STATE OF MICHIGAN
IN THE MICHIGAN COURT OF APPEALS

IN RE IMPLEMENTING PROVISIONS
OF PUBLIC ACT 233 OF 2023

PSC Case No. U-21547

COURT OF APPEALS NO. 373259

THE MICHIGAN HOUSE OF REPRESENTATIVES' PROPOSED AMICUS BRIEF

ORAL ARGUMENT NOT REQUESTED

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

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STATEMENT OF THE BASIS OF JURISDICTION

The Michigan House of Representatives ("the House") believes that Appellants' statement of the basis of jurisdiction is complete and correct. Further, the House notes Appellee's concession, aside from its ripeness argument, that MCL 462.26(1) provides this Court jurisdiction to review the Michigan Public Service Commission's Order dated October 10, 2024, in PSC Case No. U-21547 (Appellee's Brief on Appeal, p x).

STATEMENT OF THE QUESTION PRESENTED

DID THE PSC UNLAWFULLY AND UNREASONABLY EXCEED ITS AUTHORITY IN ISSUING ALL OR PARTS OF THE OCTOBER 10 ORDER?

Appellant answers: YES
Appellee answers: NO
Amicus House of Representatives answers: YES

STANDARD OF REVIEW

The House believes that Appellants' statement of the standard of review is complete and correct.

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INTRODUCTION

In this case, the Michigan Public Service Commission ("PSC") exceeded its authority by changing a statute enacted by the Legislature, adding words and restrictions not placed in the text by the Legislature itself. Regarding development approvals for certain large-scale energy projects, the PSC apparently believed that the Legislature had not gone far enough in creating a new system that moved control from local units of government to the PSC. Determined to make the statute go further, increase the scope of its own powers, and line the pockets of favored developers, the PSC created and utilized a non-contested case to issue an order that did violence to the statute enacted by the Legislature. In doing so, the PSC exceeded the scope of its authority.

The Michigan House of Representatives ("the House")[1] submits this amicus curiae brief to highlight the manner in which the PSC attempted to usurp the role of the Legislature by improperly adding words and requirements that the Legislature did not choose to include when it enacted the statute. The House supports Appellants' additional arguments on appeal, including the argument that the PSC's order is unlawful because it is in effect a rule subject to the Administrative Procedures Act. The House, however, chooses to focus its proposed amicus brief on the PSC's efforts to rewrite statutory language that is the Legislature's prerogative to enact.

The House joins with Appellants to urge this Court to declare the PSC's Order of October 10, 2024, to be without force or effect, or in the alternative, to strike down those portions of the PSC's order that are contrary to or in addition to the text of the statutory language enacted by the Legislature.

STATEMENT OF FACTS

I. This Court May Take Judicial Notice of the Official Records of the Michigan Legislature.

A court may take judicial notice of an adjudicative fact, as described in MRE 201. A court may do so if the fact is not subject to reasonable dispute because it can be

[1] Counsel for the proposed amicus, the Michigan House of Representatives, authored this brief in whole. No party or their counsel made a monetary contribution intended to fund the preparation or submission of this Proposed Amicus Brief.

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accurately and readily determined from sources whose accuracy cannot reasonably be questioned. MRE 201(b)(2); *People v Burt*, 89 Mich App 293, 297; 279 NW2d 299 (1979). Furthermore, a court may take judicial notice at any stage of the proceeding. MRE 201(d).

Specific to this case, a court may take judicial notice of the facts shown by the journals of the Michigan House of Representatives and the Michigan Senate. *Wilson v Atwood*, 270 Mich 317, 321; 258 NW 773 (1935). As this Court stated in *Ruffertshafer v Robert Gage Coal Co*, 291 Mich 254, 259-260; 289 NW 151 (1939):

> This court will take judicial notice of the journals of the legislature. *People v Mahaney*, 13 Mich 481 [1865]; *Callaghan v Chapman*, 59 Mich 610; 26 NW 806 [1886]; *Attorney General v Rice*, 64 Mich 385; 31 NW 203 [1887]; *Wilson v Atwood*, 270 Mich 317; 258 NW 773 [1935]; *Remus v City of Grand Rapids*, 274 Mich 577; 265 NW 755 [1936].

