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.

Court of Appeals No. 373259

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
FOSTER, SWIFT, COLLINS & SMITH, PC
Attorneys for Appellants
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200
mhomier@fosterswift.com
lgenovich@fosterswift.com
labdoo@fosterswift.com

Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
ASSISTANT ATTORNEYS GENERAL – PUBLIC SERVICE DIVISION
Attorneys for Appellee
7109 W. Saginaw Highway, 3rd Floor
Lansing, MI 48917
(517) 284-8140
taylorn10@michigan.gov
stirlinga1@michigan.gov

APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Dated: January 3, 2025

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Public Acts

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction pursuant to MCL 462.26 and MCR 7.203(D). The Public Service Commission Order conferring jurisdiction was issued October 10, 2024.

STATEMENT OF QUESTIONS PRESENTED

Under longstanding Michigan law, courts strictly construe the authority of Appellee, the Public Service Commission ("PSC"). Courts also strictly construe the exemptions from the Administrative Procedures Act, MCL 24.201 *et seq*.

Public Act 233 of 2023 grants the PSC limited jurisdiction over siting qualifying utility-scale renewable energy projects. PA 233 clearly specifies a process and certain specific definitions. Among other things, PA 233 grants the PSC the authority to establish application filing requirements. It also requires the PSC to grant a certificate to an applicant under certain circumstances.

On October 10, 2024, the PSC issued an order that purportedly establishes application filing requirements. But the order also rewrites key statutory definitions and reframes key process deadlines specified in PA 233. The order unlawfully expands the PSC's limited statutory jurisdiction and divests local governments of zoning authority.

I. Did the Public Service Commission unlawfully and unreasonably exceed its authority in issuing all or parts of the October 10 Order?

Appellants answer: Yes

Appellee likely answers: No

II. Is the Order unlawful because it is in effect a rule subject to the Administrative Procedures Act?

Appellants answer: Yes

Appellee likely answers: No

INTRODUCTION

This appeal arises from the PSC's Order issued on October 10, 2024, in PSC Case No. U-21547 (the "Order). (PSC Order, 10/10/2024; Exhibit A). The Order purports to establish instructions and procedures for renewal energy development project certificate applications, but it ventures into rulemaking in violation of the Administrative Procedures Act and rewrites key statutory definitions of Public Act 233 of 2023 ("PA 233") (Public Act 233, effective 11/29/2024, Exhibit B). The Order undermines the authority of local communities, including Appellants, to regulate the siting of utility-scale renewable energy projects as permitted by PA 233.

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

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

The PSC does not have the power to rewrite PA 233, and in doing so through the Order, the PSC has overstepped its limited authority. For the reasons set forth in this brief, Appellants request that this Court vacate the Order, in whole or in part.

STATEMENT OF FACTS

What is PA 233?

In late 2023, the Michigan Legislature passed and the Governor signed PA 233, which took effect November 29, 2024, and Public Act 234 of 2023 ("PA 234"). PA 233 adds a new Part 8 to the Clean and Renewable Energy and Energy Waste Reduction Act, Act 295 of 2008. PA 234 amends Section 205 of the Michigan Zoning Enabling Act, PA 110 of 2006 ("MZEA"), to provide that local zoning ordinances are subject to the new Part 8.

Part 8 establishes exemptions to local zoning regulations for utility-scale renewable energy projects. Specifically, energy storage facilities, solar energy facilities, and wind energy facilities that meet threshold power capacity requirements may be authorized by the PSC, rather than by the municipality in which the facility is located, but only under limited circumstances—specifically where the municipality does not have a CREO. A CREO is defined by PA 233 as "an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8)." § 221(f).[1] A "local unit of government is considered to not have a [CREO] if it has a moratorium on the development of energy facilities in effect within its jurisdiction." *Id*.[2]

In local units of government without a CREO, the PSC may only review and consider applications for the following proposed facilities:

---

[1] References to PA 233 will simply cite to the relevant section.

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

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

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

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

The Process Under PA 233

Under PA 233, a developer[3] of a proposed project that meets the threshold nameplate capacity requirements may, under limited circumstances, seek a certificate from the PSC.[4] A developer of a wind, solar, or energy storage facility must first perform a series of tasks in each "affected local unit" or "ALU." "Affected local unit" is defined by PA 233 to mean "a unit of local government in which all or part of a proposed energy facility will be located." § 221(a). A "local unit of government" or "local unit" "means a county, township, city, or village." § 221(n).

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

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

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

Additionally, at least 60 days before the public meeting, the developer must offer to meet with the chief elected official of each ALU to discuss the site plan. § 223(2). After the developer offers to meet with the chief elected official(s), the ALUs have a choice: they may decline or accept the offer to meet. If the ALU meets with the developer, a 30-day window opens during which the local unit may inform the developer that it has a CREO. § 223(3). Once the ALU provides this notice, the developer *must* submit their application to the ALU, not the PSC, and comply with the ALU's CREO to obtain approval. *Id*.

