STATE OF MICHIGAN

IN THE COURT OF APPEALS

ALMER CHARTER TOWNSHIP, et al., Appellants, v. MICHIGAN PUBLIC SERVICE COMMISSION, Appellee.	Court of Appeals No. 373259 Michigan Public Service Commission Case No. U-21547 ***This appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.***

AMICUS BRIEF OF THE MICHIGAN CONSERVATIVE ENERGY FORUM

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STATEMENT OF JURISDICTION

Amicus curiae Michigan Conservative Energy Forum ("MICEF") adopts as its own the Statement of Jurisdiction set forth in the brief filed by Appellee Michigan Public Service Commission ("MPSC") to the brief filed by Appellants Almer Charter Township, et al.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Amicus curiae MICEF adopts as its own the Counter-Statement of Questions Presented set forth in the brief filed by Appellee MPSC to the brief filed by Appellants Almer Charter Township, et al.

I. STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The amicus curiae is the Michigan Conservative Energy Forum ("MICEF"), a Michigan non-profit advocacy organization established in 2013. MICEF is focused exclusively on energy policy and the development of advanced, clean energy systems. MICEF plays an active role in advancing state energy policy and was directly involved in the legislative deliberations leading to the passage of Public Act 233 of 2023 ("Act 233"), MCL 460.1001 et seq., including testifying in legislative committee hearings on several occasions regarding the development of large-scale renewable energy projects.

MICEF advocates for energy solutions that increase access to clean, affordable and reliable energy statewide. MICEF promotes clean energy and energy waste reduction to stimulate economic growth, create jobs, protect and responsibly use natural resources, while improving energy reliability and enhancing national and grid security. MICEF believes free markets are the key to continued innovation and technological advancements in energy production, distribution, storage and efficiency. MICEF knows that job creation and economic growth sparked by diversified, clean energy policy do not have to come at the expense of our environment. MICEF is committed to Michigan being a national clean energy leader.

In addition to its advocacy in the legislative process that enacted Act 233, MICEF was fully engaged in the public participation process conducted by the Michigan Public Service Commission ("MPSC") under its February 8, 2024 Order opening the docket for this case, MPSC Case No. U-

[1] Disclosure pursuant to MCR 7.212(H): No counsel for any party to this case authored this Brief in whole or in part and no counsel or party to the case made a monetary contribution intended to fund its preparation or submission.

21547. MICEF attended all the public meetings and submitted informal written comments on two occasions during the MPSC Staff's preparation of a straw proposal, as ordered by the MPSC. MICEF then submitted formal comments in the docket in response to the MPSC Staff's June 21, 2024 proposal. MICEF's formal comments were referenced on several occasions by the MPSC in its October 10, 2024 Order ("Order") that is the subject of this appeal.

MICEF possesses a unique expertise in this subject area because of its work through a program it operates identified as the Land & Liberty Coalition® ("L&LC"). MICEF, and its counterpart in the state of Indiana, piloted L&LC in 2018. The program has since grown to have operations in 15 states. The purpose of L&LC is to facilitate community consideration and adoption of large-scale renewable energy projects of the exact nature covered by Act 233. L&LC works alongside energy developers, local elected officials and appointed zoning and planning boards, landowners, community leaders and everyday citizens to shape zoning ordinances and permitting processes to successfully site renewable energy projects.

No other entity in Michigan operates a program, with both full-time and part-time staff, dedicated exclusively to the process of siting renewable energy projects. Our staff includes past and present elected local officials and appointed planning commissioners, with experience in developing and approving Master Plans, ordinances, permits and variances. L&LC team members have collectively been to hundreds of county and township meetings in more than half of Michigan's 83 counties where renewable energy ordinances, permits and projects have been addressed. Through its L&LC program, MICEF has been an eyewitness to examples of both proper and improper local zoning and permitting practices.

Local governments have impeded the development of renewable energy through burdensome zoning restrictions and permitting requirements to the detriment of Michigan becoming a national leader in renewable energy. If the sound decision of the MPSC in this case is disturbed, then it is likely that local governments will continue to impose unnecessary and costly restrictions on the development of renewable energy. By enacting Act 233, the Michigan Legislature addressed a vexing problem and vested the MPSC with the authority to establish a siting certification process for new renewable energy developments as an alternative to local government siting requirements. The MPSC in this case correctly interpreted Act 233 when it established application filing instructions and an application process for developers to use, as required under the law. The Michigan Legislature is the appropriate venue for local governments to seek any further relief, not this Court.

