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

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

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

Laura Chappelle (P42052)
Timothy J. Lundgren (P62807)
Justin Ooms (P82065)
POTOMAC LAW GROUP, PLLC
Attorneys for Intervening Appellees Michigan Energy Innovation Business Council, Institute for Energy Innovation, Clean Grid Alliance, and Advanced Energy United
720 Dogwood Avenue, NE
Ada, MI 49301
(616) 915-3726
lchappelle@potomaclaw.com
tlundgren@potomaclaw.com
jooms@potomaclaw.com

Brion B. Doyle (P67870)
Regan A. Gibson (P83322)
Neil E. Youngdahl (P82454)
VARNUM LLP
Attorneys for Intervening Appellees Michigan Energy Innovation Business Council, Institute for Energy Innovation, Clean Grid Alliance, and Advanced Energy United
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000
bbdoyle@varnumlaw.com
ragibson@varnumlaw.com
neyoungdahl@varnumlaw.com

APPELLANTS' REPLY BRIEF ON APPEAL[1]

ORAL ARGUMENT REQUESTED

Dated: February 28, 2025

[1] This reply brief serves as Appellants' combined reply to the responsive briefs of the PSC and the Intervening Appellees.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT

I. The Order is unreasonable and unlawful.

A. The PSC impermissibly redefined "CREO."

The PSC and Intervening Appellees contend that a CREO may not include any regulations not found in § 226(8) based on § 223(3)(c)(ii), which provides that a developer may submit an application to the PSC if "the application complies with the requirements of section 226(8), but an [ALU] denies the application." Their reliance on this provision is unreasonable and unlawful.

First, PA 233 does not define a CREO as one that "includes no further restrictions than are found in section 226(8)." Instead, it states that a CREO may not have requirements that are "more restrictive than the provisions included in section 226(8)." Second, § 223(3)(c)(ii) (on which the PSC and Intervening Appellees rely) cannot be read in isolation. "[T]he statute must be read as a whole, unless something different was clearly intended." *Beydoun v Bd of State Canvassers*, ___ Mich App ____, ____; ____ NW3d ____ (2024), slip op at 2-3. "Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Id*., slip op at 3.

PA 233 contains other provisions that render the PSC's narrow redefining of "CREO" unreasonable. Section 223(5) provides as follows:

> If the commission approves an applicant for a certificate submitted under subsection (3)(c), the [ALU] is considered to no longer have a [CREO], unless the commission finds that the [ALU's] denial of the application was reasonably related to the applicant's failure to provide information required by subsection (3)(a).

The cross-reference at the end of the above-quoted sentence explicitly requires an application to contain information not related to Section 226(8). See 223(3)(a). Moreover, "[a]n [ALU] may require other information necessary to determine compliance with the [CREO]." *Id*. Indeed, an application must include items like "information on the effects of the proposed energy facility on public health and safety," "evidence of consultation" with EGLE and other relevant agencies, a

soil and economic survey report, interconnection queue information, and a description of feasible alternative developed locations if the proposed site is undeveloped land. And the ALU may "require other information." § 225(1).

In other words, the Legislature made explicit its decision that a CREO can contain requirements outside those contained in Section 226(8). Determining the opposite creates an absurdity. If a CREO could only contain the requirements of Section 226(8), the entire idea of a CREO is meaningless and of no effect. Whole provisions of PA 233 would be nugatory. And there would be no point in having an ordinance regulating qualifying projects. Such a scenario may be what the PSC and developers want, but it is the system the Legislature created.

"[A] court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecom. Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). Michigan courts have long recognized that, due to the very nature of an administrative agency's rulemaking power, when a statute and an administrative rule conflict, the statute necessarily controls. *See In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98; 754 NW2d 259 (2008)("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."); *Mich Sportservice, Inc. v Dep't of Revenue Comm'r*, 319 Mich 561, 566; 30 NW2d 281 (1948) ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within the power of the department of revenue to extend the scope of the act.").

Accordingly, it is wholly unreasonable, unlawful, and an abuse of discretion for the PSC to redefine CREO to mean an ordinance that has only the exact regulations contained in § 226(8).