As PA 233's co-sponsor stated during a legislative hearing, "[f]or those municipalities that want to be more involved in the [permitting] process they now have the opportunity to come up with their own local permitting process, which must mirror tenets of the state process."[5]

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

In limited circumstances, the developer may still submit its application to the PSC. Those circumstances are: (1) if the ALU does not approve or deny the application within 120 days; (2) if, after the chief elected official of the ALU notifies the developer that the ALU has a CREO, the

---

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

ALU adopts an amended ordinance that "imposes additional requirements on the development of energy facilities that are more restrictive than those in [S]ection 226(8);" or (3) if "[t]he application complies with the requirements of Section 226(8), but the local unit denies the application." § 223(3)(c). If a proposed project includes multiple ALUs, the developer may also proceed to the PSC if just one ALU does not send notice that it has a CREO. See § 223(3).[6]

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

ALUs also benefit from "host community agreements." Under § 227(1), an applicant before the PSC must "enter into a host community agreement with each affected local unit." Such an agreement must provide that the facility owner will pay the ALU $2,000 per megawatt of nameplate capacity located within the ALU. *Id*. The payment must "be used as determined by the affected local unit for police, fire, public safety, or other infrastructure, or for other projects as agreed to by the local unit and the applicant." *Id*.[7]

---

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

[7] If an ALU and an applicant fail to enter to enter into a host community agreement, after good-faith negotiations, the applicant may choose to enter into a "community benefits agreement" and direct at least $2,000 per megawatt of nameplate capacity to community-based organizations. §

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

To review an application, the PSC must conduct a contested case proceeding. § 226(3). ALUs and both participating and nonparticipating property owners may intervene in that proceeding by right. *Id*. When evaluating an application, the PSC must consider the feasible alternative developed locations described in the application and the impact of the proposed facility on local land use, including the percentage of land within the ALU dedicated to energy generation. § 226(6). The PSC may also condition a certificate on the applicant taking additional reasonable action related to the impacts of the proposed energy facility, including, but not limited to: establishing and maintaining for the life of the facility vegetative ground cover; meeting or exceeding pollinator standards throughout the lifetime of the facility; providing for community improvements in the ALU; and making a good-faith effort to maintain and take proper care of the property where the energy facility is proposed to be located during construction and operation of the facility. § 226(6)(a)–(d).

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

227(2). In short, a developer must grant the $2,000 per megawatt of nameplate capacity to either the ALU or community-based organizations in each ALU.

The [PSC] shall grant the application and issue a certificate if it determines all of the following:

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

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

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

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

(e) All of the following apply:

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

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

> to 3148, whichever provides the higher wage and fringe benefit rates.
>
> (iii) To the extent permitted by law, the entities performing the construction or construction maintenance work will enter into a project labor agreement or operate under a collective bargaining agreement for the work to be performed.
>
> (f) The proposed energy facility will not unreasonably diminish farmland, including, but not limited to, prime farmland and, to the extent that evidence of such farmland is available in the evidentiary record, farmland dedicated to the cultivation of specialty crops.
>
> (g) The proposed energy facility does not present an unreasonable threat to public health or safety. [*Id*.]

Regarding § 226(7)(g) specifically, the Legislature defined what "an unreasonable threat to public health or safety" is for qualifying facilities. Section 226(8) states that "[t]he proposed energy facility meets the requirements of subsection (7)(g) if it will comply with the following standards. . ." Those standards are specific requirements for things like setbacks, fencing, noise, blade tip height for wind energy facilities, and dark sky lighting solutions.

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

This process is also summarized in the table on the following page:

<table>
<tr><td colspan="2">Initial Local Unit Contact:
Applicant must “offer in writing to meet with the chief elected official of each affected local unit . . . to discuss the site plan.”</td></tr>
<tr><td colspan="2">Meeting with Local Unit Chief Elected Official:
Applicant meets with chief elected official to discuss site plan (unless local unit declines)
Local unit must provide notice of compatible ordinance <u>within 30 days</u> after this meeting.</td></tr>
<tr><td colspan="2">Next Step (Depending on ALU Action/Compatible Renewable Energy Ordinance)</td></tr>
<tr><td>No notice of CREO from within 30 days (PSC route)</td><td>Notice of CREO from local unit local unit within 30 days (local route)</td></tr>
<tr><td>Applicant must notify Clerk that a public meeting will be held in the local unit and provide site plan (at least 30 days before public meeting)</td><td>Applicant must file application for approval with local unit, pursuant to compatible ordinance</td></tr>
<tr><td>Applicant must publish notice of the public meeting (at least 14 days before public meeting)</td><td>Local unit must approve or deny application within 120 days (can be extended another 120 days with consent from provider)</td></tr>
<tr><td>Public meeting is held in local unit</td><td>Applicant can still go to the PSC if:
Local unit fails to timely approve or deny the application
The application complies with statute [226(8)] but local unit denies it
Local unit amends ordinance so that it is no longer compatible
Any individual affected local unit does not send notice of a CREO
PSC’s review is whether the applicant supplied all required information to the local unit, and the PSC must grant a certificate if the application meets the requirements of § 226.</td></tr>
</table>

PA 233’s grant of authority to the PSC

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

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

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

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

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

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

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

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

h. consolidate proceedings. § 230(2).

PA 233's Relationship with Other Laws

The Legislature made clear its intent regarding PA 233's relationship with other laws. PA 233 provides that, except in one circumstance, it controls in any conflict between it and any other law of this state. § 230(3).[8] As discussed above, PA 234 of 2023 expressly amended the MZEA so that the MZEA is subject to PA 233. But PA 233 also contains other qualifying language, including limits on its own reach and limits on local control. Regarding local control, PA 233 states that "[a] local ordinance shall not prohibit or regulate testing activities undertaken by [an electric provider or producer] for purposes of determining the suitability of a site for the placement of an energy facility." § 231(1). It also provides that "a zoning ordinance or limitation imposed after" an applicant applied to the PSC may "not be construed to limit or impair the construction, operation,

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

or maintenance of the energy facility." § 231(2). It provides that "[i]f a certificate is issued, the certificate and [PA 233] preempt a local policy, practice, regulation, rule, or other ordinance that prohibits, regulates, or imposes additional or more restrictive requirements than those specified in the" certificate. § 231(3). Additionally, it provides that:

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

The PSC Opens a "Docket" on its Own Motion

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

> THEREFORE, IT IS ORDERED that:
>
> A. The Commission Staff shall engage with interested person in transparent open meetings, as described in this order.
>
> B. The Commission Staff shall file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in this docket by June 21, 2024.
>
> C. Any interested person may file comments regarding the Commission Staff's recommendations in this docket. Comments shall be filed no later than 5:00 p.m. (Eastern time) on July 17, 2024, and reply comments shall be filed no later than 5:00 p.m. (Eastern time) on August 9, 2024. [PSC Order, 2/8/2024; Exhibit C.]

