STATE OF MICHIGAN
IN THE COURT OF APPPEALS

In the matter, on the Commission's own motion to open a docket to implement the provisions of Public Act 233 of 2023

Michigan Public Service Commission
Case No. U-21547

ALMER CHARTER TOWNSHIP, et al.
Appellants,

v

Court of Appeals No. 373259

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellee.

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

AMICUS CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION

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STATEMENT OF BASIS OF APPELLATE JURISDICTION

Amicus Curiae Michigan Townships Association ("MTA") adopts the Statement of Basis of Jurisdiction as contained in the Appellants' Brief on Appeal to this Honorable Court. MTA submits this brief pursuant to MCR 7.212(H)(1) and leave granted by this Honorable Court on March 25, 2025. Compliance with MCR 7.212(H)(3) is not required as this brief is being presented by an amicus curiae association representing political subdivisions as listed in MCR 7.312(H)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE MICHIGAN PUBLIC SERVICE COMMISSION'S ORDER OF OCTOBER 10, 2024, WAS ADOPTED IN VIOLATION OF THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT, MCL 24.201 *et seq* AND PUBLIC ACT 233 OF 2023?**

AMICUS CURIAE MTA ANSWERS: "YES"

APPELLANT ANSWERED: "YES"

APPELLEES ANSWERED: "NO"

II. **WHETHER THE MICHIGAN PUBLIC SERVICE COMMISSION'S ORDER OF OCTOBER 10, 2024, EXCEEDED THE COMMISSION'S AUTHORITY UNDER PUBLIC ACT 233 OF 2023 BY REDEFINING OR CREATING NEW KEY TERMS IN CONTRAVENTION OF THE LEGISLATURE'S INTENT?**

AMICUS CURIAE MTA ANSWERS: "YES"

APPELLANT ANSWERED: "YES"

APPELLEES ANSWERED: "NO"

INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Michigan Townships Association ("MTA") is a Michigan non-profit corporation whose membership consists of more than 98% of Michigan's 1,240 townships joined together for the purpose of exchanging information and providing education and guidance to and among township officials to enhance the administration of township government services.[1] Established in 1953, MTA is widely recognized for its expertise with regard to township issues. Through its legal defense fund, MTA has participated as amicus curiae in numerous state and federal cases of statewide significance to Michigan townships.

Both Public Act 233 of 2023 ("PA 233") and the Michigan Public Service Commission's October 10, 2024, Order concerning the Act ("October 10 Order")[2] have had and will continue to have a significant impact on Michigan townships. Both have the possibility to affect all township residents statewide through their regulation of utility-scale renewable energy facilities (being solar energy facilities, wind energy facilities, and energy storage facilities). PA 233 presents perhaps one of the greatest potential impacts on township land use since township zoning was established in 1943.[3] Even so, MTA recognizes that this case does not challenge the validity of PA 233 itself. Rather, this appeal challenges only the October 10 Order issued by the MPSC, both in the unlawful manner of its adoption and in the MPSC's flawed interpretation of PA 233.

In the October 10 Order, the MPSC adopted what it termed "Application Filing Instructions and Procedures." As will be explained, the following serious errors exist with this Order which require it to be invalidated by this Honorable Court:

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[1] Pursuant to Michigan Court Rule 7.312(H)(2), the Michigan Townships Association is an association representing political subdivisions.
[2] Appendix to Appellants' Brief on Appeal, Exhibit A.
[3] The Township Zoning Act, PA 184 of 1943. Current township zoning authority emanates from Public Act 110 of 2006, MCL 125.3101 *et. seq*. (The Michigan Zoning Enabling Act (MZEA)).

1. The adoption of the October 10 Order did not follow the proper procedure and resulted in an overreach of authority by the MPSC.
2. The MPSC improperly redefined the Legislature's chosen definition of the term "Affected Local Unit" beyond the plain language and intent.
3. The MPSC improperly redefined the Legislature's chosen definition of "Compatible Renewable Energy Ordinance" beyond the plain language and intent.
4. The MPSC improperly created a fourth type of facility, a hybrid facility, which is completely outside the plain language and intent of PA 233.

