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, Intervening Appellees.	Court of Appeals No. 373259 **INTERVENING APPELLEES' BRIEF ON APPEAL** **ORAL ARGUMENT REQUESTED**

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INTERVENING APPELLEES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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CONCURRENCE WITH APPELLANTS' STATEMENT OF BASIS OF JURISDICTION

Intervening Appellees concur with Appellants that this Court has jurisdiction over this appeal pursuant to MCL 462.26 and MCR 7.203(D) and that the Michigan Public Service Commission ("MPSC" or "Commission") Order that is the subject of this appeal was issued October 10, 2024.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Intervening Appellees do not concur with the factual and legal assertions that Appellants make in their Statement nor in Appellants articulations of the Questions Presented.

I. Did the Public Service Commission act lawfully and reasonably in exercising its authority in issuing the October 10 Order?

Intervening Appellees' answer: Yes.

Appellants' answer: No.

II. Is the Order a rule subject to the Administrative Procedures Act?

Intervening Appellees' answer: No.

Appellants' answer: Yes.

I. INTRODUCTION

Through this appeal, Appellants ask this Court to provide something that the Legislature, Michigan voters, and the Michigan Public Service Commission ("MPSC" or "Commission") have rejected: endorsement of their desire to continue obstructing the rights of landowners and energy project developers seeking to freely cooperate in responsibly constructing and operating new renewable energy and energy storage facilities. This obstructionism contradicts Michigan's public policy, as expressed by the Legislature in Public Act 235 of 2023 ("Act 235"), which mandated an increased renewable energy portfolio and greater clean energy standards for the State's retail electric providers, including its regulated utilities (*e.g.*, Consumers Energy and DTE Energy).

The Legislature anticipated and rejected Appellants' desire to effectively veto renewable energy projects within their jurisdictions and thereby frustrate Act 235's goals. By way of Public Act 233 ("Act 233"), the Legislature preempted local authority over siting decisions related to renewable energy projects and instead placed that authority with the Commission subject to certain exceptions. One of these exceptions applies if the local government has an ordinance that "provides for the development of energy facilities within the local unit of government" and is no more restrictive than requirements contained in Act 233. MCL 460.1221(f). Another exception exists for projects below a certain capacity threshold. MCL 460.1222(l). The Legislature also limited a local government's ability to sidestep Act 233's preemptive effects through an exercise of local zoning power by explicitly subjecting the Michigan Zoning Enabling Act ("MZEA") to key provisions of Act 233. MCL 125.3205(d).

The Commission has express authority to administer Act 233 in order to implement its purpose under firmly established Michigan law. See MCL 460.1230(1); see *In re Quality of Service Standards for Regulated Telecommunication Services*, 204 Mich App 607 (1994) ("[A]lthough statutes granting authority to administrative agencies generally are construed strictly,

due regard must always be had to legislative intent, and powers necessary to a full effectuation of authority expressly granted will be recognized as properly appertaining to the agency."). Act 233 explicitly grants the Commission the authority to establish application filing requirements by rule or order. MCL 460.1224(1). By issuing the "Application Filing Instructions and Procedures" in its October 10 Order, the Commission did no more than lawfully and reasonably exercise the authority granted to it by Act 233 in furtherance of the public interest. Because Appellants fail to establish that the MPSC acted unlawfully, unreasonably, or in violation of the public interest, Intervening Appellees respectfully request that this Court affirm the October 10 Order.

II. COUNTER-STATEMENT OF FACTS

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

Act 233, Michigan's state siting law for renewable energy and energy storage projects pursuant to which the MPSC issued its October 10 Order, was part of a package of renewable and clean energy bills enacted in November 2023. Act 233 created a new Part 8 within existing Act 295, the "Clean and Renewable Energy and Energy Waste Reduction Act," whose purpose is "to promote the *development* and *use* of clean and renewable energy resources." MCL 460.1001(2) (emphasis added). Act 234, in turn, amended the MZEA to make that act expressly subject to the new Part 8 of Act 295. See MCL 125.3205(1)(d).

This package of bills also included Act 235, which amended the renewable portfolio standard ("RPS") previously applicable to electric providers in Michigan under Act 295 from 15% (the status quo before Act 235) to 50% by 2030 and 60% by 2035.[1] Act 235 also amended Act 295

[1] The term "electric provider" for the purposes of Act 235's RPS and clean energy standard includes investor-owned, rate-regulated utilities like Consumers Energy Company and DTE Electric Company as well as competitive alternative electric suppliers ("AESs"), cooperative

to require electric providers in Michigan to achieve a clean energy[2] portfolio of 80% by 2035 and 100% by 2040. Act 233 is therefore properly viewed as a necessary tool to assist the State in achieving those renewable and clean energy standards. The Legislature was particularly troubled by the obstacles that utility-scale renewable energy projects faced when trying to obtain permitting though local government. This context, coupled with the State's ambitious renewable energy goals, is critical to understanding the legislative intent behind Act 233. See *People v Roy*, 346 Mich App 244, 249 (2023) ("[C]ourts may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions.").

Act 233 was introduced in the House of Representatives as House Bill 5120 of 2023 ("HB 5120"). From its inception, HB 5120 was built around a key concern: if local governments were left to create their own subjective (and often exclusionary) standards for utility-scale renewable energy projects, Michigan would never meet its renewable energy goals. Prior to Act 233, a renewable energy project proposed to be sited in Michigan faced many tactics employed by municipalities that opposed any development, based either on "not in my backyard" sentiments of residents or, more fundamentally, local (and outside) political opposition to the very concept of clean or renewable energy. Examples abound of local governments enacting lengthy or repeated zoning moratoria, exclusionary zoning ordinances, or simply refusing to follow their existing ordinances to allow lawful developments to move forward. This phenomenon is not unique to Michigan. Several other states, including Ohio, Kentucky, Massachusetts, and Washington, have

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utilities, and municipal utilities. In other words, *all* retail suppliers of electricity in Michigan are subject to the requirements. This effectively requires 50% of *all kWh of electricity sold in Michigan* to be renewable by 2030 (60% by 2035). See MCL 460.1028(2).

[2] "Clean energy" includes renewable energy as well as nuclear and certain limited types of natural gas generation.

enacted laws that place renewable energy siting with a state body, recognizing that state goals for renewable energy development cannot be met if development is subject to unchecked local control and approval. See generally Enterline & Valainis, *Laws in Order: An Inventory of State Renewable Energy Siting Policies*, Regulatory Assistance Project (June 2024) (available at https://www.catf.us/resource/laws-in-order/) (last accessed February 6, 2025). Michigan followed this trend with Act 233, which preempts local zoning requirements in favor of a siting certification process at the MPSC for large utility-scale renewable energy projects and energy storage projects when a local ordinance violates the requirements of Act 233.

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

> If enacted, the bill [i.e., what became Act 235] would *necessitate the buildout of more utility-scale renewable energy resources like solar, wind, and storage in the State*; however, according to testimony, *the current process for siting and permitting renewable energy resources in local governmental units has proven complex and has delayed the buildout of these resources*. Accordingly, it has been suggested that the siting and permitting of renewable energy resources be regulated by the MPSC unless local governmental units demonstrated that they had requirements for the buildout of these resources that were compatible with those proposed by Part 8.

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

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

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

House Legislative Analysis, HB 5120 & 5121 (October 17, 2023), p 1 (emphasis added); *see also* House Legislative Analysis, HB 5120 & 5121 (February 5, 2024), p 1 ("Generally speaking, the

MPSC certification *process preempts local regulation of those facilities*, although a local government with an ordinance whose *requirements do not exceed the bill's certification standards* can act as a permitting authority in some circumstances.") (emphasis added). In cases where local governments fail or refuse to follow the State's standards, the Legislature looked to the MPSC to assume responsibility for the siting of utility-scale renewable energy projects. *See* 2023 Senate Journal 2454 (No. 99, November 8, 2023) ("It is important to understand that the Michigan Public Service Commission already has siting authority over critical infrastructure—that's gas and oil pipelines, oil and gas wells, the electrical transmission and distribution networks, as well as utility generation facilities. This legislation brings utility-scale renewable generation under the same existing siting authority.").