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

Appellants' Work Toward Compatibility

Between the adoption of PA 233 and today, many Appellants adopted CREOs based on the statutory definition of that term in PA 233 (see, e.g., White River Township Solar Ordinance;

Exhibit D; Ida Township Wind Ordinance; Exhibit E). Adopting CREOs is not a quick or simple process. CREOs are zoning ordinances, and approval must follow the process outlined in the MZEA. Many other Appellants are either in the process of adopting a CREO or intend to do so.

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

This process may take several months. Indeed, many Appellants spent most of 2024 preparing, reviewing, and adopting CREOs. The public hearings regarding CREOs were extensive and thorough, with several Appellants' planning commissions receiving public comment for several hours. At least two Appellants, Speaker and Fremont Townships, had their CREOs petitioned for referendums. In both Townships, voters overwhelmingly approved the CREOs. (Exhibit F.) The underlying rationale for Appellants adopting CREOs was to retain local control

over qualifying projects. If they did not adopt CREOs, they would cede all control over the siting of qualifying facilities to the PSC as outlined in PA 233.

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

The October 10, 2024 Order

Despite its limited authority under PA 233, on October 10, 2024, the PSC issued an order in Case Number U-21547 in which the PSC redefined statutory definitions of PA 233 and improperly expanded its authority to approve applications for projects not covered by PA 233. The PSC, in the Order, stated that a CREO "may *only* contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and *may not contain additional requirements* more restrictive than those specifically identified in that section" (Order, 18) (emphasis added). The PSC further added "hybrid facilities" to the list of alternative energy projects it has authority to approve (Order, 4). Such facilities, which the PSC characterizes as combinations of wind, solar, or energy storage facilities that only together can meet the power capacity threshold of PA 233 for PSC authorization, are not defined or contemplated in PA 233. Although the statutory definitions of "solar energy facilities" and "wind energy facilities" include energy storage facilities, the Order also allows for the combination of solar and wind energy facilities, which is not contemplated by the statute. Compare §221(w), (x) with Order, 84-85. The Order also redefines "affected local unit" to include "only those local units of government that

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

In other words, the PSC has purported to both narrow the statutory definition of "CREO" such that Appellants' CREOs are no longer "compatible" and expand the types of projects that it can authorize, so that even municipalities with CREOs, as PA 233 defines them, will lose zoning control over smaller facilities that band together to be "hybrid facilities." Additionally, jurisdictions without "zoning authority" under the Order, such as Appellant Ogden Township, are cut out of the process entirely and deprived of the financial benefits provided for by the Legislature in PA 233. PA 233 took effect on November 29, 2024.

At other times, the Order is sloppy and creates confusion. In either an attempt to illegally rewrite PA 233, or in a haphazard and careless accident, the Order misstates the timelines laid out in PA 233. The Order states that ALUs must respond to offers to meet within 30 days and that failing to do so allows the applicant to proceed as if the ALU does not have a CREO (Order, 11). But PA 233 is clear that the deadline to send an applicant notification that the ALU has a CREO is *30 days after a meeting with the ALU's chief elected officer*. § 223(3).

The effects of this rewriting have already been felt. In a matter of days after PA 233 took effect, five Appellants received written offers to meet from developers. Three of these offers referred to the Order's timeline, not PA 233's. (Written Offers to Meet, various dates; Exhibit F.)

Appellants' Stand For Local Control

In the time available to claim this appeal (30 days under MCL 462.26), 72 Michigan townships and 7 counties banded together to jointly file this appeal of the Order.

The window to approve claiming the appeal was merely a month and occurred in the midst of a regular general election and the transition of public officials joining and leaving local

legislative bodies. In the time since this appeal was claimed, at least 26 additional townships and 7 additional counties have adopted resolutions supporting Appellants' cause and retaining local control, and indicating that they would have joined this appeal had they had more time to do so (Resolutions in Support of Appellants, various dates; Exhibit G).[9]

STANDARD OF REVIEW

"The standard of review applicable to orders of the Commission is narrow and well defined." *In re Mich Cable Telecom Ass'n*, 239 Mich App 686, 689; 609 NW2d 854 (2000). Under MCL 462.25, "[a]ll rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until found otherwise[.]" "[T]he burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." MCL 462.26(8). An order is unlawful if the PSC failed to follow a mandatory provision of the relevant statute or abused its discretion in the exercise of its judgment. *In re Mich Consol Gas Co's Compliance with 2008 PA 286 & 295*, 294 Mich App 119, 125; 818 NW2d 354 (2011).