B. The PSC impermissibly redefined "ALU."

As discussed in Appellants' initial brief, the PSC unlawfully and unreasonably redefined "affected local unit," or "ALU." PA 233 defines ALU as "a unit of local government in which all or part of a proposed energy facility will be located. § 221(a). "Local unit of government" or "local unit" means a county, township, city, or village." § 221(n). But the PSC redefined "ALU" to mean "a unit of local government ***exercising zoning authority*** in which all or part of a proposed energy facility will be located" (Order, 119 (emphasis added)). In other words, the PSC narrowed the definition of ALU to include only local units that exercise zoning jurisdiction.

The PSC argues that zoning authority must be considered when interpreting which local units are ALUs for the purposes of PA 233 (PSC's Brief, 33-34). Intervening Appellees argue that ALUs are only those with zoning jurisdiction because PA 233 should be read *in pari materia* with the MZEA (Intervening Appellees' Brief, 36-40).

PA 233, however, is not just about zoning. Local governments not only possess zoning authority—they also possess police powers. And the PSC's rewriting of the definition of ALU has an extra-legislative effect on those police powers.

Section 227(1) requires an applicant for a certificate to enter into a host community agreement with each ALU. That agreement must require the energy facility owner to pay the ALU $2,000 per megawatt of nameplate capacity located within the ALU. And the Legislature provided that those dollars have nothing to do with zoning. "The payment shall be used as determined by the [ALU] for police, fire, public safety, or other infrastructure, or other projects as agreed to by the local unit and the applicant." *Id.* In other words, for police-power purposes.

All townships and counties have police, fire, public safety, and infrastructure costs, not just those that exercise zoning authority. So, not only does the PSC's definition of CREO reject the idea that fire-safety regulations can be part of a CREO, the PSC believes a local unit must exercise

zoning jurisdiction or face potential emergency situations without the benefit of legislatively guaranteed funds. Developers may not like that the Legislature mandated that both the township and the county in which a part of a project resides will receive $2,000 per megawatt of nameplate capacity—but that is what the Legislature decided. The PSC cannot override that determination.

C. The PSC impermissibly created "hybrid facilities."

The PSC and Intervening Appellees argue that the addition of "hybrid facilities" to the categories of facilities over which the PSC may gain jurisdiction is reasonable. Again, the PSC added words to a statute that the Legislature did not include but that Intervening Appellees wish were there.

The Legislature made clear its intent with enumerated jurisdictional thresholds. Developers may apply for a certificate from the PSC for a solar energy facility with a nameplate capacity of at least 50 MWs, a wind energy facility with a nameplate capacity of 100 megawatts or more, or an energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more. § 222(a)-(c). The Legislature provided that a solar facility that meets the jurisdictional threshold may contain energy storage facilities and that a wind energy facility that meets the jurisdictional threshold may contain energy storage facilities. § 221(w)-(x).

The Legislature did not, however, grant the PSC jurisdiction over differing types of facilities that combine to meet one of the jurisdictional thresholds. Not satisfied with the limitations of the statute, the Order states that wind energy facilities and solar energy facilities may be combined to meet the 100 MW threshold for a wind energy facility. In short, the Order purports to expand developers' rights, at the expense of Appellants' rights, in a way the Legislature expressly chose not to do.

D. The PSC acted contrary to the Legislature's intent when it unlaterally imposed an "affirmative obligation" on ALUs to meet with developers within 30 days of a written offer to meet.

With no textual support, the PSC and Intervening Appellees argue that the Order reasonably creates a 30-day window after a written offer to meet is sent to the CEO pursuant to § 1223(2) during which the CEO or their designee must meet with the developer.

The Order states that "the CEO of an ALU has an affirmative obligation to notify [a developer] of the existence of a CREO" (Order, 11). The PSC states that the "fact that the 30-day timeline for an [ALU]'s response to a request to meet is consistent with the timeline for an [ALU]'s CREO response after a meeting is evidence of its reasonableness" (PSC's Brief, 44). Intervening Appellees admit that PA "233 does not expressly impose a timeline in which the meeting between the developer and the CEO. . . must occur[,]" but insist that not imposing such a timeline "threatens to thwart the preemptive effect of the statute" (Intervening Appellees' Brief, 43). According to the PSC and Intervening Appellees, not imposing such an obligation on ALUs would allow ALUs to upend the entire system created by PA 233.