II. INTRODUCTION

For MICEF and its members, this case is about being able to advance Michigan's renewable and clean energy agenda without being unnecessarily impeded by the overreach of local governments who seek to impose various excessive and burdensome permitting requirements and delays on energy developers who seek to install their renewable and clean energy.

In this proceeding, MICEF urged the MPSC to match, as closely as possible, the features of local zoning and permitting best practices. It was a repeated lack of adherence to both law and best practices by numerous local governments, resulting in exclusionary zoning provisions, that prompted the passage of Act 233. Act 233 substitutes the MPSC as the zoning entity for approving energy projects. MICEF offered this construct for the MPSC's development of its Order now under review precisely to preserve one of the Legislature's key intents for crafting Act 233 as it did, that being to incentivize affected local units ("ALUs") of government and developers to work cooperatively to finalize an ordinance and a project plan to both parties' benefit.

The MPSC's Order appropriately implements Act 233. The MPSC's interpretations of Act 233 are lawful and reasonable and entitled to respectful consideration. The MPSC's interpretations of "compatible renewable energy ordinance" ("CREO") and ALU are consistent with Act 233. Further, the MPSC acted within its authority to provide interpretive statements and to establish filing requirements mandated by Act 233.

For the foregoing reasons, and as further stated below, MICEF respectfully requests this Court affirm the MPSC Order below.

III. STATEMENT OF FACTS

Amicus curiae MICEF adopts as its own the Counter-Statement of Facts set forth in Appellee MPSC's brief.

IV. STANDARD OF REVIEW

Amicus curiae MICEF adopts as its own the Standard of Review set forth in Appellee MPSC's brief.

V. ARGUMENT

A. The Legislature sought to correct exclusionary zoning practices by passing Act 233 of 2023. The Legislature's chosen mechanism was to transfer permitting authority to the Michigan Public Service Commission under certain conditions.

Expanding Michigan's electricity generation capacity via a substantial buildout of renewable energy facilities is both a public policy goal (See, Public Act 235 of 2023) and a desired outcome of energy customers of all sizes who are requesting access to clean energy sources. In recognizing the demand for increased renewable and clean energy, and desiring to facilitate its expansion, the Legislature advanced Act 233 specifically to address a well-documented obstacle to that expansion.

For a decade leading up to the passage of Act 233, efforts to build renewable energy facilities by Michigan utilities and energy development companies ("developers") have been thwarted dozens upon dozens of times by the restrictive zoning practices of local units of government. But for this practice of "exclusionary zoning," enactment of Act 233 and Public Act 234 of 2023 would not have been necessary for achieving the stated energy capacity goals.

The pattern of restrictive zoning was intentional and often disingenuously portrayed as "only regulating" energy facility development. All the while, local officials were well aware that

the provisions they were including in zoning ordinances would have the effect of making the project untenable for the developer seeking a permit. One township would put forward noise limits and setback distances that would effectively block the project. The next jurisdiction would set unreasonable height restrictions and require unattainable standards for vegetative screening. It was a thinly veiled game of "whack a mole" that played out repeatedly in jurisdictions across the state.

These practices violated the spirit, if not the letter of the Michigan Zoning Enabling Act, MCL 125.3101 et seq., as the various ordinance provisions were not legitimately tied to preserving the health, safety or welfare of the community. Historically, the legitimacy of zoning provisions has been tied to preserving these three community features as a restraint on zoning provisions that could creep into the realm of being punitive, arbitrary or capricious.

Even with the passage of Act 233, some local governments are perpetuating an obstructionist strategy by adopting the required provisions of a CREO, then adding the additional provisions to their zoning ordinances that effectively block projects. The restrictive conduct post-Act 233's enactment is establishing an overlay district in which the CREO applies but then designating parcels of land for the overlay district that are not conducive to development.