"The PSC's determination regarding the scope of its authority is one of law," which this Court reviews de novo. See *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148, 157; 596 NW2d 126 (1999). "In construing the statutes empowering the PSC," Michigan courts do "not weigh the economic and public policy factors that underlie the action taken by the PSC." *Id*. at 156. As our Supreme Court has explained generally, "the power and authority to be exercised by

[9] As acts of governmental subdivisions of Michigan, this Court may take judicial notice of these resolutions under MRE 202.

boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Id*. at 155 (cleaned up). It "strictly construes the statutes which confer power on the PSC." *Id*. Although "respectful consideration" is given to the PSC's construction of a statute it is empowered to execute and a court must have "cogent reasons" to overturn the PSC's interpretation, appellate courts should on de novo review give no greater consideration to the PSC's judgment than it would that of a circuit court judge. *In re Rovas Complaint Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). "Respectful consideration is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions." *Id*. (cleaned up).[10]

"An agency rule is substantively invalid when the subject matter of the rule falls outside of or goes beyond the parameters of the enabling statute, when the rule does not comply with the intent of the Legislature, or when the rule is arbitrary or capricious." *Slis v State*, 332 Mich App 312, 340; 956 NW2d 569 (2020); see also *Ins Inst of Mich v Commr, Fin & Ins Servs, Dept of Labor & Econ Growth*, 486 Mich 370, 385; 785 NW2d 67 (2010). While an agency's construction of a statute "is entitled to respectful consideration," a "court's ultimate concern is a proper construction of the plain language of the statute." *Rovas*, 482 Mich at 108. "[T]he agency's interpretation cannot conflict with the plain meaning of the statute." *Id*.

---

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

ARGUMENT

I. The Order is unlawful and unreasonable because in issuing it the PSC exceeded its authority under PA 233.

PA 233 expressly grants the PSC limited authority in administering its provisions. As discussed above, "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *In re Public Service Comm'n*, 252 Mich App 254, 263; 652 NW2d 1 (2002). Under PA 233, the PSC may only do the following:

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

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

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

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

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

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

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

h. Consolidate proceedings. § 230(2).

In § 230 of PA 233, the Legislature unequivocally stated that "[i]n administering this part, the commission has only those powers and duties granted to the commission under this part." § 230(1). And PA 233 "shall control in any conflict between [it] and any other law of this state." § 230(2). PA 233 does not permit the PSC to redefine terms in PA 233 that the Legislature has already clearly defined. Yet the Order purports to do both by adding "hybrid facilities" to the explicit and limited list of solar, wind, and energy storage facilities to which PA 233 applies and by limiting and changing the definitions of "compatible renewable energy ordinance" and "affected local unit" in ways which further strip Appellants and all municipalities of their zoning

and police powers. These attempts by the PSC to effectively re-write PA 233 are unlawful and unreasonable.

Appellants anticipate that Appellees will argue that the Order reasonably provides clarity necessary to promote the State's renewable energy policies and to reduce the costs of applying for siting approval either through a local municipality or the PSC. However, such arguments are inappropriate and unpersuasive. "In construing the statutes empowering the PSC, [the Supreme Court] does not weigh the economic and public policy factors that underlie the action taken by the PSC." *Consumers Power Co*, 460 Mich at 156. "Those are matters of legislative concern." *Huron Portland Cement Co v Mich Pub Serv Comm'n*, 351 Mich 255, 262; 88 NW2d 492 (1958).

Again, while an agency's construction of a statute "is entitled to respectful consideration," a "court's ultimate concern is a proper construction of the plain language of the statute." *Rovas*, 482 at 108. "[T]he agency's interpretation cannot conflict with the plain meaning of the statute." *Id*. "When a statute's meaning is clear, construction of that statute is neither necessary nor permitted." *In re Procedure & Format for Filing Tariffs Under Michigan Telecom Act*, 210 Mich App 533, 551; 534 NW2d 194 (1995). "[S]tatutory language is the most authoritative evidence of the intentions of the drafters of the legislation." *Id.* at 553.

A. The Order unlawfully and unreasonably redefines "compatible renewable energy ordinance" and "affected local unit" and creates a new category of "hybrid facilities."

The Order unlawfully alters PA 233's statutory definitions and creates new ones, and it does so unlawfully and unreasonably in light of the statutory scheme. In *Procedure & Format for Filing Tariffs Under Mich Telecom Act*, telecommunication providers challenged an order from the PSC in which the PSC adopted a definition of "access services" which differed from Act 179's definition of "access." 210 Mich App at 548. Act 179 expressly defined "access" as "the provision

of access to a local exchange network for the purpose of *enabling a provider* to originate or terminate telecommunications service within the exchange." *Id*. at 548 (citing MCL 484.2102(a)) (emphasis added). The Legislature used "access" and "access services" interchangeably throughout Act 179. *Id.* at 549. Nonetheless, the PSC defined "access services" as "services and facilities provided to enable *all providers and customers* to originate or terminate *any intrastate telecommunication*." *Id*. at 548 (emphasis added). This Court held that this overly broad definition was unlawful, in part, because it departed from the statutory definition. *Id.* at 550.

In defining "access service," the PSC also misconstrued the section of Act 179 that provides that rates for access services set by a provider shall not exceed the rates allowed from the same interstate services by the federal government. *Id*. The PSC believed this section demonstrated a legislative intent that the PSC regulate any intrastate access service for which there was an equivalent interstate access service regulated by federal authorities. *Id*. This Court disagreed. "The provision is merely a cap on rates," and "[t]here is no indication in [the provision] that the Legislature intended that all regulated interstate services would also be regulated intrastate." *Id*.

Similarly here, the PSC has, as it admits[11], adopted narrower definitions of terms already defined by the Legislature in PA 233. First, "compatible renewable energy ordinance" is defined by PA 233 as

> an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8). A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the

[11] "With respect to the competing viewpoints expressed in the comments, the Commission agrees that a narrow definition for a CREO is appropriate" (Order, 17).

> development of energy facilities in effect within its jurisdiction. [§ 221(f).]

