSC*, 225 Mich App 424, 430 (1997).

Act 233 provided authority for the Commission to establish application filing requirements by order. The Commission was expressly authorized by statute to establish application filing requirements by order. Any argument by Appellants to the contrary is unlike to succeed on the merits.

ii. Appellants are unlikely to prevail in their challenge to the Commission's interpretation of the term "CREO".

The Commission's interpretation of the term "CREO" is consistent with the statutory language. The statute defines the term CREO as follows:

> [A]n 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). A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction. [MCL 460.1221(f).]

Contrary to Appellants' assertion that the Commission "redefined" this term, (Appellants' Brief in Support, p 28,) the Commission plainly relied on and interpreted this term consistent with the statutory definition. (MPSC Case No. U-21547, 10/10/2024 Order, pp 12, 17–18, F# 0025.)

The Commission recognized that the statute requires a CREO be "no more restrictive than the provisions included in section 226(8)." (*Id*. at 12, 18 (quoting MCL 460.1221(f)).) The term "restrictive" is not defined in the statute. Merriam-Webster defines "restrictive," in part, as "of or relating to restriction" or "serving or tending to restrict." "Restrictive," Merriam-Webster, https://www.merriam-webster.com/dictionary/restrictive (last visited Nov 30, 2024). The word "restriction" is further defined, in part, as "something that restricts: such as . . . a regulation that restricts or restrains." "Restriction," Merriam-Webster, https://www.merriam-webster.com/dictionary/restriction (last visited Nov 30, 2024). The word "restrict" is further defined as "to confine within bounds" or "to place under restrictions as to

use or distribution." Restrict," Merriam-Webster, https://www.merriam-webster.com/dictionary/restrict (last visited Nov 30, 2024).[8]

The plain meaning of the CREO definition, therefore, is an ordinance that does not impose restraining regulations or limitations on proposed energy facilities in addition to those found in MCL 460.1226(8). In other words, additional restrictions to those specified in MCL 460.1226(8) are inherently "more restrictive." This plain meaning is consistent with the Commission's determination.

The Commission relied on the plain language of the CREO statutory definition, but it also noted that Act 233 provides further support that the Commission's interpretation achieves the ultimate goal of statutory interpretation, which is that it is consistent with the legislative intent. (MPSC Case No. U-21547, 10/10/2024 Order, pp 17–18, F# 0025.) As discussed above, there are three instances when an application may come before the Commission after being assessed by an affected local unit claiming to have a CREO. MCL 460.1223(3)(c)(ii)–(iii). Of particular note for the Commission's CREO interpretation are the instances when an application may be filed with the Commission if: 1) "[t]he application complies with the requirements of section 226(8), but an affected local unit denies the application" or 2) if an affected local

[8] These definitions are consistent with those in other sources. Webster's New International Dictionary defines "restrictive," in part, as "serving or tending to restrict." *Webster's New International Dictionary, Second Unabridged Edition* (1966). The word "restriction" is further defined, in part, as "that which restricts; a limitation; a qualification; a regulation which restricts or restrains." *Id.* The word "restrict" is further defined as "[t]o restrain within bounds; to limit; to confine" and "to limit the free use of land." *Id.*

unit amends its zoning ordinance after notifying the project developer that it has a CREO such that "the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in section 226(8)."[9] MCL 460.1223(3)(c)(ii), (iii). Both of these provisions demonstrate the Legislature's intent that applications filed pursuant to a CREO should only be evaluated based on those requirements identified in MCL 460.1226(8) and no additional requirements.

Appellants' Brief in Support does not attempt to refute, or even address, these explanations from the Commission's October 10th Order. Nor does Appellants' Brief in Support contain a meaningful discussion or analysis of the statutory definition of a CREO in MCL 460.1221(f). Appellants primarily rely on broad statements and arguments that "[t]he language of the statute as a whole and of § 226(8), in particular, demonstrates the Legislature's intent that CREOs may contain additional, but not more restrictive, regulations." (Appellants' Brief in Support, pp 27–28.) However, examination of these arguments reveals that the statute, as a whole, supports the Commission's interpretation.