The intent of Act 233 was to remedy the status quo where restrictive zoning and permitting practices have made blocking energy facility development far more often the rule, and successful permitting the exception. It is against this backdrop that the Court should consider Appellants' appeal. 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.").

A corollary intention of the Legislature in remedying the pattern of exclusionary zoning practices was to uphold a fundamental principle of Michigan zoning laws and practice. Namely, that zoning laws must balance the welfare of the community with the property rights of individuals. Stated simply, local ordinances ought to infringe to the least degree necessary upon the liberty of persons to do as they please with their own land.

Both the Legislature and the MPSC received input directly from affected landowners as to the imposition upon private property rights, including measurable harm, wrought by exclusionary local ordinances. Tension between community welfare and private property rights is an inherent part of zoning governance. The Legislature was intentional in its effort to correct what it saw as an imbalance within that tension. Yet in its effort to correct an imbalance, the Legislature did not tip the scale to the favor of individual property rights over community welfare. As will be outlined below, the Legislature's policy scheme seeks to create a reasonable balance of interests and offers a meaningful level of due process for all affected parties.

B. The MPSC's Order reflects the overall strategy of Public Act 233 of 2023.

While the Legislature's specific intent is narrowly focused, rectifying exclusionary zoning practices, its overall statutory scheme is significantly more nuanced. In an effort to strike a balance between the traditional role of local governments in permitting projects (a.k.a. "preserving local control") and overcoming restrictive zoning practices, the Legislature crafted a scheme that was twofold in nature by: 1) creating incentives for local units of government and developers to keep the permitting of renewable energy facilities at the local level; and 2) creating an alternative mechanism for permitting to occur through a process administered by the MPSC where the local permitting process breaks down.

There is a process built into Act 233 for engaging the ALU's chief elected official and for holding a public meeting. See, Section 223(1) and (2) of Act 233, MCL 460.1223(1) and (2). The statute requires developers to first file an application with the ALU if the ALU notifies the developer that it has a CREO. See, Section 223(3) of Act 233, MCL 460.1223(3). Nothing in Act 233 prevents an ALU and a developer from agreeing to ordinance provisions that differ from those prescribed in Act 233. Those provisions could even be considered "more restrictive" than the provisions in Section 226(8) of Act 233, MCL 460.1226(8), and yet may remain agreeable to the developer. The Legislature purposely left room for local agreements to be reached under Act 233.

The extensive application requirements in the statute show that the Legislature was not providing a "short cut" for developers in utilizing the state permitting option. See, Section 225(1) of Act 233, MCL 460.1225(1) . The required information and items for the MPSC's consideration under this option provide an instructive framework for ALUs and developers to negotiate an agreement locally.

The Legislature further incentivized reaching agreements locally by placing the state siting process within a contested case and attaching significant costs for the developer. See, Section 226(1) and (3) of Act 233, MCL 460.1226(1) and (3). A developer filing an application with the MPSC assumes financial obligations in providing funding for the ALU's legal counsel and entering into a host community agreement or community benefits agreement. See, Section 226(1) and Section 227(1) and (2) of Act 233, MCL 460.1226(1) and 460.1227(1) and (2). These costs are in addition to its own expenses for application processing fees and legal representation before the MPSC.

The contested case process is complicated, time-consuming and expensive. By placing the ultimate decision for a project's approval or denial in the hands of the MPSC, both the developer and the ALU relinquish a degree of self-determination and assume a degree of risk as to the final outcome. The MPSC process is hardly a "short cut".

The MPSC, having been involved in the legislative deliberations that created Act 233, and its comprehensive process seeking input on how to implement it, crafted the Order with a sophisticated understanding of legislative intent and the overall statutory scheme. It is within this context this Court should find that the MPSC acted reasonably, lawfully, and within its authority to issue the Order.

C. The MPSC's interpretation of Act 233 warrants respectful consideration.

Appellants claim that the MPSC's interpretations of the statutory definitions for a "compatible renewable energy ordinance" ("CREO") and an "affected local unit" ("ALU") amount to "rewriting" the definitions and their effective meanings. Appellants' Brief, pp. 1, 13-14, 17-18, 20, 23-24, 26-27, 32-34. Ironically, Appellants argue the MPSC's interpretation of a CREO is too narrow and adheres too closely or literally to the plain language of the statute, while claiming the MPSC's interpretation of the ALU definition does not adhere to the plain language closely enough. Id. Proof that the statute's meaning for these terms is not clear and that the MPSC acted reasonably to provide interpretative clarification is found in the extensive and contradictory interpretations submitted in formal comments to the MPSC.