But the Order goes further:

> The Commission further specifies that a CREO *may only contain* the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and *may not contain additional requirements* more restrictive than those specifically identified in that section. [Order, 18 (emphasis added).]

Like in *Procedure & Format for Filing Tariffs Under Mich Telecom Act*, here the PSC again rewrites a definition already provided by the statute. Additionally, the PSC failed to consider that a developer who goes to the PSC to obtain a certificate is required to comply with requirements in addition to the setback, fencing, height, sound, and "other applicable requirements" of § 226(8). For example, developers *must* submit to the PSC a fire response and an emergency response plan, § 225(1)(q), despite that not being a requirement of § 226(8). Yet the Order's limiting definition of CREO would render an Appellant's ordinance that requires a fire response plan for a solar energy system incompatible with PA 233—only for the developer to be required to submit such a plan to the PSC anyway. Not only does the Order depart from the statutory definition of "CREO," but it also ignores how that definition fits within the entirety of PA 233.

Second, PA 233 defines "affected local unit" as "a unit of local government in which all or part of a proposed energy facility will be located," § 221(a), and "local unit of government" as a county, township, city, or village, § 221(n). The Order further restricts the term "ALU … to only those local units of government that exercise zoning jurisdiction." (Order, 9.) Once again, the PSC took a term clearly defined by PA 233 and limited its meaning in a manner unnecessary and inconsistent with PA 233. As explained above, the PSC has the authority to site energy facilities under limited circumstances, and the Order describes this as a transfer of siting authority that depends on the exercise of local zoning jurisdiction (Order, 9). However, the term "ALU" is

utilized by PA 233 in other contexts, too. For instance, § 226(1) requires developers to make a one-time grant to each ALU for the ALU to use for costs associated with participation in the contested case proceeding on the application. A contested case proceeding is required, and an ALU may participate by right. § 226(3). Through the proceeding, the PSC must consider the impact of the proposed energy facility on local land use. § 226(6). Regardless of whether an ALU exercises zoning jurisdiction, it has an interest in and perspective on how a proposed energy facility will impact local land use within the ALU.

Additionally, the PSC is required to grant the application and issue a certificate if it determines, among other things, that the public benefits of the proposed energy facility justify its construction. § 226(7)(a). Under PA 233, public benefits specifically include "expected tax revenue paid by the energy facility to local taxing districts" and "local job creation," both of which are surely relevant to any local unit, not just those with a zoning ordinance. *Id.* But under the Order's limited definition of ALU, such a jurisdiction would not be entitled to grant funds to support its participation in the contested-case proceeding. In limiting the definition of ALU to only local units that exercise zoning jurisdiction, the PSC ignored that PA 233's provisions clearly include local units that do not have zoning regulations.

Furthermore, ALUs benefit from "host community agreements." Under § 227(1), an applicant before the PSC must "enter into a host community agreement with each affected local unit." Such an agreement must provide that the facility owner will pay the ALU $2,000 per megawatt of nameplate capacity located within the ALU. *Id*. The payment must "be used as determined by the affected local unit for police, fire, public safety, or other infrastructure, or for other projects as agreed to by the local unit and the applicant." *Id*. Again, this benefit is not tied to

whether or not the local unit exercises zoning power and cannot be administratively stripped from unzoned ALUs.

Third, the Order creates a completely new category of facilities, "hybrid facilities," that are not contemplated by PA 233. Although the statutory scheme of PA 233 grants the PSC limited jurisdiction over specific types of facilities that meet threshold requirements, the PSC purports to use the Order to expand its jurisdiction to this additional new category of facilities. The Order states that a developer may apply if the proposed facility is a wind facility that includes solar facilities or storage facilities or a solar facility that includes storage facilities, which, when combined, meet the jurisdictional threshold (Order, 5–6, 84–85). Indeed, the Legislature allowed energy storage facilities to be included in solar and wind facilities but did not include a provision allowing solar and wind facilities to be combined. The absence of such a provision is telling.

As to the additional confusion—and unlawful formula—created by the PSC's use of "hybrid facilities," the Michigan Townships Association filed helpful public comments:

> The inclusion of energy storage facilities in [PA 233's] definitions is to recognize that energy storage does not have to be at least 50 MW capacity with 200 MWh of discharge capability to be in support of the qualifying wind or solar facility. Otherwise, the 50 MW solar project could not include energy storage if the energy storage did not qualify on its own … For example, a 50 MW solar could have a 2 MW energy storage as part of its facility. This is NOT the same as saying a 10 MW solar qualifies if there is a 40 MW energy storage facility. In that case, neither would qualify under the legislation enacted into law … The hybrid formula being proposed would allow the combination of a 2-megawatt wind facility and a 98-megawatt battery storage facility to equal the 100 megawatts for a wind energy facility. This is not supported by any legal interpretation of the statute. [MTA Comments on MPSC Staff Draft Application Instructions; Exhibit I (emphasis in original).]

Yet the PSC once again ignored the clear intent of the Legislature and adopted a new term that not only confuses and conflates the statutory requirements but also expands its own authority over smaller projects that band together to avoid local zoning regulations.

Both "compatible renewable energy ordinance" and "affected local unit" are expressly defined by PA 233. Limiting those definitions as the Order does excludes municipalities from the protections and benefits of PA 233. Creating the additional category of "hybrid facilities" further erodes local control, in contravention of the Legislature's intent and PA 233's plain language. For these reasons, the Order unlawfully and unreasonably redefines those terms. Accordingly, this Court should vacate the Order, or, at a minimum, vacate the sections described above.