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

Similarly, Senator Ed McBroom attempted to amend HB 5120 to restrict the location of projects to areas with industrial zoning. 2023 Senate Journal 2447 (No. 99, November 8, 2023). As Senator McBroom explained:

> [M]y amendment seeks to correctly identify land that is taken and used for siting of solar projects as being the industrial operations that they are. It is wrong to pretend that these things are anything less than an industrial operation and they should be taxed thusly, they should be zoned thusly, and that should be a great

> benefit to the entirety of the state and our local communities to see that designation reflect that proper tax base that they would then be, and make sure these huge corporations that are seeking to build these places are paying their fair share.

Id. at 2453. This amendment was likewise voted down. *Id*. at 2447. As a result, *Act 233 was intentionally enacted without any sort of restriction on the location of utility-scale projects, including that such projects should only be located in certain zoning districts.*

Thus, the legislative history makes clear that the Legislature wanted to ensure that local ordinances would not create additional barriers to projects that otherwise complied with the standards set forth in Act 233. HB 5120 "would require a provider or IPP to file for approval of a facility with an affected local government unit, instead of the MPSC, [only] if that unit had a renewable energy ordinance *compatible with the bill's requirements.*" Senate Legislative Analysis, HB 5120 & 5121 (November 7, 2023), p 1 (emphasis added).

The Legislature was concerned about local zoning of utility-scale renewable energy projects, including the issues and delays in permitting projects that had taken place prior to Act 233. With that concern in mind, the Legislature enacted Act 233 to create a mechanism for utility-scale projects to be approved under uniform standards, either by the local government or the MPSC. And, in cases where local governments refused to fairly enforce such standards (or adopted standards that exceeded Act 233's requirements), the Legislature created a path for developers to obtain siting approval from the MPSC.

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

As outlined above, in enacting Act 233, the Legislature intended to put a stop to certain municipalities' practices of preventing utility-scale renewable energy projects from being constructed "in their backyard" via exclusionary zoning, moratoria, and extensive delay tactics. After a failed attempt to gather signatures sufficient to place Act 233 on the ballot in the November

2024 election, municipalities,[3] including Appellants, turned to a new tactic in their fight to prevent renewable energy development: the creation of "renewable energy overlay districts" so restrictive that they make it impossible for any utility-scale renewable project to proceed. The history of two particular Appellants highlighted in Appellants' brief underscores this effort.

First, the case of Appellant Fremont Township ("Fremont"), is illustrative of the lengths to which municipalities will go to prevent the development of renewable energy. After receiving an application for a utility-scale wind project in September 2022, Fremont refused to even hold the required public hearing on the permit application under the MZEA until the developer initiated a lawsuit and the parties entered into a consent judgment. See *Algonquin Power, (MI Energy Developments) LLC, d/b/a Liberty Power v Fremont Township, Circuit Court for Sanilac County Case No 23-40158-CH.* After being forced to hold the public hearing, Fremont then sought to prevent the developer from appealing the Planning Commission's denial of the permit to the Zoning Board of Appeals ("ZBA") by enacting an illegal moratorium pursuant to the Township's police power,[4] resulting in two further lawsuits to force the ZBA to hear the developer's appeal. See *Algonquin Power, (MI Energy Developments) LLC, d/b/a Liberty Power v Fremont Township, Circuit Court for Sanilac County Case No 24-40544-CH; Algonquin Power, (MI Energy Developments) LLC, d/b/a Liberty Power v Fremont Township, Circuit Court for Sanilac County Case No 24-40545-AA;* see also Appellants' App'x 28-30.

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

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

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

Appellant White River Township ("White River") has gone even further to limit the development of renewable energy within its borders. While Appellants' Appendix includes the purported CREO enacted by White River (White River Township Ordinance 61-2024), it *fails to include* the Ordinance separately enacted on the same day that limits the Renewable Energy Overlay District *to a single 600-acre contaminated brownfield parcel*.[5] See White River Township Ordinance 60-2024, at Intv App 010. This means that the ability to develop any utility-scale renewable energy facility in White River is entirely dependent on (1) the decision of a single landowner to allow renewable energy development on its property; (2) the ability of a developer to then obtain other regulatory approvals necessary for the development of a brownfield property

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

that is the subject of ongoing environmental remediation efforts, and then (3) to obtain financing for construction and operation of such a development on a highly-contaminated parcel. White River Township, if successful, will effectively foreclose the development of any renewable energy projects within its borders while at the same time proclaiming that is has complied with Act 233 by adopting its purported CREO.

C. ACT 233'S PREEMPTIVE EFFECT AND GRANTS OF AUTHORITY TO THE COMMISSION.

Act 233 was enacted to cut through the thicket of local government obstructionism sampled above and provides sufficient authority to the Commission to do so. Act 233 explicitly grants certain powers to the MPSC and requires that it carry out certain duties. See MCL 460.1230(1). The Legislature also declared that Act 233 preempts any other state law, with the exception of the Electric Transmission Line Certification Act. See MCL 460.1230(3). Further, the Legislature stated that an issued certificate under Act 233 and the Act itself "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 commission's certificate." MCL 460.1231(3) (emphasis added). The preemptive effects of the Act and the Commission's rulings on certificates are consistent with the above-cited legislative history stating that the Act was intended to preempt local zoning.

Act 233 explicitly authorizes the MPSC to do the following:

(1) to prescribe the format and content of public notices (MCL 460.1223(1));

(2) to set application filing requirements, which may be established by rule or order (MCL 460.1224(1));

(3) to set the site plan requirements by rule or order (MCL 460.1224(1)(c));

(4) to determine the contents of an application before the Commission (MCL 460.1225(1)(s));

(5) to determine reasonable application fees (MCL 460.1226(4));

(6) to grant or deny applications and to issue certificates (MCL 460.1226(5));

(7) to determine reasonable pollinator standards as necessary (MCL 460.1226(6)(b));

(8) to decide what proceedings at the MPSC, the regional transmission organization, or the FERC are relevant to determining the contribution of the proposed energy facility to meeting the identified energy, capacity, reliability, or resource adequacy needs of this state (MCL 460.1226(7)(a));

(9) to set more stringent zoning requirements for solar (MCL 460.1226(8)(a)(vi)), for wind (MCL 460.1226(8)(b)(viii), and for energy storage (MCL 460.1226(8)(c)(v));

(10) to issue orders necessary to protect information in an application for a certificate (MCL 460.1228(2));

(11) to consolidate related proceedings (MCL 460.1230(2)).

Collectively, the statutory language setting forth the preemptive effect of Act 233 and the explicit grants of authority to the Commission demonstrate the desire of the Legislature to enlarge the authority of the Commission with respect to renewable energy and energy storage siting and, correspondingly, to diminish local control.

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

Following the signing into law of Act 233 in November 2023, the MPSC issued an order on February 8, 2024 opening the docket U-21547 and directing the Commission Staff to file recommendations on application filing instructions, guidance relating to CREOs, and any other issues involving Act 233 by June 21, 2024. ("February 8 Order"). February 8 Order in Case U-21547 at Intv App 016. The U-21547 proceeding was not opened as a contested case

proceeding, but "on the Commission's own motion" as a comment proceeding. Thus, the February 8 Order sought engagement with experts, local units of government, project developers, and other interested persons "in transparent open meetings to consider issues relating to application filing instructions or guidelines, the potential use of consultants and assessment of application fees, whether and how pre-application consultations with the Staff would be helpful to potential applicants, guidance for use in the development of CREOs, as well as any additional issues that may arise during the engagement process from potential applicants and local units of government." *Id.* at Intv App 017. The Commission also directed Staff to hold public meetings starting in March 2024 and to file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in the docket by June 21, 2024. *Id.* The Commission noted that it would accept comments on the Staff's recommendations until 5:00 p.m. on July 17, 2024, and reply comments until 5:00 p.m. on August 9, 2024. *Id.* at 018.