See also *Dept of Transp v Thrasher*, 196 Mich App 320, 323; 493 NW2d 457 (1992), in which this Court explained:

> Courts may look to the legislative history of an act to ascertain the meaning of its provisions. *People v Hall,* 391 Mich 175, 191; 215 NW2d 166 (1974); *Great Lakes Steel v Dep't of Labor,* 191 Mich App 323; 477 NW2d 124 (1991). A court may consider journals chronicling legislative history, and the changes in the bill during its passage. *Kizer v Livingston Co Bd of Comm'rs,* 38 Mich App 239, 246-247; 195 NW2d 884 (1972).

As the originator and custodian of the relevant public records referenced in this statement of facts, the House asks this Court to take judicial notice of the adjudicative facts contained in the public records relevant to the passage of Public Act 233 of 2023 ("PA 233") in the Michigan Legislature, including the official journals of the Michigan House of Representatives and the Michigan Senate. The facts set forth in these materials are not subject to reasonable dispute because they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. See MRE 201. Further, these materials chronicle legislative history and the changes in the relevant House bill during its passage. *Kizer* at 246-247.

II. Adoption of the Legislation

In this appeal, this Court will consider the plain language of Public Act 233 of 2023 ("PA 233"), which began as House Bill 5120 of the 2023-2024 legislative session, Michigan's 102nd Legislature. PA 233 amended the Clean and Renewable Energy and

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Energy Waste Reduction Act, by amending the title, amending section 13 (the definitions section), and adding a new part 8.[2]

HB 5120 was introduced in the House on October 10, 2023, and was referred to the House Committee on Energy, Communications, and Technology, on the same day.[3] On October 11, 2023, that committee held a public meeting at which it received testimony from the public regarding the bill.[4] On October 18, 2023, that committee held another public meeting at which it reported the bill to the House floor with its recommendation, but also with amendments set forth in a bill substitute labeled H-1.[5]

On November 2, 2023, the bill was considered on the House floor.[6] The H-1 bill substitute recommended by the committee was not adopted.[7] Eight separate proposed amendments to the H-1 bill substitute that members submitted on the House Floor were considered to have "fallen" because they were written to amend the H-1 substitute that was not adopted.[8] The House then adopted a bill substitute labeled H-3,[9] and thereafter proceeded to consider 27 proposed amendments to that H-3 bill substitute. Twenty-four of these amendments were adopted and three were defeated.[10] The House then voted on the bill, as the H-3 bill substitute, with the language changes made in the 24

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[2] As introduced, House Bill 5120 only amended the title and added a new part 8. [Appendix 1.] After the bill passed both chambers of the Legislature, the bill also amended section 13. [Appendix 7.]

[3] See House Journal 82 of 2023, p 1930, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/House/pdf/2023-HJ-10-10-082.pdf (last accessed February 15, 2025). House Bill 5120, as introduced, is attached as Appendix 1.

[4] Records regarding House committees during the 2023-2024 legislative session may be found here: house.mi.gov/Committees/2023-2024 (last accessed February 17, 2025). The video of the meeting of the House Committee on Energy, Communications, and Technology, for October 11, 2023, may be found here: house.mi.gov/Video-Archive (last accessed February 17, 2025).

[5] The video of the meeting of the House Committee on Energy, Communications, and Technology, for October 18, 2023, may be found here: house.mi.gov/Committees/2023-2024 (last accessed February 17, 2025).

[6] The video of proceedings on the House Floor, for November 2, 2023, may be found here: Michigan House TV - Session-110223 (last accessed February 17, 2025).

[7] See House Journal 93 of 2023, p 2314, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/House/pdf/2023-HJ-11-02-093.pdf (last accessed February 15, 2025).

[8] No votes are taken on the fallen amendments. Those amendments were out of order because they sought to amend a document that was not adopted.

[9] See House Journal 93 of 2023, pp 2314-2315, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/House/pdf/2023-HJ-11-02-093.pdf (last accessed February 15, 2025). House Bill 5120, H-3 substitute, is attached as Appendix 2.

[10] See House Journal 93 of 2023, pp 2315-2319, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/House/pdf/2023-HJ-11-02-093.pdf (last accessed February 15, 2025). Within the video of the House session of November 2, 2023, Michigan House TV - Session-110223, the adoption of amendments occurred during time index 12:10 – 12:18.