B. The Order unlawfully modifies statutory timelines.

The Order unlawfully modifies the statutorily established timelines for siting approval of PA 233 energy facilities. Under PA 233, developers are required to hold a public meeting in each ALU where they intend to obtain a certificate for and construct an energy facility. § 223(1). At least 60 days before the public meeting, the developer must offer, in writing, to meet with the chief elected official ("CEO") of each ALU, to discuss the site plan. § 223(2). If, within 30 days of the developer and CEO meeting, the CEO notifies the developer that the ALU has a CREO, then the developer must file for siting approval from the ALU. § 223(3). PA 233 prescribes the timeline for these meetings and notifications.

The Order, however, establishes new and different deadlines. "[If the] CEO fails to notify the electric provider or IPP of the existence of a CREO *within 30 days following receipt of an offer to meet*, the electric provider or IPP may proceed as if an ALU does not have a CREO (Order, 11–12 124 (emphasis added)). This directly contradicts PA 233, which gives the CEO 30 days after the actual meeting between the CEO and the developer to notify the developer of the ALU's

CREO. See § 223(3). Such contradiction rewrites PA 233—a legislative function outside of its authority—and is thus unlawful.

The effect of the PSC's attempted rewrite of PA 233 is already being felt. Several written offers to meet with Appellants regarding site plans refer to the Order's timelines, not the statute's. (Exhibit H). In an email to Appellant Cohoctah Township, one developer even claims that Order—not the statute—controls, and is using the threat of lost intervention dollars and local control to pressure the ALU (Ranger Power Email, 1/2/2025; Exhibit J).Accordingly, this Court should vacate the Order, or, at a minimum, vacate the sections described above.

C. The Order as a whole is unlawful and unreasonable because it is not authorized by PA 233.

The Order itself is unlawful and unreasonable because the decisions contained in the Order are well outside the scope of the PSC's authority granted by the Legislature under PA 233. The PSC's interpretation of PA 233—giving it broad rulemaking authority—is well beyond the plain language of the statute. Therefore, the subject matter of the rule "goes beyond the parameters of the enabling statute" and is substantively invalid. *Slis*, 332 Mich App at 340. Moreover, the Order is unreasonable and unlawful when the entire statutory scheme is considered. Indeed, PA 233, as PA 234 suggests, must be read in context with the MZEA.

The Legislature knows how to limit local zoning authority: the MZEA limits local control over home occupations (MCL 125.3204); oil and gas wells and the extraction of natural resources (MCL 125.3205); amateur radio service station antenna structures (MCL 125.3205(a)); commemorative signs (MCL 125.3025(d)); and state licensed residential facilities, qualified residential treatment programs, family child care home, group child care homes, adult foster care small group or large group homes and facilities offering substance use disorder services (MCL

126.3206). In particular, the MZEA states that state-licensed residential facilities and qualified residential treatment programs that provide service for 10 or fewer individuals are residential, permitted uses in all residential zoning districts and are not subject to special use or conditional use permits. MCL 125.3206(1). Yet, PA 233 does no such thing and never expressly states that qualifying energy projects are permitted in any zoning district, or even any particular type of district (like commercial, agriculture, or industrial districts). Neither does PA 234. And the Legislature did not amend the MZEA to state that. So, at a minimum, there is no "clear and unmistakable language" granting the PSC authority to impose its narrow definition of CREO on Appellants. See *Consumers Power Co*, 460 Mich at 155.

Even in PA 233 itself, the Legislature expressed its intent that providers granted a certificate by the PSC must comply with local ordinances. § 231(5). The language of the statute as a whole and of § 226(8), in particular, demonstrates the Legislature's intent that CREOs may contain additional, but not more restrictive, than the regulations under § 226(8). Section 226(8) explicitly relies on § 226(7)(g) to explain that a "proposed energy facility does not present an unreasonable threat to public health or safety" if it complies with the enumerated requirements of Subsection (8). Put another way, Subsection (8) merely defines what does not constitute "an unreasonable risk to public health or safety" as a matter of law. Read in context, Subsection 8, and Subdivision 7(g), are only a small piece of the total information required by an application presented to the PSC. The application must also contain the information described in § 226(6) and (7), and through §223(3)(a), most of the information described in §225(1). Section §223(3)(a) also permits an ALU to "require other information necessary to determine compliance with the" CREO.

By the PSC's logic, applications submitted to the PSC and to ALUs must contain the information required by § 223(3)(a), § 225(1), the rest of § 226, and the PSC must consider all

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

In other words, the PSC may not redefine CREO to mean that a local ordinance may contain no other restrictions than those found in §226(8) because such an action violates basic tenets of administrative law in Michigan, including precedent directly tied to the PSC. Again, the PSC's authority is limited and it must rely on clear and unmistakable language when executing statutes it is charged to enforce. *Consumers Power Co*, 460 Mich at 155–157. PA 233 contains no clear and unmistakable language allowing it to redefine CREO or ALU, or to create new terms like "hybrid facilities."

Indeed, other statutory schemes shed light on these concepts, and looking to preemption jurisprudence is helpful. Our Supreme Court has long held that "an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the [state] statute." *DeRuiter v Byron Twp*, 505 Mich 130, 147; 949 NW2d 91 (2020). It has explained that "[t]he mere fact that the State, in the exercise of its police power, has made certain regulations does not prohibit a municipality from exacting additional requirements." *Id*. (cleaned up). "So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in

themselves pernicious, as being unreasonable or discriminatory, both will stand." *Id*. (cleaned up). "The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription." *Id*. (cleaned up).

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

Here, many Appellants have exercised their authority under the MZEA to determine where qualifying energy facilities may be located by copying the provisions of § 226(8) into their CREOs while also specifying the zoning districts where such facilities may be located. Like the statute at issue in *DeRuiter*, PA 233 is silent on the issue of "where." Accordingly, the PSC's redefining of CREO and ALU and the creation of hybrid facilities runs afoul of Michigan's preemption jurisprudence.