The MPSC also established a website where information on Act 233 and the Commission's actions could be found: https://www.michigan.gov/mpsc/commission/workgroups/2023-energy-legislation/renewable-energy-and-energy-storage-facility-siting. This website hosted documents from the MPSC Staff meetings, such as presentations and agendas, comments requested and received, recordings of the meetings, and other resources such as Frequently Asked Questions, in addition to offering an opportunity to sign up to be on the mailing list for all activities of this MPSC Staff effort. The MPSC Staff held meetings on the following dates in 2024: March 7, March 19, April 5, April 26, May 15, May 28, July 10, and September 4. Staff circulated various draft straw proposals for comment at the meetings on April 5, May 15, and May 28. MPSC Staff filed their Application Instructions and Procedures, Staff Draft, final straw proposal for comment in the docket on June 21 ("Straw Proposal"). Meetings continued into July and September for

stakeholders to discuss concerns with and support for various parts of the Straw Proposal, and to bring attention to additional issues not addressed in the Straw Proposal. As ordered by the Commission, filed comments were received on the Straw Proposal until July 17 and reply comments until August 9.

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

III. STANDARD OF REVIEW

"The standard of review for orders of the Commission is 'narrow and well defined.'" *In re Antrim Shale Formation re Operations of Wells Under Vacuum*, 319 Mich App 175, 180; 899 NW2d 799 (2017) (cleaned up). Appellants bear the burden of proof. "When appealing a decision of the Commission, the appellant has the burden 'to show *by clear and satisfactory evidence* that the order of the commission complained of is unlawful or unreasonable.'" *Id.* (quoting MCL 462.26(8)) (emphasis added). "An order is unlawful if the Commission failed to follow a statutory mandate or abused its discretion." *Id.* Questions of whether the Commission exceeded the scope of its authority and of statutory interpretation are reviewed *de novo*. *Id.* "An order is unreasonable if it is not supported by the evidence." *Consumers Energy Co v Michigan Public Service Com'n*, 268 Mich App 171, 174; 268 NW2d 633 (2005).

"The Commission has no common-law powers; it has only the authority granted to it by the Legislature." *In re Reliability Plans of Electric Utilities for 2017–2021*, 505 Mich 97, 119; 949 NW2d 73 (2020). "What authority a statute gives an agency is a matter of statutory interpretation. The primary goal of statutory interpretation is to give effect to the Legislature's intent." *Id.* Among the Commission's powers is "the authority to interpret the statutes it administers and enforces," and "[c]ourts give the agency's statutory interpretation respectful, nonbinding consideration and do not overturn it absent cogent reasons." *Id.* (citing *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008)); see also *Vectren Infrastructure Servs Corp v Dept of Treasury*, 512 Mich 594, 613–14; 999 NW2d 748 (2023) ("Agency interpretations of the statutes they are charged with implementing are generally given 'respectful consideration' so long as they are consistent with the plain language of the statute."). Furthermore, "although statutes granting authority to administrative agencies generally are construed strictly, due regard must always be had to legislative intent, and powers necessary to a full effectuation of authority expressly granted will be recognized as properly appertaining to the agency." *In re Quality of Service Standards*, 204 Mich App at 613 (1994).

IV. ARGUMENT

The Commission in the October 10 Order does no more than follow the Legislature's directions to establish "application filing requirements . . . by rule or order to maintain consistency between applications." See MCL 460.1224(1). To the extent the October 10 Order does anything more than this, it represents the exercise of the Commission's permissive statutory authority granted to it to interpret, administer, and enforce Act 233. In order to sustain their arguments to the contrary, Appellants must establish by clear and satisfactory evidence that the Commission lacked the statutory authority to issue its Order. MCL 462.26(8). Appellants concede that the Commission is authorized to "establish application filing requirements," (Br on Appeal at 33), and

that there is an exception under MCL 24.207(h) for interpretive rules and under MCL 24.207(j) for the exercise of permissive statutory power without requiring a rulemaking process, even where private rights may be affected. Appellants also recognize that, where a statute gives an agency discretion whether to act by rule or order and the agency chooses to proceed by order, the order may be given general applicability if issued after public notice and a public hearing. (Appellants Br on Appeal at 32); see also MCL 24.232(6).

Because Appellants fail to meet their burden to demonstrate by clear and satisfactory evidence that the Commission lacked authority under the Michigan Administrative Procedures Act, Act 306 of 1969, MCL 24.201, *et seq.*, ("MAPA") and Act 233 to issue the October 10 Order, Intervening Appellees respectfully request that this Court affirm the October 10 Order.

A. THE OCTOBER 10 ORDER DOES NOT VIOLATE THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT.

Appellants complain that the Commission's Order "ventures into rulemaking" and "rewrites key statutory definitions" as well as "undermines the authority of local communities […] to regulate the siting of utility-scale renewable energy projects." (Appellants' Br on Appeal at 1). It in fact does none of those things but is rather issued in obedience to the Legislature's direction that the Commission establish "application filing requirements . . . by . . . rule or order to maintain consistency between applications." MCL 460.1224(1). It is thus a legitimate exercise of permissive statutory authority from the Legislature that reasonably harmonizes the PSC's certification process with the processes of local zoning approval by means of appropriate and necessary interpretations of key terms in the statute. See MCL 24.207(h), (j).

Section 224(1) of Act 233 directs the Commission to establish "application filing requirements . . . by . . . rule or order to maintain consistency between applications." MCL 460.1224(1). Section 32(6) of the MAPA, in turn, provides that

> If 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.

MCL 24.232(6). The MAPA defines a "rule" in relevant part as follows:

> 'Rule' means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof, but does not include any of the following:
>
> ***
>
> (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.
>
> ***
>
> (j) a decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

MCL 24.207.

An administrative agency can act to interpret a statute and/or to exercise a permissive statutory power without following the formal rulemaking process, despite impacts on private rights. See MCL 24.207(h) and (j); *O'Halloran v Secretary of State*, , ___ Mich ___; ___ NW3d ___ (Docket Nos 166424 & 166425), 2024 WL 3976495 (August 28, 2024) (addressing interpretive rules), *Michigan Trucking Association v MPSC*, 225 Mich App 424; 571 NW2d 734 (1997) (addressing permissive statutory power).

The exception to rulemaking found in MCL 24.207(h) applies when an agency is promulgating "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). The exception to the rulemaking process found in MCL 24.207(j)

applies to "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j).

Appellants concede *at length* in their Brief on Appeal that recent precedent clearly holds that "interpretive rules . . . fall under the MCL 24.207(h) rulemaking exception," *O'Halloran*, 2024 WL 3976495, at *8. (See Appellant Br on Appeal at 30–34.) The Supreme Court described interpretive rules as follows:

> Interpretive 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.

O'Halloran, 2024 WL 3976495, at *9. The Court emphasized that "[a]n interpretive statement that goes beyond the scope of the law may be challenged when it is in issue in a judicial proceeding. An interpretation not supported by the enabling act is an invalid interpretation, not a rule." *Id.* citing *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 243; 501 NW2d 88 (1993).

The determinations Appellants challenge on appeal, which can be fairly traced to the operation of the legislation itself and not exclusively to the MPSC's Order (see Section IV.B., *infra*), are plainly interpretive rules. For example, when the Commission's Application Instructions state that "A CREO under Act 233 may only contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8), and may not contain additional requirements beyond those specifically identified in that section," this is simply interpreting the plain language of MCL 460.1221(f) and of the statute as a whole. MCL 460.1221(f) requires that a CREO be "no more restrictive than the provisions included in section 226(8)." *Id.* The Commission merely interprets the full scope of the statutory restriction by explaining what kind of requirements are to be found in Section 226(8) (setback, fencing, height,

sound, etc.) and emphasizing that the Legislature's exclusive list of issues a CREO can regulate in Section 226(8) may not be supplemented by the ALU. (See also Section IV.B.1., *infra*.)

To the extent that any of the Commission's actions complained of here are not interpretive rules necessary for fulfilling its role in administering the statutory scheme, they are plainly exercises of a permissive statutory power under Act 233. See MCL 24.207(j). The exercise of a permissive statutory power, furthermore, is excluded from the procedural requirements of the rulemaking process, "although private rights or interests are affected." *Id.* Act 233 provided the Commission with authority to act in a number of ways to establish, oversee, and carryout the certification proceedings under the Act. See II.C. supra. The Commission's Order was a lawful exercise of that permissive authority.