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amendments that had been adopted. The bill passed the House by a vote of 56-52, with 2 members of the House not voting on the bill.[11]

On November 7, 2023, the Senate received the House bill and referred it to the Senate Committee on Energy and Environment.[12] On November 8, 2023, the Senate committee considered the bill and referred it to the Senate Committee of the Whole with a bill substitute labeled S-1.[13] On the Senate Floor, the Senate Committee of the Whole reported the bill with a bill substitute labeled S-4.[14] Two amendments to the S-4 bill substitute were defeated, and the Senate passed the bill by a vote of 20-18.[15]

Both the House and the Senate were in session on November 8, 2023. Once the Senate passed the bill, with its desired changes, the Senate returned the bill to the House that same day. The bill required a concurrence vote in the House because the Senate had changed the language of the bill originally sent to it by the House. On November 8, 2023, the House approved the Senate's version of the bill, by a concurrence vote of 56-53, with 1 member of the House not voting on the bill.[16] The House then enrolled the bill, printed it, and presented it to the Governor for her consideration. The Governor signed the bill into law as Public Act 233 of 2023 ("PA 233") on December 31, 2023.[17]

As can be seen from this legislative process, the text of this bill was subject to many changes that were negotiated and debated by the elected representatives of the people serving in the House and the Senate. Of particular relevance to this appeal, the House notes three language changes that occurred during the legislative adoption process: (1) the addition of language regarding "compatible renewable energy ordinances" ("CREOs"), (2) a change to the threshold megawatt capacity for solar energy

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[11] See House Journal 93 of 2023, pp 2319-2320, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/House/pdf/2023-HJ-11-02-093.pdf (last accessed February 15, 2025). Within the video of the House session of November 2, 2023, Michigan House TV - Session-110223, the vote on the bill, as amended, occurred during time index 12:26-12:49.

[12] See Senate Journal 98 of 2023, p 2414, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/Senate/pdf/2023-SJ-11-07-098.pdf (last accessed February 15, 2025).

[13] See Senate Journal 99 of 2023, p 2440, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/Senate/pdf/2023-SJ-11-08-099.pdf (last accessed February 15, 2025).

[14] *Id.* at p 2445, available at https://www.legislature.mi.gov/Home/Document?objectName=2023-SJ-11-08-099 (last accessed February 14, 2025). The Senate's S-4 version of the bill is attached as Appendix 3.

[15] *Id.* at p 2447.

[16] See House Journal 96 of 2023, p 2365-66, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/House/pdf/2023-HJ-11-08-096.pdf (last accessed February 15, 2025).

[17] House Bill 5120 of 2023 (Public Act 233 of 2023) - Michigan Legislature (last accessed February 17, 2025).

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facilities necessary to trigger the requirements of MCL 460.1222, and (3) the addition of language to the text so that a project located on noncontiguous sites would not qualify for PSC consideration under MCL 460.1222 unless it shared a single point of connection to the energy grid.

First, the concept of a "compatible renewable energy ordinance" (CREO), including the definition found in MCL 460.1221(f), was not contained in the House bill as introduced [Appendix 1], or in the H-3 substitute adopted on the House Floor [Appendix 2]. The concept of a CREO was added to the bill on the House Floor through amendment 2W, sponsored by Representative Reggie Miller. This was one of the 24 amendments to the bill adopted on the House Floor [Appendix 4].[18]

Second, amendment 2U, sponsored by Representative Abraham Aiyash, modified the nameplate capacity thresholds necessary to trigger the application of MCL 460.1222. In the bill as introduced [Appendix 1, p 6] and the H-3 substitute [Appendix 2, p 8], §222 stated:

> "(1) This part applies to all of the following:
> (a) Any wind energy or solar energy facility with a nameplate capacity of 100 megawatts of capacity or more.
> (b) Any energy storage facility with a nameplate capacity of 100 megawatts or more and an energy discharge capability of 200 megawatt hours or more." [Appendix 2.]

Representative Aiyash's amendment 2U, however, rewrote §222 to read:

> "(1) This part applies to all of the following:
> (a) Any solar energy facility with a nameplate capacity of 50 megawatts or more.
> (b) Any wind energy facility with a nameplate capacity of 100 megawatts or more.
> (c) Any energy storage facility with a nameplate capacity of 100 megawatts or more and an energy discharge capability of 200 megawatt hours or more." [Appendix 5.][19]

Through adoption of this amendment, the House separated wind energy and solar energy facilities for purposes of calculating the qualifying nameplate capacity needed to trigger PSC review, and established differing nameplate capacity thresholds for those two types of energy facilities, before either type of facility could qualify for PSC review. The

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[18] See House Journal 93 of 2023, pp 2317, available at https://www.legislature.mi.gov/documents/2023-2024/Journal/House/pdf/2023-HJ-11-02-093.pdf (last accessed February 15, 2025).
[19] *Id.*

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amendment demonstrates that the Legislature intentionally chose to treat each type of facility (wind, solar, and energy storage) distinctly, with differing thresholds established based on the type of facility involved in a developer's proposed project.