Appellants point to the fact that MCL 460.1226(8) specifies what constitutes "an unreasonable [threat] to public health or safety" and that MCL 460.1223(3)(a) requires information in addition to the requirements of MCL 460.1226(8) in an application to an affected local unit. (Appellants' Brief in Support, p 28.) Based on

[9] An application may also be filed at the Commission in this instance if the affected local unit fails to timely approve or deny and application. MCL 460.1223(3)(c)(i).

these provisions, Appellants claim the Commission's interpretation is illogical because it would preclude an affected local unit from rejecting an application based on this additional information. (*Id.*) Appellants' Brief in Support fails to acknowledge several statutory provisions that undermine this argument.

The fact that the Legislature ensured that an applicant would give the affected local unit additional information regarding a proposed project does not undermine the plain meaning of the CREO definition in MCL 460.1221(f). It is not illogical that this information might be important to the affected local unit, especially in light of Act 233's other transparency-focused provisions. *See* MCL 460.1223; MCL 460.1226(2). Second, the fact that MCL 460.1226(8) details what is an unreasonable risk to public health or safety does nothing to establish that the Legislature did not intend for these to be the bounds of a CREO. Finally, this argument fails to recognize that the statute explicitly and unambiguously states that a developer can bring any application that meets the requirements of MCL 460.1226(8) before the Commission if denied by an affected local unit. MCL 460.1223(3)(c)(ii).

Despite Appellants' claims to the contrary, it is in fact their argument that is illogical. As discussed above, the Commission recognized that the statute clearly states a developer can bring any application complying with the restrictions of MCL 460.1226(8) to the Commission if denied by the affected local unit. (MPSC Case No. U-21547, 10/10/2024 Order, pp 17–18, F# 0025 (citing MCL 460.1223(3)(c)(ii)).) Pursuant to Appellants' interpretation, an affected local unit could institute

additional restrictions other than those articulated in MCL 460.1226(8), deny the application pursuant to such additional restrictions, and then the developer could still apply to the Commission for approval where it would no longer be subject to such additional restrictions. Furthermore, if the Commission approved the application, the affected local unit would be "considered to no longer have a [CREO]," as long as the affected local unit denial was not premised on incompleteness. MCL 460.1223(5). This absurd result, together with the plain language of MCL 460.1221(f) and the other provisions discussed in the Commission's order, demonstrate that the Legislature intended to limit the term "CREO" consistent with the Commission's interpretation.

Appellants point to *DeRuiter v Byron Twp* in an attempt to support their assertion that the Commission cannot "redefine" the term CREO. (Appellants' Brief in Support, pp 28–29.) Yet, they fail to note that *DeRuiter* explicitly dealt with the concept of implied conflict preemption of local authority. *DeRuiter v Twp of Byron*, 505 Mich 130, 140 (2020). In that case, the Court decided whether a local zoning ordinance conflicted with the provisions of the Michigan Medical Marihuana Act and was, thereby, implicitly preempted. *Id.* at 134–135, 140. While the Court addressed a provision of the statute prohibiting penalization of patients and primary caregivers in compliance with the Michigan Medical Marihuana Act, it did not deal with any provision analogous to MCL 460.1221(f) stating that local ordinances could be "no more restrictive" than the state statute. *Id.* at 138.

The present case is wholly distinguishable from *DeRuiter*. First, there is no preemption at issue in this case. Nothing in Act 233 or the Commission's October 10th Order preempts affected local units from enacting ordinances that do not constitute a CREO. The October 10 Order instead provides guidance regarding the interpretation of when those ordinances meet the statutory definition of a CREO. (MPSC Case No. U-21547, 10/10/2024 Order, pp 12, 17–18, F# 0025.) Furthermore, to the extent the concept of preemption could be informative for this case, an implied preemption case like *DeRuiter* would certainly not be the appropriate case to look to. Here, the statute explicitly states that a CREO may be "no more restrictive than the provisions included in section 226(8)." MCL 460.1221(f).

Appellants also seek to rely on *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148 (1999) to argue that the Commission impermissibly relied on public policy reasons to "redefine" key terms in the statute, including CREO. (Appellants' Brief in Support, p 26.) This argument is again presented without examining the actual analysis presented in the October 10th Order and discussed throughout this Answer. More importantly, Appellants' reliance on this case is misplaced. First, *Consumers Power Co* addresses the Commission's authority to compel a regulated utility to provide a specific service. *Consumers Power Co*, 460 Mich at 132. The holding does nothing to question the Commission's authority to interpret the statutes it is obligated to administer. Second, unlike the arguments addressed in *Consumers Power Co*, the interpretations challenged in the instant case are not premised on their economic or public policy merits. *Id.* at 131. As a reading of the

October 10th order clearly demonstrates, the interpretations are premised on the statutory language and sound principles of statutory construction.