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

Appellants express concern about the binding nature of the Order on persons appearing before the Commission in an Act 233 proceeding. But to the extent that private interests are affected by the MPSC's order, these effects are either due to the actions of the underlying statute which the MPSC is simply interpreting or else they are valid exercises of statutory authority that

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

The validity of the October 10 Order as an exercise of Commission authority on the basis of the above-articulated exceptions to the MAPA rulemaking process is further buttressed by this Court's recent decision upholding an order of the MPSC interpreting for the first time the requirements of Act 341 of 2016. That order was challenged, in part, on grounds of a failure to use the APA rulemaking process. See *In re Reliability Plans of Electric Utilities for 2017-2021*, 2020 WL 7089873, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2020 (Docket Nos 340600 and 340607) ("*In re Reliability Plans*").[6] In reviewing the MPSC's actions and the governing statute, the court found the necessary authority for the MPSC's actions in the statute: "Section 6w requires the MPSC to establish the format for electric provider resource adequacy filings, and authorizes it to determine local clearing requirements and planning reserve margin requirements for electric providers." *Id.* at *4. The court further noted that in some sections of Act 341, the Legislature specifically told the MPSC to act via contested case or consultation with another body. *Id.* The court found it significant that "[t]he Legislature's specification of procedural methodology . . . indicates that, where the Legislature did not specify how to proceed, it expected the MPSC to do so within its own discretion." *Id.* at *5. Finally, the court observed that the timeline for implementation was too "compressed" for the MPSC to act to promulgate rules pursuant to the APA, which the court has previously found to be an indication that the Legislature did not intend APA rulemaking. *Id.* at *5; see also *Michigan Trucking Assoc'n*, 225 Mich App at 430 (safety rating system likely to be hotly contested and so time to promulgate it

[6] Copies of unpublished cases are included in Intervenor-Appellees' Appendix at 091.

through formal rulemaking procedures would be impossible, and unreasonable results are to be avoided when construing a statute).

The lack of explicit legislative direction to use rulemaking has also been found significant in the past by Michigan courts. In *Michigan Trucking Ass'n v Michigan Public Service Commission*, a trucking association appealed an MPSC order implementing a safety rating system for motor carrier vehicles. *Id.* at 426. The appellant complained that the order amounted to a rule and that the MPSC failed to follow proper procedures for promulgation of rules before issuing its order. *Id.* There, the statute explicitly authorized the MPSC to implement either by rule or order a safety rating system for motor carriers. *Id.* The court found that "the safety rating system is clearly an exercise of permissive statutory power," and so it is exempt from formal adoption and promulgation under the APA. The court found that this finding "is buttressed by the fact that the statute does not expressly require the PSC to promulgate the rating system before implementation." *Id.* at 430. Finally, the court found it telling that there was not enough time to go through the full formal rulemaking process before the law was effective, holding that "it is reasonable to assume that any safety rating system would be hotly contested by the regulated carriers and that subjecting the safety rating system to a formal hearing and promulgation requirements of the APA would make it impossible for the PSC to have the system in place within twelve months, the time frame prescribed by the statute." *Id.*

In the various grants of authority found in PA 233 (as listed in Section II.C., *supra*), the MPSC is told to use a "rule or order" only with respect to application filing requirements and requirements for a site plan (Sec. 234(1)) and is required to use an order only with respect to protection of confidential information (Sec. 228(2)). It is never told only to use the formal rulemaking process. Thus, in all other cases the means by which the Commission may choose to

act is discretionary. Furthermore, Section 232(6) of the MAPA recognizes that where agencies are given discretion to act by rule or by order, an order may be given general applicability "after public notice and a public hearing." MCL 24.232(6).

Appellants recognize this provision exists but summarily dismiss its applicability, stating that "[t]he Order is generally applicable, but no public hearing was held[;] [a]ccordingly, the PSC could not proceed 'by order' under MCL 24.232(6)." (Appellant Br on Appeal at 32.) Although Appellants bear the burden of proof under MCL 462.26, they make no effort to explain any standard pursuant to which they conclude that "no public hearing was held" and that the requirements of MCL 24.232(6) were not complied with. To the contrary, the record below establishes that extensive public outreach was conducted, both formal and informal, that extensive public comments were received (over 100, see October 10 Order at 3), and that Appellants as a whole were by no means unaware of the proceeding nor unable to present comments and input. See July 17, 2024 Comments of Michigan Association of Counties, Case U-21547, at Intv App 024; July 17, 2024 Comments of Michigan Township Association, Case U-21547, at Intv App 025; Public Comment of Roger Johnson, Planning Commission of Deerfield Township, at Intv App 85; Public Comment of Clint A. Beach, Cohoctah Township Planning Commissioner, at Intv App 089.

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

accordance with that process. The MPSC's actions are thus plainly an exercise of permissive statutory authority.

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

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

Because the authority granted to the MPSC by the Legislature in Act 233, and the exercise of that authority via an order of the Commission here, are so similar to statutes and agency actions

in previous cases upholding agency action as the proper exercise of authority to interpret statutes the agency administers and the proper exercise of permissive statutory authority, Appellants' arguments that the MPSC's Order violate the MAPA must fail.

B. THE COMMISSION'S INTERPRETATIONS OF CERTAIN KEY STATUTORY TERMS AND PROVISIONS IN THE OCTOBER 10 ORDER ARE FIRMLY GROUNDED IN AND AUTHORIZED BY ACT 233.

Appellants' claims that the Commission "redefined" certain terms in Act 233 fail. Appellants argue that the Commission effectively rewrote Act 233 by

> adding "hybrid facilities" to the explicit and limited list of solar, wind and energy storage facilities to which [Act] 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.

(Appellant Br on Appeal at 17–18.)

As Appellees and Intervening Appellees explained in their Briefs in Opposition to Appellants' Motion for Preliminary Injunction and as explained further below, what Appellants characterize as "redefining" key statutory terms is, rather, faithful interpretation of those terms in the context of Act 233 as a whole. This Court recently reiterated in *Holliday v Secretary of State* that

> context matters, and . . . this Court cannot cherry-pick words and phrases from the statute and read them in isolation from the rest of the text. This focus on the big picture echoes a primary canon of construction: the individual discrete words of a statute must be read holistically with[] a view to their place in the overall statutory scheme. As the Michigan Supreme Court has explained:
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> > The statutory language must be read and understood in its grammatical context unless it is clear that something different was intended. Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. A statute must be read in conjunction with other relevant statutes to ensure that the

> legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.

___ Mich ___, ___ NW3d ___ (Docket Nos. 372241, 372255, 372256), 2024 WL 4009409, at *12 (August 30, 2024) (cleaned up) (quoting *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009)). Appellants' preferred readings of the terms "compatible renewable energy ordinance" and "affected local unit" require this Court to do exactly what the Court in *Holliday* refused to do: "cherry-pick words and phrases from the statute and read them in isolation from the rest of the text." *Holliday*, 2024 WL 4009409, at *12. The Commission's October 10 Order refused to do so, and the Court should do the same here.