Third, in HB 5120 as introduced [Appendix 1], in the H-3 substitute [Appendix 2], and in the version of the bill as it passed the House [Appendix 6], an "energy facility" was defined to mean "an energy storage facility, solar energy facility, or wind energy facility. An energy facility may be located on more than 1 parcel of property, including noncontiguous parcels." The S-4 version of the bill that passed the Senate, however, changed the definition of an "energy facility" to mean "an energy storage facility, solar energy facility, or wind energy facility. An energy facility may be located on more than 1 parcel of property, including noncontiguous parcels, *but shares a single point of interconnection to the grid*." (Emphasis added.) [Appendix 7.] This is the language that was presented to and signed into law by the Governor.

Before this amendment, an "energy facility" could have been comprised of different installations on different parcels of land, separated by vast distances, and with more than one point of interconnection to the grid. Under the original language, a developer could have presented a project with a solar energy facility on a parcel in the Upper Peninsula, and a solar energy facility on a parcel in the Lower Peninsula, and those two solar energy facilities (and their separate nameplate capacities) would have been aggregated to meet the thresholds for triggering PSC review. The Legislature made a different choice, however, and by adding the language "but shares a single point of interconnection to the grid," eliminated the possibility of facilities being able to aggregate their nameplate capacity if they were located on noncontiguous parcels that did not share a single point of interconnection to the grid.

It is apparent from these facts that the Legislature carefully considered and drafted the language of PA 233, with important changes to the text of the bill occurring as the bill progressed through the Legislature. The language that appears in the bill as enacted was the result of significant negotiation and compromise, both within the House as a chamber and between the House and the Senate. The exact words ultimately chosen by the Legislature must be given meaning, according to the statute's plain language. Allowing unelected bureaucrats at the PSC to rewrite the statute to better suit their policy

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choices does impermissible violence to the prerogative of the Legislature to determine what the law requires.

ARGUMENTS

"As a general proposition, this Court reviews de novo questions of law, such as the proper interpretation of a statute." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97; 754 NW2d 259 (2008), citing *City of Taylor v Detroit Edison Co,* 475 Mich 109, 115; 715 NW2d 28 (2006). More precisely, however, "the primary issue in this case is the proper standard of review of an administrative agency's construction of a statute." *Id.*

> The legislative power of the State of Michigan is vested in a senate and a house of representatives. Simply put, legislative power is the power to make laws. In accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore the Legislature's product and still be true to our responsibilities that give our branch only the judicial power. While administrative agencies have what have been described as "quasi-legislative" powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature. [*Id.* at 98 (cleaned up).]

"When interpreting a statute, this Court's primary obligation is to ascertain and give effect to the intent of the Legislature." *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003), citing *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003); *Freeman v Hi Temp Products, Inc*, 229 Mich App 92, 96; 580 NW2d 918 (1998). "This Court must presume the Legislature intended the meaning clearly expressed and must enforce a statute as written." *Id.* Courts may not speculate with respect to the probable intent of the Legislature beyond the words expressed in the statute. If the plain and ordinary meaning of the statute is clear, judicial construction is normally neither necessary nor permitted. *Thrasher* at 323, citing *Nat'l Exposition Co v Detroit,* 169 Mich App 25, 29, 425 NW2d 497 (1988).

The first criterion in determining legislative intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006). This Court "must give due deference to acts of the Legislature, and we will not inquire into the wisdom of

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its legislation." *Oakland Co Bd of Co Road Com'rs v Michigan Prop & Cas Guar Ass'n*, 456 Mich 590, 612-613; 575 NW2d 751 (1998).

"The PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *In re Public Service Comm'n*, 252 Mich App 254, 263; 652 NW2d 1 (2002). "The PSC's determination regarding the scope of its authority is one of law," which this Court reviews de novo. See *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148, 157; 596 NW2d 126 (1999). "An agency rule is substantively invalid when the subject matter of the rule falls outside of or goes beyond the parameters of the enabling statute, when the rule does not comply with the intent of the Legislature, or when the rule is arbitrary or capricious." *Slis v State*, 332 Mich App 312, 340; 956 NW2d 569 (2020); see also *Ins Inst of Mich v Commr, Fin & Ins Servs, Dept of Labor & Econ Growth*, 486 Mich 370, 385; 785 NW2d 67 (2010). While an agency's construction of a statute "is entitled to respectful consideration," a "court's ultimate concern is a proper construction of the plain language of the statute." *Rovas* at 108. "[T]he agency's interpretation cannot conflict with the plain meaning of the statute." *Id.* "[S]tatutory language is the most authoritative evidence of the intentions of the drafters of the legislation." *In re Procedure & Format for Filing Tariffs Under Michigan Telecom Act*, 210 Mich App 533, 553; 534 NW2d 194 (1995).

