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 **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO INTERVENE AS APPELLEES** **** IMMEDIATE CONSIDERATION REQUESTED ****

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NOW COMES Michigan Energy Innovation Business Council ("EIBC"), Institute for Energy Innovation ("IEI"), Clean Grid Alliance ("CGA"), and Advanced Energy United ("AEU") (collectively "Intervening Appellees"), by and through their counsel, POTOMAC LAW GROUP PLLC and VARNUM LLP, and respectfully move the Court pursuant to MCR 7.211 for leave to file a Reply in support of their Motion to Intervene as Appellees. A copy of the proposed Reply is attached hereto as **Exhibit A**. In support of their motion, Intervening Appellees state as follows:

1. Appellants have filed this action seeking review of the Michigan Public Service Commission's ("MPSC") October 10, 2024 Order (the "October 10 Order") outlining the procedures for submitting an application for a permit to construct a utility-scale renewable energy development under PA 233.

2. Appellants have further moved this Court for a preliminary injunction staying the implementation of the MPSC's October 10 Order.

3. Intervening Appellees are business trade associations representing members of the renewable energy industry, including electric providers, developers, and independent power producers who will be subject to the requirements of PA 233 and the October 10 Order.

4. Intervening Appellees filed their Motion to Intervene in this action on December 2, 2024. Appellants filed their Response in Opposition Intervening Appellees' motion on December 5, 2024.

5. Appellants' Response in Opposition to the Motion to Intervene raises new legal arguments and authority and, in some instances, misstates the relevant legal standards and precedential value of the cited authority.

6. For example, Appellants claim that the inadequate representation analysis *Anglers of the Au Sable v United States Forest Service*, 590 F Supp2d 877, 882-83 (ED Mich 2008) was reversed by the Sixth Circuit. Resp. at 6 ("Additionally, the Sixth Circuit rejected the district Court's explanation that 'case law tends to support that proposition [that existing parties cannot protect would-be Intervening Appellees' interest adequately when the party before the court is the government[,]" as the district court did not cite any Michigan or Sixth Circuit case law to support that proposition."). Based on publicly available documents, this is demonstrably false—this analysis was never reversed.

7. Intervening Appellees' proposed Reply addresses, among other things, the legal authority cited by Appellants and the different interests of the MPSC and Intervening Appellees.

WHEREFORE, for the foregoing reasons, Intervenor-Appellees respectfully request that this Court grant this motion and permit them leave to file the Reply brief attached hereto as Exhibit A.

Respectfully submitted,

VARNUM LLP

Dated: December 10, 2024

By: */s/ Brion B. Doyle*

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Exhibit A

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REPLY IN SUPPORT OF MOTION TO INTERVENE

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I. INTRODUCTION

In opposing the Motion to Intervene filed by Michigan Energy Innovation Business Council, Institute for Energy Innovation, Clean Grid Alliance, and Advanced Energy United (collectively, "Intervening Appellees"), Appellants concede that Intervening Appellees satisfy three out of the four requirements for intervention as of right. Appellants do not dispute: (1) that this application is timely; (2) that Intervening Appellees have a sufficient interest in the proceeding to justify intervention of right; or (3) that the outcome of this proceeding may impede or impair their ability to protect that interest. Appellants oppose the intervention on a single basis: that the Michigan Public Service Commission ("MPSC") adequately represents Intervening Appellees. See Resp to Mot to Intervene ("Resp") at 3-6.

In opposing the Motion to Intervene, Appellants misconstrue prior precedent and adopt a narrow, overly strict view of the rules of intervention by right. First, Appellants wrongfully claim that factors of "adversity of interest, collusion, or nonfeasance" that courts may consider when evaluating the "adequate representation" of an intervenor by a party are an exclusive three-part test that must be satisfied before intervention is allowed, when in fact these are merely some of the factors a court may consider. Second, Appellants erroneously argue that it is Intervening Appellees' burden to demonstrate that the MPSC is currently failing to adequately represent their interests, when all that Intervening Appellees are required to show is that the MPSC may fail to adequately represent Intervening Appellees' interests in the future. Third, Appellants wrongly claim that because the MPSC and Intervening Appellees seek the same outcome (i.e., that the MPSC's October 10 Order be upheld by this Court), they must have the same interests in pursuing that outcome. This argument ignores the pecuniary interests of Intervening Appellees' members in their development projects which are threatened by the outcome of this proceeding and reliant