As a preliminary matter, Appellants note that CEO-developer meetings have already occurred. Appellant CEOs have met with developers and informed developers that the relevant ALU has a CREO. The PSC and Intervening Appellees can point to no case where an Appellant has refused to meet within a reasonable period of time after the written offer to meet has been sent.

But critically, PA 233 imposes no such obligation or timeline on ALUs. In § 223, the Legislature imposed duties on developers and on ALUs. The Legislature required developers to notice and hold a public meeting, pursuant to specific enumerated timelines and requirements. It required developers to provide the CEO of each ALU with a written offer to meet, pursuant to specific and enumerated timelines and requirements. It also required ALUs to notify developers that a CREO is in place within 30 days after the CEO-developer meeting. And it chose to require

ALUs to approve or deny applications submitted to the ALU within 120 days. But it did not impose a 30-day window (or any window at all) during which the CEO-developer meeting must occur. "The language of the statute expresses the legislative intent." *GMAC, LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). "The omission of a provision should be construed as intentional." *Id*. In short, the PSC added provisions to PA 233 the Legislature did not include. Such authority is not included in "those powers and duties granted to the" PSC in PA 233 and is, therefore, outside the PSC's authority to implement PA 233. See § 230(1).[2] Again, the PSC and Intervening Appellees' problem with the statute is that it does not provide what they want.

II. The PSC exceeded its limited authority to issue orders and violated the Administrative Procedures Act.

Intervening Appellees argue that the Order is not an invalid rule because this Court held in *Michigan Trucking Ass'n v Public Service Com'n,* 225 Mich App 424; 571 NW2d 734 (1997), that "twelve months" is not enough time to promulgate a rule (Intervening Appellees Brief, 19). But there is a key difference between that case and this one. In *Michigan Trucking Ass'n*, the "twelve-month" timeline in which the PSC had to issue an order was a statutory mandate: the PSC was required by statute to "implement by rule or order a motor carrier safety system within 12 months after the effective date of" the statute. *Id*. at 426.

Here, it is true that PA 233 took effect one year after it was enrolled. Yet there is no similar requirement in PA 233 for the PSC to adopt a rule, order, or application filing instructions in that twelve-month period. The PSC had more time. As the PSC represents at length in its brief, no applications have yet been filed nearly three months later.

---

[2] Even assuming *arguendo* that an ALU could unreasonably delay a CEO-developer meeting, that should be a factual question to be decided in court, not a legal "interpretation" made by the PSC.

III. This appeal is ripe for review.

The PSC argues that this appeal is not ripe for review (notably, Intervening Appellees do not). The PSC simply wishes to ignore the statutory requirement that any appeal from the Order was required to be filed within 30 days following the entry of the Order. MCL 462.26(1). The PSC admits, at length, that there is no binding authority supporting its position (PSC's Brief, viii-ix).

IV. Local Governments Continue to Express Support for Local Control

In the 30-day window to appeal, 79 local governments formally approved joining this appeal. This 30-day window saw both major holidays and a general election, busy times for elected officials. Appellants attached to their brief on appeal resolutions adopted by an additional 31 townships and counties supporting this appeal, and Appellants requested that this Court take judicial notice of those resolutions (Appellants' Brief on Appeal, 16). Since Appellants filed their initial brief, Appellants have learned of 12 additional townships and counties that have adopted resolutions in support of local control and this appeal (Exhibit A). Appellants again ask the Court to take judicial notice of these resolutions pursuant to MRE 202. In short, 109 municipalities from all across Michigan have taken formal action to support this appeal.

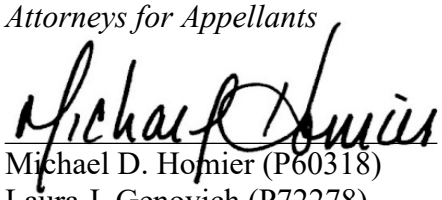
CONCLUSION

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

Respectfully submitted,

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Appellants

Dated: February 28, 2025

By: 

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

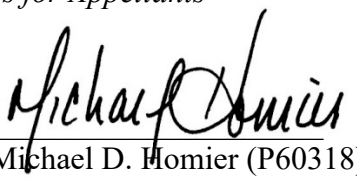
(616) 726-2200

WORD COUNT CERTIFICATION

This brief contains 2,233 words in accordance with MCR 7.212(B).

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Appellants

Dated: February 28, 2025

By: 

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

89561:00001:201255944-5