Appellants have failed to meet their burden to establish that they are likely to prevail on the merits of their CREO arguments. The Commission clearly and thoroughly articulated why its interpretation is consistent with the plain language of the statute. Appellants failed to fully engage with that explanation, let alone show their ability to successfully demonstrate that it was unlawful or unreasonable.

iii. Appellants are unlikely to prevail in their challenge to the Commission's interpretation of the term "affected local unit."

Appellants failed to demonstrate that their challenge to the Commission's interpretation of what constitutes an affected local unit will likely show that the Commission's order was unlawful or unreasonable. This attempt suffers many of the same fatal flaws discussed above regarding Appellants' challenge of the Commission's CREO interpretation.

An affected local unit is defined by the statute to mean "a unit of local government in which all or part of a proposed energy facility will be located." MCL 460.1221(a). A "local unit of government" or "local unit" is, in turn, defined as "a county, township, city or village." MCL 460.1221(n). MCL 460.1223(3) requires developers apply for siting with the affected local unit if the chief elected official in each affected local unit notifies the developer, within 30 days following a meeting with that developer, that it has a CREO. MCL 460.1223(3). If the chief elected official confirms its affected local unit has a CREO, the developer must apply for

approval through the affected local unit's local processes. *Id*. Yet, under the Michigan Zoning Enabling Act, the zoning jurisdiction of a county does not include areas subject to a township zoning ordinance. MCL 125.3102(x); MCL 125.3209. It is, therefore, impossible under the Michigan Zoning Enabling Act for a county and township, for example, to each have an enforceable CREO in the same location and to represent the same to a potential developer.

It is an established principle of statutory interpretation that the words of a statute should not be "construed in [a] void, but should be read together to harmonize [their] meaning, giving effect to the act as a whole." *Honigman Miller Schwartz* and *Cohn LLP v City of Detroit*, 505 Mich 284, 307 (2020) (quoting *General Motors Corp v Erves* (On Rehearing), 399 Mich 241, 255 (1976)). Furthermore, as the Commission noted in its October 10th Order, "[a] statute should be interpreted in light of the overall statutory scheme, and [a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." (MPSC Case No. U-21547, 10/10/2024 Order, p 10, F# 0025 (quoting *Honigman Miller Schwartz* and *Cohn LLP*, 505 Mich at 307 (quotation marks omitted)).)

Given the structure of zoning jurisdiction between various levels of local government such as counties, townships, and villages, the Commission rightfully determined that interpreting the term affected local unit in a void and in purely geographical terms, could not be compatible with the requirements under MCL

460.1223(3) to permit proceedings under a local process. In such instances, reading the statute to give effect to the entire Act is appropriate and necessary.

The Commission, therefore, examined the statutory language and recognized that Act 233 transfers authority to site energy facilities under four limited circumstances. (MPSC Case No. U-21547, 10/10/2024 Order, p 9, F# 0025.) These include when:

> (1) "a local unit of government exercising zoning jurisdiction" requests the Commission require a developer to obtain a certificate from the Commission, MCL 460.1222(2);
>
> (2) an affected local unit fails to approve or deny an application under the local siting process within 120 days, MCL 460.1223(3)(b), (c)(i);
>
> (3) an affected local unit, under the local siting process, denies an application that complies with Section 226(8) of Act 233, MCL 460.1223(c)(ii); and
>
> (4) an affected local unit amends its zoning ordinance after its chief elected official notifies the developer that the affected local unit has a CREO, and the amendment imposes additional requirements that are more restrictive than those outlined in Section 226(8) of Act 233. MCL 460.1223(c)(iii).

The Commission further recognized that an affected local unit " 'is considered not to have a [CREO] if it has a moratorium on the development of energy facilities in

effect within its jurisdiction.' " (MPSC Case No. U-21547, 10/10/2024 Order, p 9, F# 0025 (quoting MCL 460.1221(f)).)