The PSC's Order Improperly Changed the Statutory Text Adopted by the Legislature, and Improperly Added Text the Legislature Did Not Include.

Amongst other changes, PA 233 added a new Part 8 to the Clean and Renewable Energy and Energy Waste Reduction Act, Act 295 of 2008 ("the Act"). A companion piece of legislation, Public Act 234 of 2023 ("PA 234"), amended Section 205 of the Michigan Zoning Enabling Act, PA 110 of 2006 ("MZEA"), to provide that local zoning ordinances are subject to the new Part 8 of the Act.

A. The PSC Changed the Legislature's Definition of "Affected Local Unit"

In PA 233, the Legislature defined the term "affected local unit" (ALU) to mean "a unit of local government in which all or part of a proposed energy facility will be located." MCL 460.1221(a).[20] The Legislature further defined the term "local unit of government" or

[20] This language remained the same in every version of the bill, from introduction through final passage and signature by the Governor.

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"local unit" to mean "a county, township, city, or village." MCL 460.1221(n).[21] This statutory term is used later in the statute to describe where a developer[22] must hold a public meeting to discuss its proposed energy facility. The statute provides that a developer which proposes to obtain a certificate for and construct an energy facility "shall hold a public meeting in each affected local unit." MCL 460.1223(1).

Furthermore, the statutory term "affected local unit" is also used later in the statute to describe which local units of government will benefit from "host community agreements." Under MCL 460.1227(1), an applicant before the PSC must "enter into a host community agreement with each affected local unit." Such an agreement must provide that the facility owner will pay the ALU $2,000 per megawatt of nameplate capacity located within the ALU. *Id.* The payment must "be used as determined by the affected local unit for police, fire, public safety, or other infrastructure, or for other projects as agreed to by the local unit and the applicant." *Id.*

Instead of applying the law as written by the Legislature, the PSC wrongly decided to rewrite the statutory definition of "affected local unit" to limit the scope of the definition, and include "only those local units of government that exercise zoning jurisdiction," or "a unit of local government exercising zoning authority in which all or part of a proposed energy facility will be located" (Order, 10, 83). The Legislature did not restrict its definition of an "affected local unit" to include only local units of government that exercise zoning jurisdiction. The Legislature defined the term to mean "a unit of local government in which all or part of a proposed energy facility will be located." The PSC had no authority to alter the definition supplied by the Legislature.

The PSC simply cannot add words to a legislatively crafted definition because the unelected bureaucrats employed at the PSC feel that the Legislature's definition was too broad, and therefore undesirable to that commission. Under the plain language of the statute, an "affected local unit" for purposes of PA 233 is "a unit of local government in

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[21] This definition was contained in the bill as introduced, at §221(i). Additional definitions were added to the bill throughout the legislative drafting process, and this definition is found at §221(n) in the final version of the bill, as signed by the Governor.

[22] Similar to Appellants' characterization in their Brief on Appeal, the House also refers to "independent power producers, "IPPs," and "electric providers" as "developers", for simplicity.

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which all or part of a proposed energy facility will be located", regardless of whether that local unit exercises local zoning authority.

As an example of the potential real-world application of this definition, consider a proposed development that would be located on property located within two adjacent local units of government, such as a development that includes real property in two adjacent townships, only one of which has a zoning ordinance. Under the Legislature's definition as set forth in the statute, both of the two townships qualify as an "affected local unit", regardless of whether they both have a zoning ordinance, because both townships are "a unit of local government in which all or part of a proposed energy facility will be located." Therefore, under MCL 460.1223(1), the developer would be required to "hold a public meeting in each affected local unit," meaning that a separate public meeting would have to occur in each of the two townships. Furthermore, the developer would be required to "offer in writing to meet with the chief elected official of each affected local unit … to discuss the site plan." MCL 460.1223(2).