The MPSC has authority and the responsibility to interpret the statutes it administers. Interpreting statutes is a routine aspect of the MPSC's activities. See, *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93 (2008). When interpreting statutes within its purview,

this Court must give those interpretations respectful consideration. *In re Michigan Consol Gas Co to Increase Rates Application*, 293 Mich App 360, 365 (2011) ("A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference.")

1. **The MPSC's interpretation of the defined term "CREO" is both consistent with the language of the statute and reasonable.**

Appellants argue that the Legislature intended "that CREOs may contain additional, but not more restrictive, regulations." Appellants' Brief, p. 25. Appellants claim that provisions regarding zoning districts, or creating overlay districts or additional regulations regarding a myriad of issues can be included in a CREO so long as the ordinance contains the standards listed in Section 226(8) of Act 233, MCL 460.1226(8). Appellants, however, provide no rationale or standards the MPSC or an ALU would apply to determine if those "additional… regulations" "are no more restrictive" than the provisions of Section 226(8) of Act 233, MCL 460.1226(8). Appellants cannot point to any language in Act 233 to support their claim.

Appellants make an additional unsubstantiated logical leap by asserting that allowing an ALU or the MPSC to require information be submitted with an application is legislative authorization to add requirements to a CREO. See, Section 223(3) and Section 225(1) of Act 233, MCL 460.1223(3) and 460.1225(1). Required information to complete an application does not alter a zoning-related requirement.

The rationales put forward for asserting that CREOs can be embellished with additional requirements is precisely the pattern of zoning practices the Legislature was intent on curtailing. Anything but a close adherence to the provisions of the statute is an invitation for zoning mischief to return. The MPSC's interpretation of the CREO definition is faithful to statute outlining

specifics elements that must be in a CREO and that additional, more restrictive provisions are not allowed. The MPSC's interpretation of the term "compatible renewable energy ordinance" is lawful and reasonable an should be affirmed.

2. <u>The MPSC's interpretation of "affected local unit" was logically necessary.</u>

It is clear from the totality of Act 233, granting the MPSC substitute permitting authority, that the MPSC was compelled to interpret the phrase "affected local unit" ("ALU") as it did. Not only is the interpretation reasonable, it is the only logical interpretation when considering an ALU in relation to the developer and the application and adjudication process before the MPSC. The conditions that trigger a developer's option to seek a certificate from the MPSC make sense only if an ALU exercises zoning authority. A county or township without such authority cannot trigger Act 233; it cannot pass a CREO; it cannot receive a permit application.

Appellants acknowledge that Act 233 gives the MPSC substitute zoning authority. "As explained above, the PSC has the authority to site energy facilities under limited circumstances, and the Order describes this as a transfer of siting authority that depends on the exercise of local zoning jurisdiction (Order, 9)." Appellants' Brief, p. 20. Thus, it is only in the exercise of zoning authority that the MPSC may exercise substitute zoning authority.

The MPSC reached the same conclusion when it issued its Order. The MPSC stated, the following:

> Critically, the Commission finds that all the circumstances that trigger the Commission's limited authority to site energy facilities necessarily requires 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.

Order, p. 10.

Indeed, multiple provisions of Act 233 show that the MPSC's interpretation of an ALU is reasonable and necessary. Section 223(3) of Act 233, MCL 460.1223(3) states, "If… the chief elected official of each affected local unit notifies the electric provider or IPP planning to construct the energy facility that the affected local unit *has a compatible renewable energy ordinance*…" (emphasis added). Section 223(3)(a) of Act 233, MCL 460.1223(3)(a) states, "An affected local unit may require other information necessary to determine compliance with *the compatible renewable energy ordinance*" (emphasis added). Section 223(3)(b) of Act 233, MCL 460.1223(3)(b), states, "A local unit of government *with which an application is filed under this subsection*…" (emphasis added). Section 231(3) of Act 233, MCL 460.1231(3), states, "If a certificate is issued, the certificate and this part 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." Thus, only a local unit with zoning jurisdiction should be considered the ALU for purposes of the statute.