The Commission explained that all of the instances providing the Commission authority to site an energy facility under Act 233 "necessarily require a local unit of government to exercise zoning jurisdiction." *(Id.* at 10.) This structure indicates the Legislature's intent that the term affected local unit be read to apply only to those entities exercising zoning jurisdiction. Given that Act 233's structure demands interpretation to harmonize provisions that are otherwise incompatible, the Commission did not act unlawfully or unreasonably in its interpretation.

Like with respect to their arguments regarding the definition of the term "CREO," Appellants make no real attempt to engage with the Commission's analysis. They once again rely on broad claims that the Commission is not authorized by Act 233 to "redefine" or "rewrite" the statue without recognizing the valid exercise of statutory interpretation recognized by their own standard of review analysis. (*See* Section III.B.2.b of this Answer.)

One attempt Appellants do make to take issue with the Commission's interpretation of the term affected local unit, as well as the other interpretations Appellants disagree with, is a section incorrectly claiming that the Commission allowed "[i]ndustry comments and policy reasons" to "reshape the Legislature's intent." (Appellants' Brief in Support, pp 25–26.) This section contains hyperbolic accusations. What this section does not contain is a complete presentation of the full breadth of comments the Commission addressed, which were submitted by a

diverse set of entities, including potential developers, landowners, local units of government, environmental advocacy organizations, labor organizations, and academic institutions, (*see* MPSC Case No. U-21547, 10/10/2024 Order, 2–3, F# 0025); support for the notion that it is impermissible for the Commission to have sought input from this diverse set of commenters; or an explanation of how Appellants' accusations inform the four-factor preliminary injunction standard.

Appellants have not met their burden to establish that they are likely to prevail on the merits of their affected local unit arguments. While Appellants need not "clearly establish[]" each of their claims to be successful, based on Michigan law, they must surely do more with respect to their challenge to the Commission's affected local unit interpretation to justify the extraordinary remedy that is a preliminary injunction. The Commission acted lawfully and reasonably in issuing this interpretation and Appellants' have failed to demonstrate otherwise.

iv. Appellants are unlikely to prevail in their challenge to the Commission's use of the term "hybrid facility".

Appellants' fail to meet their burden to demonstrate the likelihood that they will successfully challenge the Commission's use of the term "hybrid facility" because they fail to address the statutory language the Commission addressed in articulating this concept. Appellants' Brief in Support lacks any discussion of the statutory language that the Commission evaluated when using this term in relation to the capacity thresholds necessary for Commission jurisdiction.

As Appellants have previously acknowledged, Act 233's definitions explicitly provide that an "energy storage facility" can be a component of a "solar energy facility" or "wind energy facility." (Amended Claim of Appeal, p 7.); MCL 460.1221(w), (x). These definitions are broad.[10] In using the term "hybrid facility" the Commission simply gave a name to a concept articulated in the statute – that energy facilities can be comprised of multiple technologies. *Compare* (MPSC Case No. U-21547, 10/10/2024 Order, pp 5–6, F# 0025) *with* MCL 460.1221(w), (x). The threshold capacity for such facilities would necessarily contemplate all parts of the energy facility, including the incorporated energy storage facility. *See* MCL 460.1222(1). The Commission appropriately found that hybrid facilities should be considered wholistically when determining whether they have met the statutory capacity thresholds. (MPSC Case No. U-21547, 10/10/2024 Order, pp 4–6, F# 0025.) Though not the basis of the Commission's determination, the October 10th Order also notes that its use of the term hybrid facilities and the capacity thresholds is consistent with the Michigan Department of Environment, Great Lakes, and

[10] *See e.g.* MCL 460.1221(w) (" 'Solar energy facility' means a system that captures and converts solar energy into electricity, for the purpose of sale or for use in locations other than solely the solar energy facility property. Solar energy facility **includes, but is not limited to**, the following equipment and facilities to be constructed by an electric provider or independent power producer: photovoltaic solar panels; solar inverters; access roads; distribution, collection, and feeder lines; wires and cables; conduit; footings; foundations; towers; poles; crossarms; guy lines and anchors; substations; interconnection or switching facilities; circuit breakers and transformers; **energy storage facilities**; overhead and underground control; communications and radio relay systems and telecommunications equipment; utility lines and installations; generation tie lines; solar monitoring stations; and accessory equipment and structures.") (emphasis added).