Under the PSC's newly restricted definition, however, if one of the townships lacks a zoning ordinance, that township would not qualify as an "affected local unit", even if "part of a proposed energy facility will be located" within its boundaries. Therefore, the developer would be required to hold only one public meeting, in the township that does have a zoning ordinance. No public hearing would be required to be held in the other township in which a part of the proposed energy facility would be located. This is not the result intended by the Legislature, as demonstrated by the plain language that the Legislature enacted into law.

Furthermore, under the PSC's definition, the developer would not need to pay the township that lacks a zoning ordinance the required $2,000 per megawatt of nameplate capacity that would be located within that local unit. The Legislature made a different choice. The Legislature determined that developers would be required to "enter into a host community agreement with *each* affected local unit," (emphasis added) and such agreement must provide for the facility owner's payment to the ALU of $2,000 per megawatt of nameplate capacity located within the ALU. MCL 460.1227(1). The PSC's altered definition would deprive a township lacking a zoning ordinance this payment, which the Legislature intended would be "used as determined by the affected local unit

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for police, fire, public safety, or other infrastructure, or for other projects as agreed to by the local unit and the applicant." *Id.* The PSC decided to rob local communities of these funds for local services by cutting them out of the definition of "affected local unit", even though those local units would still be required to provide these services to a development built in part within that local unit's territory. The PSC is attempting to line the pockets of favored developers at the expense of local units, and is doing so when the Legislature clearly made the opposite choice – to require developers to pay *each* affected local unit $2,000 per megawatt of nameplate capacity located within that ALU.

Finally, the Legislature knew how to describe a "local unit of government exercising zoning jurisdiction", because it used exactly those words in MCL 460.1222(2) when describing which local units may request the PSC to require a developer to obtain a certificate from the commission. The fact that the Legislature used the phrase "local unit of government exercising zoning jurisdiction" in MCL 460.1222(2), but did not use that phrase in the definition of "affected local unit" in MCL 460.1221(a) shows clearly that the Legislature did not want the definition of "affected local unit" to be limited to the more narrow definition now desired by the PSC, "only those local units of government that exercise zoning jurisdiction".

B. The Legislature Did Not Allow for "Hybrid Facilities" to Qualify under MCL 462.1222.

In PA 233, the Legislature adopted language stating that the requirements of Part 8 apply to all of the following:

> (a) Any solar energy facility with a nameplate capacity of 50 megawatts or more.
> (b) Any wind energy facility with a nameplate capacity of 100 megawatts or more.
> (c) Any energy storage facility with a nameplate capacity of 200 megawatt hours or more. [MCL 460.1222(1).]

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The Legislature also adopted specific definitions for the terms "energy facility",[23] "solar energy facility",[24] "wind energy facility",[25] and "energy storage facility."[26] Nowhere in PA 233, however, does the word "hybrid" appear. The Legislature did NOT create a definition for a "hybrid energy facility" and did NOT state that the requirements of MCL 460.1222 apply to a "hybrid energy facility."

The PSC, unhappy with the list of facilities that the Legislature decided to subject to the requirements of Part 8, decided to add so-called "hybrid facilities" to the statute. In taking this action, the PSC created an entirely new category of energy facility, such that

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[23] The Legislature defined an "Energy facility", in § 221(i), as follows:

> "'Energy facility' means an energy storage facility, solar energy facility, or wind energy facility. An energy facility may be located on more than 1 parcel of property, including noncontiguous parcels, but shares a single point of interconnection to the grid."

[24] The Legislature defined a "solar energy facility", in § 221(w), as follows:

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

[25] The Legislature defined a "wind energy facility", in § 221(x), as follows:

> "'Wind energy facility' means a system that captures and converts wind into electricity, for the purpose of sale or for use in locations other than solely the wind energy facility property. Wind energy facility includes, but is not limited to, the following equipment and facilities to be constructed by an electric provider or independent power producer: wind towers; wind turbines; access roads; distribution, collection, and feeder lines; wires and cables; conduit; footings; foundations; towers; poles; crossarms; guy lines and anchors; substations; interconnection or switching facilities; circuit breakers and transformers; energy storage facilities; overhead and underground control; communications and radio relay systems and telecommunications equipment; monitoring and recording equipment and facilities; erosion control facilities; utility lines and installations; generation tie lines; ancillary buildings; wind monitoring stations; and accessory equipment and structures."

[26] The Legislature defined an "Energy storage facility", in § 221(j), as follows:

> "Energy storage facility" means a system that absorbs, stores, and discharges electricity. Energy storage facility does not include either of the following:
> (i) Fossil fuel storage.
> (ii) Power-to-gas storage that directly uses fossil fuel inputs.