on timely implementation of the MPSC's Order. The argument also fails to appreciate that the MPSC's primary interest in this case is to preserve its authority to implement the statutes it administers and the level of deference courts grant to that authority. Intervening Appellees, by contrast, have a narrower interest: to ensure that Intervening Appellees' members are able to pursue permitting of renewable energy projects with the MPSC within the scope of PA 233 and, where appropriate, move in a timely manner beyond the hostile local permitting process that has stymied the development of their renewable energy projects in Michigan. This divergence of interests plays a particularly clear role when considering that Appellants are seeking a preliminary injunction here: timing is far more important for the developer interest than for a state administrative agency.

Finally, even if the Court finds that Intervening Appellees are not entitled to intervene by right (which they are), Intervening Appellees should nevertheless be granted permissive intervention because they are the only parties in this appeal who represent the entities expressly governed by the MPSC's Order, and their intervention will not delay or prejudice the adjudication of the rights of the original parties. Accordingly, as argued more fully below, Intervening Appellees respectfully request that the Court grant their motion to intervene as appellees.

II. ARGUMENT

A. INTERVENING APPELLEES ARE ENTITLED TO INTERVENTION AS OF RIGHT BECAUSE THEIR INTERESTS DIVERGE FROM THOSE OF THE MPSC.

Appellants concede that Intervening Appellees satisfy the first three requirements for intervention as of right, and they focus only on their claim that the MPSC adequately represents Intervening Appellees' interests in this matter. In making this argument, Appellants misstate three key aspects of the inadequate-representation analysis.

First, this analysis is not a rigid, three-part test where any one factor is determinative. Courts recognize that the three-part "adversity of interest, collusion, or nonfeasance" test that Appellants cite does not represent all the ways that a representative may be inadequate. See, e.g., *Daggett v Com'n on Gov Ethics & Election Pracs*, 172 F3d 104, 111 (CA 1, 1999); 7C Fed Prac & Proc Civ § 1909 (3d ed.) (Wright & Miller) ("The wide variety of cases that come to the courts make it unlikely that there are three and only three circumstances that would make representation inadequate and suggest that adequacy of representation is a very complex variable.") (collecting cases). This accords with Michigan's rule that if there is a mere "**concern** of inadequate representation . . . the rules of intervention should be **construed liberally** in favor of intervention." *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 762; 630 NW2d 646 (2001) (emphasis added); *Black v Dept of Social Services*, 212 Mich App 203, 204; 537 NW2d 456 (1995) ("The rule should be liberally construed to allow intervention where the applicant's interests may be inadequately represented."). This liberal approach is further influenced by the black-letter law that Intervening Appellees' burden to satisfy the inadequate-representation requirement "is treated as minimal." *Karrip v Cannon Twp*, 115 Mich App 726, 731; 321 NW2d 690 (1982). Put simply, if the Court concludes that Intervening Appellees might be inadequately represented based on this case's circumstances, it must err on the side of allowing Intervening Appellees into this case.

Second, Appellants look to the wrong time period to determine if the inadequate-representation requirement is met. The test is predictive: it looks to what may happen during the course of the proceeding, not the current status of the proceeding. "There need be no positive showing that the *existing* representation is in fact inadequate." *Karrip*, 115 Mich App at 731-32 (emphasis added). "[I]ntervention is properly allowed where the intervenor's interest '*may be*' inadequately represented by one of the existing parties." *Vestevich*, 245 Mich App at 761 (emphasis in original). When the inquiry is properly framed, Appellants' response actually makes a key point in favor of intervention: "[a]t this time, neither Appellants nor Appellee have filed their Brief on Appeal, so the interests of the MPSC in upholding the Order are only speculative." Resp at 8 n.8 **This is the point of Intervening Appellees' motion and the main reason that intervention is necessary**—Intervening Appellees' interests "may be" inadequately represented by the MSPC during the course of this proceeding, so they must be allowed to intervene to protect their own interests. Otherwise, the Intervener's interest (which Appellants concede exists) may be impaired (which Appellants concede would happen if they succeed).