Energy's eligibility requirements for the Renewables Ready Communities Award grant structure. (*Id.* at 6, n 6.)

Like their treatment of the other interpretations Appellants seek to challenge, they once again failed to engage with the analysis in the October 10th order or demonstrate why the Commission's use of the term "hybrid facility" is unlawful or unreasonable. For this reason, and the reasons articulated above with respect to the interpretation of CREO and affected local unit, which the Commission incorporates here by reference, the Court should find that Appellants have not met their burden to demonstrate they are likely to prevail on the merits of this argument.

3. Any harm alleged by Appellants is outweighed by the harm to the Commission if it were prevented from fulfilling its statutory obligation to administer Act 233.

In deciding whether to grant a motion for preliminary injunction, the Court examines whether the harm to the moving party, if any, outweighs the harm the injunction would cause to the adverse party. *State Emps Ass'n*, 421 Mich at 157. This Court has previously stopped short of examining the relative harm between the moving and opposing party where the moving party demonstrated no irreparable harm. *Hammel*, 297 Mich App at 653.

As explained above, Appellants have failed to demonstrate that failure to issue a preliminary injunction will cause any harm to the individual Appellants, let alone any irreparable harm. Therefore, there is no need for this Court to weigh the respective harms to Appellants versus those that the Commission will face if a

preliminary injunction is granted. Even still, a preliminary injunction in this case would harm the Commission.

The Commission is authorized and required to implement Act 233. *See* MCL 460.1226. The Commission and its Staff have invested significant public time and resources in preparing for implementation of Act 233. (*See* MPSC Case No. U-21547, 10/10/2024 Order, pp 1–4, F# 0025.) To prevent the full implementation of this lawful legislation cannot be justified by the speculative harms alleged for which there are adequate alternative remedies.

Appellants claim that a preliminary injunction will not harm the Commission because it will "in no way undercut the PSC's authority to approve energy facilities that wish to be located in municipalities that do not have a CREO–as defined by [Act] 233." (Appellants' Brief in Support, p 33.) The obvious shortfall of this argument is that it ignores the impact on the Commission's ability to administer aspects of Act 233 that apply to situations in which an affected local unit claims to have a CREO. *See* MCL 460.1223(3)(c).

There are real harms that could result from a preliminary injunction at this premature stage. When compared to the harms alleged by Appellants, the balance clearly favors denying Appellants' Motion for Preliminary Injunction.

4. The requested injunction, if granted, would harm the public interest by preventing the implementation of a statutorily mandated Commission function.

Even more important than the potential harms to the Commission are the potential harms to the public interest that would result from granting Appellants'

requested preliminary injunction. Harms to the public interest arising from the granting of a preliminary injunction weigh against granting such relief. *State Emps Ass'n*, 421 Mich at 157.

Putting aside the inherent public interest in not delaying implementation of a valid statute without the requisite showing for such extraordinary relief, the requested preliminary injunction would harm the public interest in other practical ways. For example, a preliminary injunction would harm landowners and developers seeking to site an energy facility on their property pursuant to the Act 233 process.

Act 233 does not confer any powers of eminent domain. MCL 460.1230(4). All owners of land on which relevant projects will be sited are, therefore, willing participants who have decided to site a facility on their property. (*See* MPSC Case No. U-21547, 10/21/2024 Errata, p 2, n 1, F# 0026.) Issuance of a preliminary injunction at this stage would harm these landowners' rights to make use of their land in the way they see fit pursuant to a valid Michigan law.

For these reasons, issuance of the requested preliminary injunction would harm the public interest. This harm supports denial of Appellants' motion.

CONCLUSION

Appellants' Motion for Preliminary Injunction is not appropriate in this case. Not only does the motion suffer from fatal procedural flaws, but it also fails to meaningfully address the Commission interpretations it takes issue with. Appellants have not met the heavy burden for demonstrating that the extraordinary relief of a preliminary injunction is appropriate. Granting such relief at this time would needlessly delay the implementation of a valid Michigan law. The Commission respectfully requests that this Honorable Court deny the Motion for Preliminary Injunction. The MPSC further requests that this Honorable Court grant additional relief it deems appropriate and just.

Respectfully submitted,

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