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one or more different types of energy facilities could be aggregated to meet the statutory threshold regarding the amount of power generated by the facility. As the PSC stated:

> The Staff Draft adopts the applicability thresholds outlined in Section 222(1) of Act 233 and *further* proposes that hybrid energy facilities (i.e., energy facilities comprised of multiple technology types) should meet the statutory thresholds when multiple technologies are combined for siting. Staff Draft, p. 1. Specifically, the Staff Draft proposes that "[h]ybrid facilities comprised of solar and storage facilities must have a combined nameplate capacity of at least 50 MW in total which is the same minimum size threshold for solar or storage." *Id*. The Staff Draft further proposes that "[h]ybrid projects which are comprised of wind facilities combined with solar and/or storage facilities must have a nameplate capacity of at least 100 MW in total which is the minimum size threshold for wind facilities." *Id* [Order, pp 4-5 (emphasis added) (footnote omitted).]

As the Michigan Townships Association noted at the time, the PSC's unauthorized re-writing of the statute will absolutely lead to the applicability of the statute to combined energy facilities that would otherwise not qualify individually under the statutory thresholds adopted by the Legislature.

Simply stated, the PSC has attempted to add language to the statute that simply is not there. During the legislative process of drafting, negotiating, and compromising, the Legislature did amend the nameplate capacity requirements that are necessary to trigger the application of MCL 460.1222. In the bill as introduced, solar energy facilities and wind energy facilities each had to reach a nameplate capacity of 100 megawatts in order to qualify. During the amendments that occurred on the House Floor, however, the nameplate capacity required for a solar energy facility to qualify was lowered from 100 megawatts to 50 megawatts. If the Legislature had wanted to allow the aggregation of different types of energy facilities to meet the threshold megawatt numbers, it could have easily done so. It did not. The Legislature intended that the development of facilities other than solar energy facilities, wind energy facilities, and energy storage facilities would remain subject to ordinary local zoning controls, and would not trigger the application of MCL 460.1222.

Other portions of the statute also reveal that the Legislature did not intend for this PSC-created category of "hybrid energy facility" to exist. For example, see MCL

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460.1226(2), which describes the required notice of opportunity for public comment. The statute provides:

> (2) Upon filing an application with the commission, the applicant shall provide notice of the opportunity to comment on the application in a form and manner prescribed by the commission. The notice shall be published in a newspaper of general circulation in each affected local unit or a comparable digital alternative. The notice shall be written in plain, nontechnical, and easily understood terms and shall contain a title that includes the name of the applicant and the words "NOTICE OF INTENT TO CONSTRUCT ______________ FACILITY", with the words "WIND ENERGY", "SOLAR ENERGY", or "ENERGY STORAGE", as applicable, entered in the blank space. The commission shall further prescribe the format and contents of the notice.

Likewise, see MCL 460.1226(8), discussing the requirement that an energy facility must comply with certain standards. This statutory subsection lists separate requirements for a "solar energy facility," a "wind energy facility," and an "energy storage facility." The subsection does not list requirements for a "hybrid energy facility" because the Legislature did not contemplate or intend that the fourth category, a "hybrid energy facility," would exist.

Furthermore, the Legislature chose to eliminate the ability for a developer to aggregate the nameplate capacity of a project located on noncontiguous parcels, unless they share a single point of connection to the grid. Two noncontiguous parcels containing the same type of energy facility (e.g. two solar energy facilities, or two wind energy facilities, or two energy storage facilities) were allowed to aggregate their nameplate capacity, in order to trigger PSC review of the project, but only under very narrow circumstances – where they shared a single point of connection to the grid. The Legislature did *not* choose to allow *different* types of energy facilities to aggregate their nameplate capacities in order to qualify for PSC review. The PSC invented this definition of "hybrid energy facility" from whole cloth because it wanted to exercise control over more projects than what the statute described. The PSC badly exceeded its authority in doing so.

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C. The PSC Changed Statutory Timelines Enacted by the Legislature

The PSC unlawfully altered the timelines that the Legislature created for approvals of the large-scale energy facilities subject to PA 233. Under the language adopted by the Legislature, developers are required to hold a public meeting in each "affected local unit" where they intend to obtain a certificate for and construct an energy facility. MCL 460.1223(1). At least 60 days before the public meeting, the developer must offer, in writing, to meet with the chief elected official of each "affected local unit", to discuss the site plan. MCL 460.1223(2). If, within 30 days of the meeting between the developer and the chief elected official, the chief elected official notifies the developer that the "affected local unit" has a CREO, then the developer must file for siting approval from the "affected local unit." MCL 460.1223(3). As demonstrated by the plain language of the statute, the Legislature chose these timelines and enacted them into law.