Third, Appellants improperly conflate the concept of Intervening Appellees' "interest" with that of Intervening Appellees' preferred outcome. The fact that the MSPC and Intervening Appellees share "the same ultimate objective: affirmance of the Order" does not end the Court's inquiry and dictate a denial of intervention. See Resp at 5. Rather, the question is whether the MSPC and Intervening Appellees have identical interests in pursuing that objective. And they surely do not. For one, this Court has squarely held that, in cases where a party seeks to intervene on the government's side, "[c]laiming a much narrower interest than the general public seems to meet the minimal burden necessary to show that one's interests may be inadequately represented by existing parties." *Karrip*, 115 Mich App at 732.

Here, the MPSC has many interests that drive it to defend the Order—for example, it has an interest in how this Court defines the MSPC's authority to interpret statutes that it administers; it has an interest in the level of deference that this Court provides to those interpretations; and it has an interest in this Court's opining on the propriety the MPSC's procedure. On the other hand, Intervening Appellees have narrower interests: ensuring that State-level siting processes are upheld in a way that is workable: that does not increase costs or delay development plans, which would put projects at risk of failure due to in ability to meet regulatory, interconnection, and contractual requirements and timelines. (See Intervening Appellee's Resp, pp. 2, 40-41.) Intervening Appellee's interests are "narrower," as they do not run to the general public interest, ratepayer costs, or the reputation or procedural integrity of MPSC proceedings and interpretations. Therefore, Intervening Appellee's interests may not be inadequately represented by the MSPC. *Id*. Moreover, courts recognize that, when a private party has a pecuniary interest, the government necessarily does not provide adequate representation because it may have to advance certain arguments or abandon issues for the public good, at the private party's expense. *Anglers of the Au Sable v United States Forest Service*, 590 F Supp 2d 877, 882-83 (ED Mich 2008) ("Although the government's interest in the outcome of the dispute might advance the interests of a private entity to a substantial degree, **the case may still call for some arguments that the government must abandon under a sense of public duty, whereas the prospect of losing millions of dollars will compel the private entity to advance them**").[1] See also *Wineries of the Old Mission Peninsula*

[1] Appellants attempt to minimize the relevance of *Anglers* in two ways, neither of which is appropriate. First, they note that there was some dispute about whether the specific statute at issue in that case, the National Environmental Policy Act ("NEPA"), prohibited private-party Intervening Appellees. *Id*. at 882. The Court only looked at that question in the context of the first prong of an intervention analysis—whether there is an interest in the proceeding—which Appellants do not contest is satisfied here. Moreover, this is not a NEPA case and Intervening Appellees cite *Anglers* only for the persuasive value of the courts' inadequate-representation

Ass'n v Twp of Peninsula, Michigan, 41 F4th 767 (6th Cir 2022) (allowing a local advocacy group to intervene even where the defendant township and intervenors shared the same ultimate objective but were "animated by different, and possibly conflicting, concerns"). Put more simply, the MPSC's interests support ratepayers generally, as reflected in their Mission Statement, "The mission of the Michigan Public Service Commission is to serve the public by ensuring safe, reliable, and accessible energy and telecommunications services at reasonable rates." See Michigan Public Service Commission, "About the MPSC," *available at* https://www.michigan.gov/mpsc/about (last visited Dec 9, 2024). Project developers' interests (particularly non-utility developers who are limited in their ability to pass on additional costs to the ultimate customers) run to the costs that are paid by the developers in siting a project, not necessarily costs ultimately paid by the public. Such developers are not otherwise regulated by the MPSC except for the PA 233 process and therefore the MPSC has no interest in advancing any particular project from a developer not regulated as a utility in Michigan.