The MPSC has attempted to belie the importance of this appeal by stating that "[t]his appeal is not a serious dispute of the Commission's authority, but largely an expression of dissatisfaction with the contents of Act 233 framed as a challenge to the Commission's rightful and lawful efforts to provide needed interpretive guidance for implementing Act 233."[4] This statement mischaracterizes and minimizes the significant issues raised here. MTA is naturally disappointed with the provisions of PA 233 which have usurped certain siting decisions for projects which were previously under local control. However, the issues raised on this appeal are specific to the MPSC's misapplication and misinterpretation of that statute in their October 10 Order.

The MPSC attempts to disguise its actions (taken in the form of the October 10 Order) as merely interpretive guidance. However, PA 233 states that "application filing requirements" must be established "by rule or order," and this language has special meaning in law.[5] The MPSC's actions here go beyond interpretive guidance. The seriousness of the subject matter and the actions taken by the MPSC require careful consideration.

[4] Brief of Appellee Michigan Public Service Commission, page 1.
[5] See MCL 460.1224(1) and MCL 24.232(6) discussed below.

The issues raised by the October 10 Order have statewide significance and importance to Michigan townships. Indeed, the great interest in this case is evidenced by the number of parties and amicus briefs. MTA believes that the following discussion will assist this Honorable Court in understanding the erroneous nature of the October 10 Order.

STATEMENT OF FACTS

MTA adopts the Statement of Facts as contained in the Appellants' Brief on Appeal. The Appellants' statement of facts provides a comprehensive overview of PA 233 and should be reviewed as if incorporated herein.

ARGUMENT

I. THE MICHIGAN PUBLIC SERVICE COMMISSION'S ORDER OF OCTOBER 10, 2024, WAS ADOPTED IN VIOLATION OF THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT, MCL 24.201 *et seq* AND PUBLIC ACT 233 OF 2023.

A. STANDARD OF REVIEW.

For brevity, MTA adopts the Standard of Review as contained in the Appellants' Brief. We only note that issues raised in this case involving statutory interpretation are reviewed by the Court de novo.[6]

B. APPLICABLE RULES OF STATUTORY INTERPRETATION.

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature."[4] The Michigan Supreme Court has succinctly indicated the general rules for determining the intent of the Legislature:

> … The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute. In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory. 'As far as possible, effect should be given to every phrase, clause, and word in the statute.' Moreover, the statutory language must be read and understood in its grammatical context. When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[7]

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[6] *Saugatuck Dunes Coastal Alliance v Saugatuck Township,* 509 Mich 561, 577; 983 NW2d 798 (2022).

[7] *MDEQ v Worth Twp*, 491 Mich 227, 237-38; 814 NW2d 646 (2012) (footnotes omitted).

C. THE PLAIN LANGUAGE OF ACT 233 AND THE ADMINSTRATIVE PROCEDURES ACT SUPPORT THAT THE OCTOBER 10 ORDER WAS NOT VALIDLY ADOPTED.

Many briefs in support of the October 10 Order spend a great deal of time emphasizing that the Order is merely interpretive guidance. However, this argument belies the plain language of Act 233 and the Administrative Procedures Act (APA). PA 233 and the APA provide explicit statements as to how the MPSC is required to adopt its application criteria. As discussed below, the plain language of the two statutes does not permit the process used by the MPSC in issuing the October 10 Order.

MCL 460.1224 (1) provides that:

> A site plan required under section 223 or 225 shall meet application filing requirements established by commission rule or order to maintain consistency between applications. The site plan shall include the following:
>
> (a) The location and a description of the energy facility.
>
> (b) A description of the anticipated effects of the energy facility on the environment, natural resources, and solid waste disposal capacity, which may include records of consultation with relevant state, tribal, and federal agencies.
>
> (c) Additional information required by commission rule or order that directly relates to the site plan. (Emphasis added)

The plain language of the statute requires the establishment of application filing requirements by "rule" or "order" to maintain consistency between applications. This requirement is not discretionary. PA 233 only permits application guidelines or instructive guidance when they are issued as a rule or order.