For the reasons stated above, the Order is unlawful and unreasonably further limits the power of municipalities to reasonably regulate land uses within their borders, well beyond what the Legislature intended. Accordingly, this Court should vacate the Order.

II. The Order is unlawful because it is a rule not adopted in compliance with the Administrative Procedures Act, MCL 24.201 *et seq*.

The Order is also unlawful because it is a rule not adopted in compliance with the Administrative Procedures Act ("APA"), MCL 24.201 *et seq*.

An agency is obligated to employ formal APA rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 404; 591 NW2d 314 (1998). Under the APA, a rule is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207.

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

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

The Order arose from PSC Case Number U-21547, "In the matter, on the Commission's own motion, to open a docket to implement the provisions of Public 233 of 2023." There were no named parties and there was no evidentiary hearing. The Order binds all persons and entities dealing with the PSC in any proceeding initiated under PA 233. In short, the Order is simply a rule

under another name and is subject to the rulemaking process. And yet the PSC's alternative process did not mirror that required by the APA.

Before initiating rulemaking, an agency must file with the Michigan Office of Administrative Hearings and Rules ("MOAHR") a request for rulemaking in a format prescribed by MOAHR. MCL 24.239(1). MOAHR must approve the request for rulemaking. MCL 24.239a. Then, the agency submits draft rules to MOAHR, *id*., and the latter reviews the draft to ensure the agency is within its statutory authority and edits the rules for conformance with stylistic rules. MCL 24.234, 24.236. The agency then submits a regulatory impact statement and cost-benefit analysis, which includes a small business impact statement. MCL 24.245(3). The regulatory impact statement must contemplate, among other things, the economic impact of the proposed rule, any burdens placed on the regulated community, and the expected benefits. *Id*. After the regulatory impact statement is approved by MOAHR and following public notice, the agency must hold a public hearing where individuals may offer written or verbal comments regarding the proposed rule. MCL 24.239a, 24.242, and 24.245. Following the public hearing and the end of the public comment period, the final rules must be submitted to the Legislative Service Bureau and again to MOAHR. MCL 24.245 and 24.246. Finally, the rules are sent to the Legislature's Joint Committee on Administrative Rules, which has 15 session days to consider the rule. MCL 24.245a(1)(a)-(d). The Committee may object, propose that the rule be changed, or introduce bills to enact the subject of the rule into law. *Id*.

The PSC's process did not include most of these steps. No other agencies were involved. The Legislature did not review the Order. In no circumstances was the process employed by the PSC like that required by the APA.

Yet in their response to the motion for preliminary injunction, the PSC argued that "[i]t would have been inappropriate for the Commission to file a request for rulemaking with the [MOAHR] for these interpretations, as rules developed under the APA do not include interpretive statements, guidelines, or explanatory materials" (Appellee's Response to Motion for Preliminary Injunction, 12/2/2024, 30). The PSC simply cannot rely on this circular logic. The Order, or at least parts of it, are not simply interpretative statements exempt from rulemaking.

Indeed, the definition of "rule" under MCL 24.207 is broadly construed to reflect the APA's preference for policy determinations pursuant to rules, while the exceptions are narrowly construed. *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). An agency may not avoid the requirements for promulgating rules by issuing its directives under different labels. See *id*. at 9. Our Supreme Court has explained that Section 7(h), which exempts from the definition of "rule" "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory," is to be narrowly construed. *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services*, 431 Mich 172, 184; 428 NW2d 335 (1988). An "agency's label is not dispositive and the inquiry must focus on the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id*. at 188. "In short, an agency statement of general applicability in itself has the force and effect of law when the statement itself alters rights or imposes obligations and has a present, binding effect on regulated entities, the agency, and the courts. If an agency statement (1) merely explains what the agency believes an ambiguous provision of a statute or agency rule means or (2) explains what factors will be considered and what goals will be pursued when an agency exercises a discretionary power or conducts an adjudication, the statement will generally not be considered to alter rights,

impose obligations, or have a present, binding effect. *Mich Farm Bureau v Dep't of Environment, Great Lakes, and Energy*, ___ Mich ___, ____; NW3d _____ (2024) (Docket No. 165166), slip op at 36-37.

In other words, an agency action is a "rule" under the APA if: (1) it is an agency regulation, statement, standard, policy, ruling, or instruction; (2) it is of general applicability; (3) it implements or applies law enforced or administered by the agency, or it prescribes the organization, procedure, or practice of the agency; and (4) it, in itself, has the force and effect of law." *Id.*, slip op at 27. It cannot be seriously disputed that the Order fails to meet the first three elements. The focus, here, is on the fourth: whether the Order has the force and effect of law.

Our Supreme Court has recently examined this element. In *O'Halloran*, *M.D. v Secretary of State*, ____ Mich ____; ____ NW3D ____ (2024) (Docket No. 166424), slip op at 27, it explained that when an agency relies on the interpretative statement or guideline exemption, the agency's document must not impose requirements on those affected and must be correct statements of law. In that case, the plaintiffs challenged the Secretary of State's latest "manual" for election challengers. *Id*., slip op at 2. The Supreme Court upheld the manual on the merits and under the APA because the manual did not "purport to add any substantive requirements beyond those listed in" the relevant statute and the manual was a correct interpretation of the law. *Id*., slip op at 21, 27. Accordingly, the manual was an "interpretative rule."