The PSC, however, decided to unilaterally change the timelines established by the Legislature. The PSC ordered that, if the chief elected official "fails to notify the electric provider or IPP of the existence of a CREO *within 30 days following receipt of an offer to meet*, the electric provider or IPP may proceed as if an ALU does not have a CREO." (Order, 11–12 (emphasis added)). This directly contradicts PA 233, which gives the chief elected official 30 days after the actual meeting between the CEO and the developer to notify the developer of the affected local unit's CREO.

This Court should honor the language of the statute as enacted by the Legislature, and strike down the PSC's newly invented language that has no basis in the statutory language, and that does violence to the Legislature's intent.

D. The PSC Impermissibly Changed the Legislature's Choice of Language Regarding CREOs

In PA 233, the Legislature included a statutory definition for the term "Compatible renewable energy ordinance" ("CREO"), in section 221(f), as follows:

> "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). A local unit of government is considered not to have a compatible renewable energy ordinance if it has a

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moratorium on the development of energy facilities in effect within its jurisdiction. [Emphasis added.]

As explained above, the concept of a CREO was not included in the version of the bill as introduced [Appendix 1] or in the H-3 substitute approved on the House Floor [Appendix 2]. The ability for a local unit of government with zoning authority to enact a CREO was added by an amendment on the House Floor [Appendix 4].

In its Order, the PSC stated that a CREO "may *only* contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and *may not contain additional requirements* more restrictive than those specifically identified in that section" (Order, 18) (emphasis added). That is not what the Legislature said in PA 233. The Legislature did not state that a CREO may not contain additional requirements, beyond what was specifically listed out in section 226(8). The Legislature stated that a CREO is an ordinance that is "no more restrictive than the provisions included in section 226(8)."

Once again, the PSC decided to rewrite the plain language of the statute enacted by the Legislature. But that is not the province of the PSC, which has attempted to override the language of the statute to accomplish its political and policy goals, when such goals could not gain majority support in the Legislature.

The PSC failed to consider that a developer who goes to the PSC to obtain a certificate is required to comply with many requirements in addition to the setback, fencing, height, sound, and "other applicable requirements" of MCL 460.1226(8). For example, developers *must* submit to the PSC a fire response and an emergency response plan, MCL 460.1225(1)(q), despite that not being a requirement of MCL 460.1226(8). Yet, the Order's limiting definition of CREO would render an Appellant's ordinance that requires a fire response plan for a solar energy system automatically incompatible with PA 233—only for the developer to be required to submit such a plan to the PSC anyway. Not only does the Order depart from the statutory definition of "CREO," but it also ignores how that definition fits within the entirety of PA 233.[27]

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[27] The House supports Appellants' other arguments on appeal, including the argument that the PSC's October 10, 2024 Order violates the Administrative Procedures Act. In its amicus curiae brief, the House

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CONCLUSION AND RELIEF REQUESTED

The 102nd Legislature enacted a statute that was the product of significant negotiation and compromise. The multitude of amendments made to the language of the bill during the process of its enactment into law demonstrates clearly that the specific words used in the bill mattered. If the language used did not matter, then the Legislature would not have bothered to work through the legislative adoption process to add the more than two dozen amendments and bill substitutes. The PSC simply has no authority to change the language enacted by the Legislature. In this case, the PSC exceeded its authority in its Order of October 10, 2024, by adding language that the Legislature did not choose to place in the text of the statute.

For the reasons set forth in this brief, the House joins Appellants to urge this Court to declare the PSC's Order of October 10, 2024, to be without force or effect, or in the alternative, to strike down those portions of the PSC's order that are contrary to or in addition to the text of the statutory language enacted by the Legislature.

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simply chose to focus on the aspects of the PSC's Order that most directly violate the Legislature's prerogative to decide the language—and therefore the meaning—of a statute. The House's failure to specifically address in this proposed amicus brief each argument brought forward by Appellants should not be construed so as to indicate a lack of support for Appellants' arguments.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Michigan Court Rules 7.212(B)(3). I certify that this document contains 7,741 countable words. The document is set in Arial font, and the text is in at least 12-point type with 1.5-linespaced text, except quotations and footnotes are single-spaced.

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