In *Michigan State AFL-CIO*, the Sixth Circuit reversed the trial court's denial of the Chamber of Commerce's motion to intervene in a case involving a challenge to Michigan's Campaign Finance Act. *Michigan State AFL-CIO v Miller*, 103 F3d 1240, 1246-47 (CA 6, 1997). In that case, the Sixth Circuit found that the Chamber of Commerce was entitled to intervention as of right because it was (1) a vital participant in the political process of adopting the amendments;

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analysis under Federal Rule of Civil Procedure 24(a). Second, Appellants claim that *Anglers*' inadequate-representation analysis was reversed by the Sixth Circuit. Resp at 6 ("Additionally, the Sixth Circuit rejected the district Court's explanation that 'case law tends to support that proposition [that existing parties cannot protect would-be Intervening Appellees' interest adequately when the party before the court is the government[,]" as the district court did not cite any Michigan or Sixth Circuit case law to support that proposition."). Based on publicly available documents, **this is demonstrably false—this analysis was never reversed.** Although various appeals were filed in that case, all were settled before the Sixth Circuit reviewed any of the district court's decisions. Thus, *Anglers* remains persuasive authority.

(2) a repeat player in Campaign Finance Act litigation; (3) a significant party which was adverse to the unions challenging the legislation; and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs. *Id.* at 1247. With regard to the inadequate representation test, the Court emphasized that the test may be satisfied simply because the existing party would not make all of the prospective intervenor's arguments. The Court reasoned that,

> "[o]ne would expect that the Chamber, as the target of the state's regulations, would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state, which is cast by the statutes in the role of the regulator. And while the Chamber's ultimate design may be to improve its members political clout in comparison to that of the unions, that will not be the focus of the state's efforts since they are aimed at creating a level playing field.

Id.

So too here. Like the Chamber, and unlike Appellants, Intervening Appellees' members are the parties that will be regulated by the October 10 Order. Further, the Court does not have to guess how the Intervening Appellees' interests may diverge from the MPSC, because that divergence can be seen in the parties' respective Answers to the Motion for Preliminary Injunction. On the level of deference that the Court owes to MSPC's statutory interpretations, the agency appears to argue that its interpretations cannot be overruled by the judiciary unless they expressly conflict with the language of the statute. MSPC Answer to Mot. for PI at 24. In contrast, Intervening Appellees argue that the MSPC's interpretations are entitled only to "respectful consideration" and are only as valuable as they are persuasive. Intervening Appellees' Answer to Mot. for PI at 27. Put differently, as the representative of entities regulated by MSPC, Intervening Appellees' view is that this Court could, in the appropriate case, overrule agency interpretation even if the interpretation did not expressly conflict with the statute but was merely incorrect. This point is important for Michigan's administrative law in general (and this case in particular) but may not be a priority for the MSPC, which might unknowingly gloss over this point on the way to

the merits or be interested in creating case law to establish its interpretations' controlling status at Intervening Appellees' future expense. This type of nuance is why courts recognize that those regulated by the government "would harbor an approach and reasoning for upholding the statute that will differ markedly from those of the state, which is cast by the statutes in the role of regulator." *Michigan State AFL-CIO*, 103 F3d at 1247.

In contrast, *United States v Michigan*, heavily relied upon by Appellants, is inapposite. See 424 F3d 438 (CA 6, 2020). In that case, a group of proposed intervenors sought to appeal the denial of their motion to intervene into a case to determine the usufructuary rights of five Indian tribes under a 19th century treaty. *Id.* at 440. Both the proposed intervenors and the State sought an identical declaratory judgment that the Tribes did not retain any off-reservation usufructuary rights under the Treaty. *Id.* at 444. The Sixth Circuit upheld the District Court's denial of the motion to intervene, finding that the intervenors failed to identify how the State's representation would be inadequate in the current case, and instead were only concerned about management and regulatory issues that would not arise until after the trial on the declaratory relief claim. *Id.* Because the intervenors failed to raise any potential inadequate representation during the current phase of the proceeding, the Sixth Circuit affirmed the denial of the motion to intervene. *Id.* at 445.