> [I]nterpretive rules are, basically, those that interpret and apply the provisions of the statute under which the agency operates. No sanction attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets. . . . [Interpretive rules] state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts. . . . If the rule represents something more than the agency's opinion as to what the statute requires—if the

> legislature has delegated a measure of legislative power to the agency, and has provided a statutory sanction for violation of such rules as the agency may adopt—then the rule may properly be described as legislative. [*Id*., slip op at 18 (cleaned up; alteration in original).]

"With this legal background," the Supreme Court "look[ed] at each challenged component of the manual, in turn, to determine whether plaintiffs are correct that either the particular component is contrary to the Michigan Election Law or the component was a formal rule requiring promulgation through the APA." *Id*., slip op at 19.

So, the inquiry here must begin with the PSC's authority. While an administrative agency may act to interpret a statute or to exercise a permissive statutory power, MCL 24.207(h) and (j), the PSC did not merely "interpret" PA 233, and it does not possess permissive statutory power to rewrite sections of PA 233.

As a general matter, under MCL 24.232(6), "[i]f a statute provides that an agency may proceed by rule-making or by order and an agency proceeds by order instead of rule-making, the agency shall not give the order general applicability to persons that were not parties to the proceeding or contested case before the issuance of the order, unless the order was issued after public notice and a public hearing." The Order is generally applicable, but no public hearing was held. Accordingly, the PSC could not proceed "by order" under MCL 24.232(6).

More specifically, this Court has explained that "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *In re Pub Serv Comm'n for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002). It has also "note[d] that the PSC must promulgate rules for the conduct of its business and the proper discharge of its functions to the extent it intends to make its policies binding on all persons dealing

with the commission or interested in any matter or proceeding pending before it." *Id*. at 264 (cleaned up).

For the reasons discussed in Section I above, the portions of the Order that redefine statutory terms (CREO and ALU) and rework statutory deadlines are not valid exercises of the PSC's "permissive statutory power." See MCL 24.207(j); see also *Mich Trucking Association v Public Service Com'n*, 225 Mich App 424; 571 NW2d 734 (1997).

PA 233 permits the PSC to establish application filing requirements. § 224(1). But it does not permit the PSC in those "filing requirements" to expand its jurisdiction and determine which local governments are affected by the process. The statute does that. The Legislature possessed that authority. The PSC does not.

In *Mich Farm Bureau,* slip op at 45, the Supreme Court relied on the fact that EGLE possessed discretion in the performance of its relevant duties. But the PSC has no discretion in issuing a certificate in certain circumstances. If an application submitted to the PSC meets the requirements of Section 226(7) and the PSC has jurisdiction over the application, the PSC must grant the certificate. So, it is paramount that the PSC only exercise its jurisdiction when the *statute* allows.

This case is unlike *O'Halloran*, where our Supreme Court upheld an election challenger's manual as exempt from the APA because the manual did not "purport to add any substantive requirements beyond those listed in" the relevant statute, *O'Halloran*, slip op at 21. Here, the PSC *does* purport to impose substantive requirements on local governments beyond what the statute requires or allows. The Order purports to impose a requirement that local governments not include any regulations beyond the strict parameters of Section 226(8), even though, as explained earlier, such a limitation is contrary to the Legislature's intent and the plain language of the statute. It

purports to require local governments to exercise zoning jurisdiction to be considered an ALU, even though the statute specifically does not include such a requirement. Indeed, in *O'Halloran*, the Secretary of State "merely mandated the use of a uniform credential form." *Id*., slip op at 21. Here, the PSC fundamentally alters the rights of local governments and unlawfully purports to expand its jurisdiction. As the *O'Halloran* Court explained, to be a permissible "interpretative statement," the statement must "fit within correct interpretations of Michigan law." *Id*., slip at 27.

The *O'Halloran* Court also explained that the manual at issue did not have "the force and effect of law" as applied to its challengers because the manual did not require election inspectors to take action against challengers who violated its terms. *Id*., slip op at 28. But the Order, in effect, does. If a local government does not abide by the Order's terms, and the PSC grants a certificate because it determines that, under its interpretation, the local government was not an ALU or did not have a CREO, the local government is then deemed to not have a CREO in future cases. § 223(5). This "sanction," which could legitimately flow from PA 233 itself, will be imposed not by the statute but by the PSC's implementation of the Order. An "interpretative rule" that relies on the guideline exemption to rulemaking may not impose a sanction. See *O'Halloran*, slip op at 18.

The redefining of "CREO" and "ALU" and the other portions of the Order herein mentioned "establish the substantive standards implementing" PA 233 and "do not merely explain" the statute. *Faircloth*, 232 Mich App 391, 404. Accordingly, the Order has "the force and effect of law" and is therefore a rule subject to the APA. This Court should vacate the Order, or the portions therein that go beyond mere guidelines.

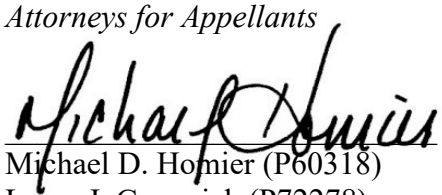
CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court vacate the Order, or, at a minimum, vacate the portions challenged herein.

Respectfully submitted,

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Appellants

Dated: January 3, 2025

By: 

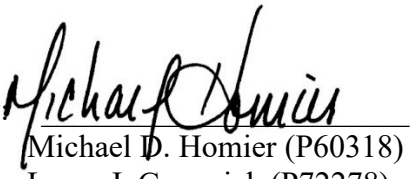
Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

WORD COUNT CERTIFICATION

This brief contains 10,847 words, in compliance with MCR 7.212(B).

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Appellants

Dated: January 3, 2025

By 

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

89561:00001:201088839-7