Act 233 only applies to a local unit of government with zoning jurisdiction. To determine otherwise would mean that the MPSC would have had to invent two understandings of an ALU – those with zoning jurisdiction and those without. Such a result is not supported by Act 233. The MPSC's interpretation of an ALU is lawful and reasonable and should be affirmed.

3. <u>The "hybrid facilities" definition is merely nomenclature.</u>

Appellants claim that the MPSC exceeded its authority in crafting a definition for a "hybrid facility" is a complaint about nothing more than nomenclature. As Appellants acknowledge, the

definitions for a "wind energy facility" or a "solar energy facility" include the possibility of an "energy storage facility" being a component of these two defined facilities. Appellants' Brief, p. 22. The MPSC was merely giving a name to wind and solar facilities that have this component versus a wind or solar facility without a storage component. "Hybrid facility" is merely shorthand for "wind with storage" or "solar with storage."

Importantly, the requirements for receiving a certificate from the MPSC for a wind or solar facility apply equally to projects whether they have a storage component or not. The provisions of Section 226(8) of Act 233, MCL 460.1226(8), which are key elements of a CREO, would apply no matter which combination of technologies would be deployed in a project.

Appellants portray the MPSC's definition of "hybrid facility" as allowing for the possibility of a combined wind and solar facility as an unlawful exercise of legislative power by the MPSC. This reflects an additional lack of statutory context. Appellants overlook or dismiss that developers are currently in the process of proposing solar projects to be built in locations where wind facilities have existed for some time and vice versa. For purposes of siting renewable energy projects, the MPSC's process, consistent with the statute and its Order, would not change regardless of whether projects were built with a combination of technologies concurrently or in sequence over time. It would be an unreasonable interpretation on the part of the MPSC to exclude the combination of wind and solar in a concurrent development when it can do so in sequence and can do so combining wind and solar with storage.

The MPSC's "hybrid facility" term should be affirmed.

4. The MPSC's timeline interpretation is necessary otherwise a local chief elected officer could indefinitely block a project.

MICEF fully supports the arguments set forth in the brief filed by Appellee MPSC with respect to Appellants' argument that the MPSC unlawfully modified the Act 233 statutory timelines, and will not repeat those arguments here. See, Appellee's Brief, pp. 43-45.

D. The MPSC's Order does not violate Michigan's Administrative Procedures Act.

MICEF fully supports the arguments set forth in the brief filed by Appellee MPSC with respect to Appellants' argument that the MPSC violated the Michigan Administrative Procedures Act, and will not repeat those arguments here. See, Appellee's Brief, pp. 45-55.

VI. CONCLUSION AND REQUESTED RELIEF

For the above-stated reasons, the Michigan Conservative Energy Forum respectfully requests that this Court deny the appeal filed by Appellants Almer Charter Township, et al. The decision of the Michigan Public Service Commission correctly interprets and applies Michigan law and should not be disturbed by this Court. The Court should affirm the Order of the Michigan Public Service Commission.

Respectfully submitted,

FRASER TREBILCOCK DAVIS DUNLAP & CAVANAUGH, P.C.

April 15, 2025

/s/Jennifer U. Heston

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STATEMENT OF COUNTABLE WORDS

Pursuant to MCR 7.212(B)(3), the undersigned certifies that the number of countable words in the foregoing brief, as determined by MCR 7.212(B)(2), is 4387, according to the word count provided by the word processing software used to create the foregoing brief. The name and version of that software is Microsoft® Word for Microsoft 365 MSO, Version 2305 Build 16.0.16501.20074, 64-bit.

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STATE OF MICHIGAN

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PROOF OF SERVICE

Debbie Hefka hereby certifies that on April 15, 2025, she caused to be filed the foregoing ***Amicus Brief of the Michigan Conservative Energy Forum*** and this ***Proof of Service*** in the above Michigan Court of Appeals docket using the Court's MiFile electronic filing system, which accomplishes electronic service and gives notice of the filing to all counsel of record.

/s/ *Deborah A. Hefka*
Deborah A. Hefka