Appellants also cite to *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148, 56; 596 NW2d 126 (1999) and *Huron Portland Cement Co v Mich Pub Serv Comm'n*, 351 Mich 255, 262; 88 NW2d 492 (1958), to argue that consideration of the MPSC's public policy goals is inappropriate. (Appellant Br on Appeal at 18.) This argument fails when considered against the facts of this case. The issue in *Consumers Power Co* was whether the Commission could require the state's regulated utilities to "wheel" power on behalf of third-party suppliers.[7] The Legislature had given no direction to the Commission to experiment with retail wheeling or utility industry restructuring, and the Commission claimed to derive its authority generally from the statutes governing its jurisdiction: "The PSC did not cite specific sections of Act 106 [of 1909], Act 3 [of 1939] or Act 300 [of 1909] when concluding that those statutes authorize it to implement an

[7] "Retail wheeling effectively 'unbundles' a local utility's production and distribution services. Traditionally, a local utility provided a 'bundled' product; it generated the electricity and transmitted it to end-users connected to its system of power lines. The industry has, however, undergone changes in recent years. Local utilities have interconnected with one another to form a nationwide grid. Thus, a utility can transmit electricity to an end-user who is not directly connected to its system. When a third-party provider supplies electricity to these end-users, the intermediate utilities are said to 'wheel' electricity across their systems. A retail wheeling program requires local utilities to provide these transmission services." *Consumers Power Co*, 460 Mich at 129.

experimental retail wheeling program." *Consumers Power Co*, 460 Mich at 130 (citing opinion of the Court of Appeals, *Consumers Power Co v Pub Serv Comm'n*, 227 Mich App 442, 451; 575 NW2d 808 (1998)). The Commission attempted to rely on its general ratemaking power and general authority to regulate the "transmission and distribution of electricity" under Act 106, its general jurisdiction over public utilities under Act 9, and its general authority to "investigate and remedy unreasonable or inadequate practices and services" under Act 300. *Id.* at 132–136. It also pointed to its authority to issue certificates of public convenience and necessity ("CPCN") under Act 69 of 1929 to promote competition (when the intent behind Act 69 was originally to prevent it). *Id.* at 136.[8] In *Consumers Power*, therefore, there were no *legislatively defined* economic or public policy factors at work. Such factors were rather first defined by the *Commission*, after which it attempted to find the authority to implement its conclusion derived from those factors in general statutes originally enacted for other purposes.[9]

Here, by contrast, the economic and public policy factors objected to by Appellants in their Brief on Appeal have been *legislatively defined*. Both the legislative history described above and the fact that Act 233 was integrated into Act 295, whose purpose is "to promote the development and use of clean and renewable energy resources," MCL 460.1001(2), demonstrate that the Commission's interests to, as Appellants state them, "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," (Appellant Br on Appeal at 18), are firmly grounded in *legislative* policy. Far from being

[8] The Appellant in *Huron* similarly (and similarly fruitlessly) pointed to broad statutory provisions to justify its complaint that the Commission wrongfully concluded it lacked authority to order Consumers Power Company to serve Appellant directly from its nearby transmission line.

[9] The Legislature would shortly thereafter enact Public Act 141 of 2000, the "Customer Choice and Electricity Reliability Act," which codified the equivalent of retail wheeling in Michigan.

extraneous factors outside the scope of this Court's review, therefore, they are a fundamental part of discerning the purpose of Act 233.

1. The Commission Appropriately Construed the Definition of "Compatible Renewable Energy Ordinance."

Appellants complain that the Order has "redefined" the statutory term "Compatible Renewable Energy Ordinance" or "CREO" and has thereby exceeded its authority under Act 233. The Commission has done no such thing.

Because the Commission's jurisdiction only attaches in limited circumstances, which most commonly depend on the presence or absence of a CREO, the Commission must, as an initial matter, determine whether or not the inclusion of particular requirements render an ordinance a CREO or not. See MCL 460.1222(2), MCL 460.1223(3)(c); see also October 10 Order at 9; *In re Procedure and Format for Filing Tariffs Under the Michigan Telecommunications Act*, 210 Mich App 533, 540; 534 NW2d 194 (1995) ("We conclude that the Legislature clearly authorized the PSC to require providers of regulated services to file tariffs . . . and that, in order to do so, it was necessary for the PSC to identify which services are regulated under Act 179. *The PSC has the inherent power necessary to carry out its express duties*") (emphasis added). Stated differently, in the face of disagreement on this threshold issue, it is the duty of the agency to clarify competing understandings of the statutory language. This is what the Commission has done here, and there can be no question regarding its authority to do so.

Act 233 contains the following definition of CREO:

> 'Compatible renewable energy ordinance' means an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8) [MCL 460.1226(8)][10]. A local unit of government is considered

[10] MCL 460.1226(8) establishes standards for solar projects that include setback, fencing, height, sound, and lighting, as well as any more stringent requirements adopted by the Commission

> not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction.

MCL 460.1221(f). On its face, this definition requires a CREO to: (1) provide for the development of energy facilities within the local unit of government, and (2) be no more restrictive than the provisions included in MCL 460.1226(8). An ordinance that, on its face or as a practical matter, does not allow the development of energy facilities within the local unit of government would violate the first requirement regardless of what specific provisions it might include or exclude. Similarly, an ordinance that was "more restrictive" than the provisions in MCL 460.1226(8) would violate the second requirement and so would not be a CREO.

Appellants' claim that the October 10 Order redefines the statute's definition of CREO depends on two primary arguments: (1) that criteria that are additional to the MCL 460.1226(8) requirements but that regulate a different aspect of solar, wind or storage projects are not "more restrictive" per the statutory CREO definition, and (2) that the clarifying language added by the Commission in the October 10 Order represents a "depart[ure] from the statutory definition" (see AT Br on Appeal at 19). Neither stands up to scrutiny.

a. ***The Commission Appropriately Found that Additional Requirements Beyond Those Contained in MCL 460.1226(8) Necessarily Make the Requirements of a Purported CREO "More Restrictive" than the Requirements of MCL 460.1226(8).***

During the comment process in the U-21547 docket underlying this appeal, a significant issue was whether adding requirements to an ordinance that are not included in MCL 460.1226(8),

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which are *necessary for compliance with federal or state environmental regulations*; standards for wind that include setback, flicker, height, sound, lighting, radio interference and any more stringent requirements adopted by the Commission which are *necessary for compliance with federal or state environmental regulations*; and standards for storage that include setback, National Fire Protection Association (NFPA) standard 855, sound, lighting, and any more stringent requirements adopted by the Commission which are *necessary for compliance with federal or state environmental regulations*.

such as those in Section 226(7) or others not listed in the Act (such as overlay districts or setbacks from a transmission line corridor), rendered the ordinance's requirements "more restrictive than the provisions included in section 226(8) [MCL 460.1226(8)]," MCL 460.1221(f), and thus brought the ordinance outside the scope of a CREO. The Commission properly found that it did.

In *Pittston Coal Group v Sebben*, 488 US 105; 109 S Ct 414; 102 LEd2d 408 (1988), the U.S. Supreme Court examined a regulation imposing restrictions on miners seeking black lung benefits in the context of a statute that required the regulations imposed by the Secretary of Labor "shall not be more restrictive" than the interim criteria. The Secretary of Labor added a criterion for "total disability" to the interim criteria for benefits and argued that the "not be more restrictive" language implicated only "medical criteria." Upon examination of the statute and the various criteria, the Supreme Court noted that "the Secretary has suggested no reason why Congress should insist that only the *medical* criteria under the interim Labor regulation be no more restrictive, while being utterly indifferent as to the addition of other conditions for recovery." *Id.* at 116. In short, the Supreme Court found that adding criteria for approval that were not in the interim criteria was necessarily "more restrictive" and therefore violated the statutory requirement. *Id.* at 114.

The Appellants here similarly argue that the Legislature was concerned only that the setbacks, fencing, height, and other requirements of MCL 460.1226(8) should be "no more restrictive" while giving an otherwise free hand to local units of government to impose restrictions without regard to how much they might impair the siting of projects within that jurisdiction. However, just as in *Pittston Coal*, there is no reason why the Legislature should insist that only one possible set of criteria under local regulation be no more restrictive, while being utterly indifferent as to the addition of other conditions for siting approval. See 488 U.S. at 116. Just as the court rejected the parallel argument of the Secretary of Labor in *Pittston Coal*, this court should

reject Appellants' view here that a CREO may include additional requirements not contemplated by the Legislature and yet be "no more restrictive" than the statutory standard. By definition, additional requirements *add restrictions* to a project facing approval. Appellants' view simply contradicts the requirement in the statutory definition that a CREO be "no more restrictive than the provisions included in section 226(8)" and so should be rejected. MCL 460.1221(f).