That is not the case here. Intervening Appellees are not concerned with hypothetical future issues; they are concerned with the applications their members are already preparing to submit for local consideration and, ultimately, to the MPSC. Unlike *United States v Michigan*, there is already clear evidence, as outlined above, that the MPSC is not adequately representing Intervening Appellees in the current phase of the litigation, given that they have asserted, in large part, entirely different arguments in their Answers to the Motion for Preliminary Injunction.

Because there is a "concern" that the MPSC "may not" adequately represent the narrower, specific, and pecuniary interests that Intervening Appellees possess, Intervening Appellees have satisfied their "minimal" burden on this issue, especially given that this Court should "liberally construe" MCR 2.209 to provide for their intervention.

B. IN THE ALTERNATIVE, INTERVENING APPELLEES SHOULD BE GRANTED PERMISSIVE INTERVENTION.

In any event, permissive intervention is appropriate. With the exception of CGA, Intervening Appellees are the only parties in this appeal who submitted comments to the MSPC when the agency was considering the October 10 Order. Intervening Appellees are further the only parties to this appeal who seek to represent the specific interests of the entities who are regulated by the October 10 Order. Given Intervening Appellees' substantial interests and prior participation in this proceeding, their intervention will aid this Court's decision-making process.

The only enumerated criterion for the Court's consideration of permissive intervention is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." MCR 2.209(B). Appellants argue that this factor weighs against permissive intervention because this case is "emergent." Resp at 8. Not so. Intervening Appellees have timely filed their pleadings, including a substantive response to Appellants' Motion for Preliminary Injunction. Intervening Appellees will continue to adhere to the briefing deadlines set by the Court Rules and this Court. This of course is not a trial-court proceeding, where the intervention of parties might result in additional discovery requests, depositions, and dispositive motion practices. The schedule for this appeal is set by the Court Rules. No delay will result from Intervening Appellees' participation.

Appellants also rely on two cases to contest permissive intervention: *Yellow Tail Ventures, Inc v City of Berkley*, 344 Mich App 689; 1 NW3d 860 (2022) and *House of Representatives &*

Senate v Governor, 333 Mich App 325; 960 NW2d 276 (2020). In both those cases, the trial court denied permissive intervention and this Court applied the abuse-of-discretion standard to determine if the denial was "outside the range of reasonable and principled outcomes," an entirely different analysis from the Court's consideration of Intervening Appellees' Motion. *Yellow Tail*, 344 Mich App at 706; *House of Representatives*, 333 Mich App at 363. And although the Court affirmed, this does not mean that allowing intervention in those cases would have been unreasonable and unprincipled. At a minimum, permissive intervention is appropriate here given that Appellants do not dispute that Intervening Appellees have an interest in the proceeding that may be impaired—which distinguishes this case from *Yellow Tail*, 344 Mich App at 707 (observing that "it is not evident that [Intervening Appellees'] interests were a subject of the litigation between the current parties") and *House of Representatives*, 333 Mich App at 364 (noting that intervening attorneys described their arguments as "virtually identical" to those made by the legislature).[2]

III. CONCLUSION

Based on the foregoing, Intervening Appellees respectfully request that the Court allow them to intervene as appellees in the above-captioned case, along with such further relief as would be just and equitable.

Respectfully submitted,

VARNUM LLP

Dated: December 10, 2024

By: */s/ Brion B. Doyle*

[2] Indeed, despite Appellants' claim to the contrary, at least one of the letters seeking to commence the local process under PA 233 included in Appellants' Appendix comes from Lakeside Solar, a development of MIEBC & CGA Member National Grid Renewables. See MIEBC, "Our Member Companies," *available at https://www.mieibc.org/our-member-companies/* (last visited Dec 9, 2024).

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CERTIFICATE OF WORD COUNT

This Reply in Support of Motion to Intervene contains 3198 words.

Respectfully submitted,

VARNUM LLP

Dated: December 10, 2024

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