Appellants' view is also inconsistent with Act 233's broad preemptive effect, demonstrated in its plain language and legislative history. Act 233 explicitly preempts other requirements under state law, with the single exception of the Electric Transmission Line Certification Act. See MCL 460.1230(3); MCL 460.1231(3) ("[T]he certificate and this part preempt a local policy, practice, regulation, rule, or other ordinance that prohibits, regulates or imposes additional or more restrictive requirements"). Legislative history confirms this: "[t]he [certification] process would preempt local zoning or regulation of such facilities." House Legislative Analysis, HB 5120 & 5121 (October 17, 2023), p 2; see also House Legislative Analysis, HB 5120 & 5121 (February 5, 2024), p. 1 ("Generally speaking, the MPSC certification *process preempts local regulation of those facilities*") (emphasis added). Legislators likened the broad preemptive effect of Act 233 to that given the MPSC processes for gas and oil pipelines, oil and gas wells, electrical transmission and distribution networks, and utility generation facilities. See 2023 Senate Journal 2454 (No. 99, November 8, 2023) ("It is important to understand that the Michigan Public Service Commission already has siting authority over critical infrastructure—that's gas and oil pipelines, oil and gas wells, the electrical transmission and distribution networks, as well as utility generation facilities.

This legislation brings utility-scale renewable generation under the same existing siting authority.").[11]

Appellants point to the case of *DeRuiter v Twp of Byron*, 505 Mich 130; 949 NW2d 91 (2020), to dispute the preemptive effect of Act 233, arguing that their ability to regulate where solar, wind, and energy storage projects may be located within their jurisdictions is not conflict preempted by Act 233. (Appellant Br on Appeal at 24–27.) Appellants assert the right to supplement the requirements of Act 233 by adding "overlays" that are designed to impose zoning control over the location of renewable energy projects within Appellants' geographic boundaries. See, e.g., Intv App 011, 13-15, White River Twp Ord 60-2024. Appellants claim that Act 233 "never expressly states that qualifying energy projects are permitted in any zoning district, or even any particular type of district (like commercial, agriculture [sic] or industrial districts)." (Appellant Br on Appeal at 25.)[12] But Act 233 plainly does cover locational issues. See, *e.g.*, MCL 460.1224(1)(a) and MCL 460.1226(9). Appellants also clearly reserve the right *to deny an application if it does not comply with these additional requirements*. See, e.g., Intv App 013-15, White River Twp Ord 60-2024. Even viewed through the lens of conflict preemption, *DeRuiter* justifies none of this.

[11] Unlike certain analogous acts governing pipelines (see Act 9 of 1929) and electric transmission (see Act 30 of 1995), however, Act 233 does not provide for the exercise of eminent domain. See MCL 460.1230(4).

[12] Appellants make the curious choice of claiming that the Commission needed "clear and unmistakable" authority to adopt the CREO definition in the October 10 Order because it would have the effect of preempting their authority to regulate the locational aspects of Act 233-jurisdictional facilities. As explained elsewhere in this Brief, the Commission needs no "clear and unmistakable language" to support its inherent authority to interpret the statute it is charged with administering, see *In re Reliability Plans*, 505 Mich at 119 (noting that among the Commission's powers is "the authority to interpret the statutes it administers and enforces"). Appellants' attempt to recast a question of statutory interpretation into one about agency authority thus fails.

In *DeRuiter*, the Michigan Supreme Court considered the scope of the preemptive effect of the Michigan Medical Marijuana Act ("MMMA"), adopted by voter initiative in 2008. *DeRuiter*, 505 Mich at 139. There the Court held that Byron Township's zoning ordinance restricting cultivation of marijuana to residential dwellings as part of a "home occupation," *id.* at 136, was not conflict preempted by the state MMMA. *Id.* at 147–148. In reaching its conclusion, the Court explained the standard governing conflict preemption: a "direct conflict exists 'when the ordinance permits what statute prohibits *or the ordinance prohibits what statute permits*.'" *DeRuiter*, 505 Mich at 140 (quoting *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977)) (emphasis added). The Court ultimately held that

> the MMMA does not nullify a municipality's inherent authority to regulate land use under the [MZEA] so long as the municipality does not prohibit or penalize all medical marijuana cultivation . . . and so long as the municipality does not impose regulations that are unreasonable and inconsistent with regulations established by state law.

DeRuiter, 505 Mich at 147 (cleaned up).

The state law at issue here is unlike the MMMA and the type of ordinance provisions cited by Appellants violate the conditions imposed by the Court in *DeRuiter*. The MMMA was enacted to create a limited exemption from prosecution for marijuana cultivation, possession and use for medicinal purposes. See *DeRuiter*, 505 Mich at 141. Unlike the state's policy with regard to clean and renewable energy resources, it was (and is) not the public policy of the state to promote the development and use of marijuana. Cf., MCL 460.1001(2). Furthermore, the MMMA is silent as to how and whether a local unit of government could exercise its zoning jurisdiction over the cultivation and storage of marijuana as Byron Township did. By contrast, the animating purpose of Act 233 is to limit the zoning jurisdiction and the discretion thereunder of local units of government in order to "promote the development and use of clean and renewable energy resources" and energy storage. MCL 460.1001(2).

A local unit of government has no inherent power to regulate land use through zoning. Instead, zoning authority must be specifically authorized by the Legislature and exists only to the limited extent authorized by that legislation. *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 515; 838 NW2d 915 (2013). The MZEA governs the creation and administration of local zoning ordinances. With respect to Act 233, the Legislature provided that Part 8 "shall control in any conflict" with the MZEA, MCL 460.1230(3), and that, if the Commission issues a certificate, it preempts all local policies, practices, regulations, rules, or other ordinances that prohibit, regulate, or impose additional or more restrictive requirements than those specified in the Commission's certificate. MCL 460.1231(3). Under Act 234, the Legislature amended the MZEA to provide that a local zoning ordinance is "subject to" Part 8. MCL 125.3205(1)(d). The Legislature thus expressly preempted any local land use regulation of energy facilities unless "local governmental units demonstrated that they had requirements for the buildout of these resources that were compatible with those proposed by Part 8." Senate Legislative Analysis, HB 5120, HB 5121, at 2 (November 8, 2023). The clear purpose of Act 233, in other words, is not to protect local control over siting but to limit it.

Besides these clear factual distinctions between *DeRuiter* and this case, it is also clear that applying even *DeRuiter*'s most generously worded standard yields an entirely different conclusion than advocated by Appellants. The Court in *DeRuiter* concluded that properly enacted ordinances would not be held to be conflict preempted "so long as the municipality does not impose regulations that are unreasonable and inconsistent with regulations established by state law." 505 Mich at 147. Locational requirements clearly fall within the category of "additional requirements" that are excluded from ordinances qualifying as CREOs. Any additional requirements that are not in MCL 460.1226(8) are necessarily "more restrictive," see *Pittston Coal*, 488 US at 114, 116, and

therefore in conflict with the statutory CREO definition. And as more fully explained in the following section, MCL 460.1223(3)(c)(iii) & (iii) allow a developer to file an application with the Commission if its application "complies with the requirements of [MCL 460.1226(8)], but an affected local unit denies the application" or if "the affected local unit amends its zoning ordinance . . . and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in MCL 460.1226(8)]," respectively. Therefore, an ordinance's imposition of *any* additional requirements, including locational requirements, is "inconsistent with regulations established by state law," i.e., MCL [460.1223(3)(c)(ii)–(iii) and MCL 460.1226(8), and is thus "more restrictive" than the requirements of MCL 460.1226(8). See *DeRuiter*, 505 Mich at 147.

Finally, it is of no help to Appellants 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)." (Appellant Br on Appeal at 20; 25 ("Read in context, Subsection 8 and Subdivision 7(g) [of MCL 460.1226] are only a small piece of the total information required by an application presented to the PSC.")). The Legislature explicitly required the Commission to make a determination whether "the public benefits of the proposed energy facility justify its construction," and included "any contributions to meeting identified energy, capacity, reliability, or resource adequacy needs of this state" as a criterion to be used. Such a consideration is not appropriately made by a local unit of government, but does fall within the MPSC's broad mandate to "ensure that all persons in this state are afforded safe, reliable electric power at a competitive rate." MCL 460.10(a). The Commission is also required to "maintain, foster, and encourage robust, reliable, and economic generation, distribution, and transmission systems to provide this state's electric suppliers and generators an opportunity to access regional

sources of generation and wholesale power markets and to ensure a reliable supply of electricity in this state. MCL 460.10(c). Local units of government have no such mandate and so cannot be expected to make such determinations about broad public benefits.

Furthermore, given the underlying facts giving rise to Act 233, it should be of no surprise to Appellants or this Court that the Commission is given broader discretion under the Act to regulate and to consider factors beyond those allowed to local units of government, many of whom have previously shown themselves unable or unwilling to reasonably exercise zoning authority in this arena. See *People v Arnold*, 502 Mich 438, 454; 918 NW2d 164 (2018) ("In construing a statute it is important to consider the law as it existed prior to the enactment, and particularly the mischief sought to be remedied by legislation.").

The Commission thus, as a matter of statutory interpretation, properly and consistent with well-established law concluded that any additional requirements beyond those included in MCL 460.1226(8) necessarily make a CREO "more restrictive than the provisions included in [MCL 460.1226(8)]."

b. ***Act 233 as a Whole Requires the Commission and this Court to Limit the Permissible Requirements in a CREO to those Contained in MCL 460.1226(8).***

Appellants claim that the Commission has, by its own admission, "adopted narrower definitions of terms already defined by the Legislature in [Act] 233." (Appellant Br on Appeal at 19.) In support of this claim, Appellants cite page 17 of the October 10 Order, where the Commission stated, "*With respect to the competing viewpoints expressed in the comments*, the Commission agrees that a narrow definition for a CREO is appropriate" (emphasis added). Appellants clearly misread this quotation. The Commission did not adopt "narrower definitions of terms already defined" in Act 233, rather, it adopted the narrower interpretation of CREO from among the "competing viewpoints" presented to it in Case No. U-21547. The Commission notes

that "nearly all commenters that commented on this issue agree that clarity and guidance are needed regarding the scope and definition of a CREO under Act 233." *Id.* In its discussion of this issue, the Commission hewed closely to the statutory language and made clear that it was the statute itself that compelled the adoption of the narrower interpretation. See October 10 Order at 17-18.

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

The Commission did no more than follow this same textual analysis, reasonably construing the statute to ensure its internal consistency and taking its cue from the statutory scheme as a whole, properly following principles of statutory construction already set forth above:

> The Commission finds that the plain language of the definition of a CREO in Act 233 expressly limits a CREO to requirements that are 'no more restrictive than the provisions included in section 226(8).' Other provisions in Act 233 reinforce this limitation. Specifically, Section 223(3)(c)(ii) of Act 233 permits [a developer] to submit an application to the Commission if 'the application *complies with the requirements of section 226(8)*, but an [ALU] denies the application.' Similarly, Section 223(3)(c)(iii) of Act 233 provides that an electric provider or IPP may submit an application to the Commission if '[a]n [ALU] amends its zoning ordinance after the [CEO] notifies the [developer] that it has a [CREO], and the amendment *imposes additional requirements on the development of energy facilities that are more restrictive than those in section 226(8)*.' The plain language of these provisions demonstrates that a CREO may only contain those requirements expressly outlined in Section 226(8) of Act 233. Had the Legislature intended to permit local units to include additional requirements beyond those identified in Section 226(8) of Act 233, it would not have restricted the Commission's authority to site energy facilities, in part, on the basis that a local unit denied an application for reasons beyond 'the requirements of section 226(8).'

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

Appellants attempt to argue otherwise using *In re Procedure and Format for Filing Tariffs Under the Michigan Telecommunications Act*, 210 Mich App 533; 534 NW2d 194 (1995). There, this Court rejected the Commission's definition of "access service" under the Michigan Telecommunications Act ("MTA") as "overly broad." *Id.* at 548. The Commission created a definition for "access service" (a term undefined as such in the MTA) that differed from the definition of "access" (defined in the MTA). The two, placed side-by-side, read as follows:

Access: "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." *In re Procedure and Format*, 210 Mich App at 548 (quoting MCL 484.2102(a)).	**Access Service**: "services and facilities provided to enable all providers and customers to originate or terminate any intrastate telecommunication." *Id.*

Appellants attempt to analogize that case with this one by leaning heavily on the statement of the Court there to the effect that the Commission's definition of "access service" "departed from the statutory definition" and was thus to be rejected. (Appellant Br on Appeal at 19.)

The two cases are distinguishable. Unlike here, where the Commission has only clarified a statutory definition in view of the statute as a whole, the Commission in *In re Procedure and Format* developed a wholly new defined term and effectively layered the new definition on top of the legislation, changing the definition of "access" when it appeared together with "service" but leaving it unchanged when it appeared alone, even though both terms were used *interchangeably* in the legislation. *Id.* at 548–549 ("The definition of 'access' . . . is drafted in terms of 'the provision' of access. The manner in which 'access' is provided is through some type of service.").

In this case, the Commission simply enunciated what was implicit in and in fact *compelled by* the statute as a whole. If Appellants' interpretation of CREO were adopted, an absurdity would be introduced into the Act, whereby local governments could include requirements in their ordinances that they would have no power to enforce (since MCL 460.1226(8)-compliant projects have recourse to the Commission), see MCL 460.1223(3)(c)(ii) & (iii), and that could in fact lead—by operation of law—to a declaration that they *do not have a CREO*, see MCL 460.1223(5).

For this reason, this Court should reject Appellants' claims regarding the definition of CREO in the October 10 Order and uphold the Commission's findings.

2. <u>The Commission Appropriately Construed the Definition of "Affected Local Unit."</u>

With respect to the definition of "affected local unit" ("ALU"), Appellants claim that the Commission "[o]nce again . . . took a term clearly defined by [Act] 233 and limited its meaning in a manner unnecessary and inconsistent with [Act] 233." (Appellant Br on Appeal at 20.) Once again, their claim fails.

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

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

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

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

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

These points clearly illustrate that Act 233 was intended to provide a new, alternative path for zoning approval rather than a different approval process outside of the zoning context. It is therefore to be read in the context of Michigan's established zoning law and interpreted to harmonize with the MZEA, a point on which Appellants agree. (See, *e.g.*, Appellant Br on Appeal at 24 ("PA 233, as PA 234 suggests, must be read in context with the MZEA.").)

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

Just as Act 233 speaks broadly about a "local unit of government" and an "affected local unit," the MZEA speaks broadly in its definitions of a "local unit of government" and of a "legislative body." The MZEA uses those terms to refer only to those local units of government or legislative bodies that have zoning authority over a project. Under the MZEA, there is no confusion in the zoning context as to which local units of government are implicated. A fundamental principle of zoning, so fundamental that it is stated twice in the MZEA, is that when a township has zoning authority, it divests a county of any zoning authority over the area of the township. See MCL 125.3102(x); MCL 125.3209.

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

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

October 10 Order at 10.

Appellants have conceded that "CREOs are zoning ordinances," (Appellant Br on Appeal at 12), and that "PA 233, as PA 234 suggests, must be read in context of the MZEA," (*id.* at 24). Yet if Appellants' preferred, expansive reading of ALU were admitted here, Act 233 would clearly conflict with the MZEA by requiring local units of government who have not exercised zoning jurisdiction to adopt zoning ordinances (in the form of CREOs) to ensure that developers would be required to follow the local approval process under MCL 460.1223(3), and developers would be required to file an application with both levels of local government.

To avoid this obvious problem, Appellants may attempt to argue, as their Brief appears to suggest, that ALU should be read one way in some contexts and another way "in other contexts." (See Appellant Br on Appeal at 21.) But such an approach would be unsuccessful. In *Empire Iron Min Pship v Orhanen*, the Michigan Supreme Court restated a longstanding principle of the law of statutory interpretation: "It is fundamental that adoption of language requires adoption of construction. *Identical language should certainly receive identical construction when found in the same act*." 455 Mich 410, 426 n 16; 565 NW2d 844 (1997) (quoting *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 155; 545 NW2d 642 (1996) (Riley, J, dissenting)) (emphasis added)).

Ultimately, Appellants' arguments that the term ALU should include every nested local unit of government whose geographical jurisdiction includes land where a proposed facility might be sited boil down to multiple instances of question begging. After acknowledging that Act 233 operates as "a transfer of siting authority that depends on the exercise of local zoning jurisdiction," (Appellant Br on Appeal at 20 (citing October 10 Order at 9)), Appellants assert that "the term 'ALU' is utilized by [Act] 233 in other contexts, too." (Appellant Br on Appeal at 20–21.) In saying this, Appellants appear to be claiming that these "other contexts" demand a broader reading of the term. That is not the case.

For the "other contexts," Appellants list the one-time grant opportunity provided to ALUs by MCL 460.1226(1); the ALUs' right to intervene provided by MCL 460.1226(3); the obligation of the Commission to consider the impact of the proposed facility on local land use under MCL 460.1226(6); the obligation of the Commission to consider expected tax revenue, local job creation and other public benefits provided by a proposed facility under MCL 460.1226(7)(a); and the host community agreements required by MCL 460.1227(1). (Appellant Br on Appeal at 20–21.) Although Intervening Appellees do not dispute that local units of government that do not exercise zoning jurisdiction might have an interest (in a colloquial sense) in receiving money to intervene in a contested case under Act 233, in how land within their geographical jurisdiction is used, and in what public benefits are provided by a proposed facility (including a $2,000/MW payment under a host community agreement), none of these general interests are legally relevant or cognizable under Act 233. If the Appellants have a quarrel over whether those benefits should be extended more broadly, that quarrel is with the Legislature, not the MPSC.

Appellants, moreover, *make no attempt to demonstrate* that their concerns are legally cognizable under Act 233. All Appellants offer are policy reasons why they might have preferred that Act 233 give all nested levels of local government the rights listed above. But such policy reasons are in fact at odds with the purpose of Act 233, which was passed to expedite local siting approvals by divesting local units of government of their zoning authority over renewable energy projects unless their zoning ordinances meet certain requirements. Claiming, as Appellants effectively do here, that Act 233 should be read to give local units of government who previously had no meaningful say in zoning jurisdictions' individual siting decisions *new* rights to participate

in and benefit from siting decisions runs counter to Act 233's purpose.[13] Rather, those rights (one-time grants, intervention as of right, host community benefits agreements, etc.) are best seen, even simply from a policy perspective, as effectively "compensating" those local units of government whose zoning jurisdiction has been preempted by Act 233. In other words, in lieu of participating in siting decisions directly through their own zoning process, such local units of government are instead given the right to participate in the Commission siting process, receive a grant to do so, and receive host community benefits that might otherwise have been negotiated as part of a local approval process.

In view of the statute as a whole, therefore, and against the background against which it was enacted, the Commission appropriately construed the definition of ALU to include only those local units of government that exercise zoning jurisdiction.

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

With respect to the October 10 Order's treatment of "hybrid facilities," Intervening Appellees welcome Appellants' apparent concession—new since their Motion for a Preliminary Injunction—that wind and solar facilities may include energy storage. (See Appellant Br on Appeal at 22); see also MCL 460.1221(w) & (x). Appellants thus now appear to focus their argument with respect to hybrid facilities on solar-wind hybrid facilities, arguing that "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." (Appellant Br on Appeal at 22).

[13] The right of county planning commissions (or coordinating zoning committee) to receive proposed township zoning ordinances for their "review and recommendation" subject to a 30-day shot clock does not change this analysis.

But Appellants' block quote immediately following the preceding sentence returns the focus to solar-storage and wind-storage hybrid facilities. There Appellants argue that Commission jurisdiction under Act 233 over a solar-storage hybrid facility that is primarily storage (on a capacity basis) or a wind-storage hybrid facility that is primarily storage (on a capacity basis)—where both facilities met their respective 50 MW and 100 MW thresholds in the aggregate—"is not supported by any legal interpretation of the statute." (Appellant Br on Appeal at 22.) Appellants fail to make clear why not.

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

Appellants characterize the foregoing as the Commission "expand[ing] its own authority over smaller projects that band together to avoid local zoning regulations." (Appellant Br on Appeal at 23.) But they provide no reason why the relative proportions of solar and storage (for solar-storage hybrid facilities) or wind and storage (for wind-storage hybrid facilities) matter for these purposes or for the purposes of the legislature's apparent determination that only large utility-scale renewable energy and energy storage facilities justify and require Commission intervention. Given that the nameplate capacity thresholds from the Act remain (50 MW for any facility that does not include wind; 100 MW for any facility that does include wind), the relative proportions of each technology within each jurisdictional category do not matter for jurisdictional purposes.

Once again, rather than conjuring up additional authority for itself as alleged by Appellants, the Commission in its October 10 Order reasonably construed the language of Act 233 to give effect to the statute as a whole with a view towards possible factual permutations. Appellants' argument therefore fails on this point also.

4. The Commission Reasonably Interpreted Act 233 In Applying the Deadlines for a CREO Notification.

The October 10 Order requires ALUs to notify a developer as to whether the ALU has a CREO or not within 30 days of receipt of a developer's offer to meet under MCL 460.1223(2). October 10 Order at 11–12. The Order grounds this conclusion in a finding that "the CEO of an ALU has an affirmative obligation to notify an electric provider or IPP of the existence of a CREO." *Id.* at 11. Appellants object to this finding, arguing that Act 233 "gives the CEO 30 days after the actual meeting between the CEO [chief elected official] and the developer to notify the developer of the ALU's CREO" and that the October 10 Order therefore "rewrites [Act] 233 . . . and is thus unlawful." (Appellant Br on Appeal at 23–24.)

Unlike the Commission's interpretation in the October 10 Order, however, Appellants' position here threatens to undermine Act 233's entire statutory scheme, an outcome the Legislature can hardly have intended. Act 233 does not expressly impose a timeline in which the meeting between the developer and the CEO pursuant to MCL 460.1223(2) must occur. Not imposing such a timeline creates a potential gap that, if left alone, threatens to thwart the preemptive effect of the statute, and place a developer entirely at the mercy of an uncooperative and unreasonable ALU.

Consider a scenario where a developer reaches out to such an ALU on June 30 of this year with a request to meet, offered in writing in accordance with the requirements of the statute and the October 10 Order. The CEO responds a month later on July 31, indicating that the next opening for a meeting is not until October. Come October, the CEO indicates in response to a developer

request to confirm the date and time of the meeting that the CEO was mistaken and that in fact the next available time would not be until the following February. Meanwhile, no notification regarding a CREO (or lack thereof) is given, effectively freezing the process under Act 233 between the steps outlined in MCL 460.1223(2) and MCL 460.1223(3). Accepting Appellants' approach here would present no barrier to an ALU pursuing such a bad-faith strategy in order to effectively force the developer to go through a local process inconsistent with PA 233 or else simply to kill the project by delay.

The Commission's finding that "the CEO of an ALU has an affirmative obligation to notify an electric provider or IPP of the existence of a CREO," October 10 Order at 11, addresses this concern in a reasonable manner. And given that the meeting referenced in MCL 460.1223(2) requires the attendance of only one official (either the CEO or the CEO's "designee"), it is reasonable to conclude that the meeting, if scheduled by both parties in good faith, need not take place more than several days after the offer to meet is received. This meeting need be no more than the developer's providing the CEO with enough information about the proposed project to enable the CEO to evaluate whether the threshold jurisdictional requirements for a PA 233 CREO are triggered or not. This does not require significant time on the CEO's part to prepare for such a meeting. Nor should the determination as to whether or not the PA 233 criteria are triggered by the proposed project require significant time investment. The October 10 Order's provision, therefore, that a CREO notification be given within 30 days of an offer to meet provides ample opportunity to schedule and hold such a meeting. It also hews closely to the 30-day requirement in MCL 460.1223(3) while simultaneously remedying the potential issue of an ALU's gaming the meeting requirements to derail the PA 233 process.

This Court should therefore uphold this portion of the October 10 Order as well as a reasonable interpretation of the Act and a reasonable exercise of a permissive statutory power in furtherance of its responsibility to enforce and administer the Act. See MCL 24.207(j); MCL 460.1230(1); *In re Reliability Plans of Electric Utilities*, 505 Mich at 119 (noting that among the Commission's powers is "the authority to interpret the statutes it administers and enforces").

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, for the foregoing reasons, Intervening Appellees respectfully request that the Commission's October 10 Order be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Michigan Court Rule 7.212(B)(1), I certify that *Intervening Appellees' Brief on Appeal* contains 14,834 words, including headings, footnotes, citations, and quotations, according to the word count in Microsoft Word 365 (2019).

Dated: February 7, 2025

By: */s/ Brion B. Doyle*
Brion B. Doyle (P67870)