This language therefore does not permit the MPSC to engage in a self-created process to develop application filing requirements. The MPSC must use either a rulemaking procedure or an order, both of which require specific procedural steps. In *Riverside Energy Mich, LLC v Mich PSC (In re Antrim Shale Formation re Operation of Wells Under Vacuum)*, 319 Mich App 175, 182; 899 NW2d 799 (2017) the Court speaks on this point:

> "Where a statute provides that an agency may proceed by rule-making or by order and an agency proceeds by order in lieu of rule-making, the order shall not be given general applicability to persons who 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."[8]

Pursuant to the above-quoted language from *Riverside Energy,* for an order to have general applicability, it can only be issued after notice and a public hearing. In this case, no such public hearing was held. The MPSC staff held various public gatherings and review sessions, but did not follow the required procedures and hold a noticed public hearing. Following the requirements of valid notice and a public hearing are important public safeguards, particularly in cases such as this one where the subject matter has the potential to affect all residents in the State.

The statute very purposely uses the term "public hearing," which encompasses more than simply a public meeting. The hallmark of a public hearing is the taking of testimony, so that the decisionmakers can reasonably rely upon the information given to them in adopting new rules or orders. This is supported in *Riverside Energy,* where the Court indicated that:

> "In this case, while the controversy over vacuum-well operation in the Antrim Shale Formation began as contested cases, the Commission later stated its intent to consider "proposals by all interested persons regarding the issue of whether the Commission should permit gas wells to be operated under vacuum from the Antrim Shale Formation" rather than resolving the issues. **The Commission then took extensive public testimony**, not only from those involved in the prior contested cases but from others, **and acted only after those public hearings**. We conclude that the Commission's generally applicable orders were not outside its authority because they were issued after public notice and a public hearing under MCL 24.232(6)."[9]

Here, no such testimony during a public hearing was allowed or occurred. October 10 Order was therefore issued outside the authority of the MPSC. The Legislature provided specific methods by which the MPSC could adopt orders or rules, and one element of that method was the

[8] Citing MCL 24.232(6) (emphasis added).
[9] *Riverside Energy*, 319 Mich App at 183 (2017).

requirement to provide public notice and a public hearing. Although the MPSC held several meetings, none of them satisfied the level of "public hearing" required by *Riverside Energy* and the APA. If the Legislature had intended for the MPSC to hold only a public meeting, it would have used that term as opposed to the specific and legally significant term "public hearing."

The MPSC and others have also contended that the October 10 Order was merely interpretive guidance, and not a rule or order requiring a public hearing. However, this argument sidesteps the specific requirements of PA 233, which requires that application procedures of general applicability be adopted specifically by rule or order, only. When the Legislature used the precise language in MCL 460.1224(1) ("established by commission rule or order"), it was plainly capturing the requirements in the MCL 24.232(6) of the APA ("If a statute provides that an agency may proceed by rulemaking or by order […]"). PA 233 therefore requires that these application procedures of general applicability may only be adopted "after public notice and a public hearing." MCL 24.232. The Michigan Court of Appeals has consistently held that the failure of an administrative agency to follow the approval process of the APA renders the action void.[10]

While we recognize that the complete invalidation of the October 10 Order is a significant remedy, it is also the remedy required by law. And, as of the date of the filing of this brief, no applications have been filed with the MPSC for siting approval for any of the covered energy facilities. The invalidation of this Order would therefore have no immediate effect on any pending applications.

Further, the MPSC could immediately initiate the proper notice and public hearing process required for an order of general applicability. The MPSC could also elect to go through the

[10] *Mich Charitable Gaming Ass'n v State*, 310 Mich App 584, 594; 873 NW2d 827 (2015); *Blank v Department of Corrections*, 222 Mich App 385, 392; 564 NW2d 130 (1997).

rulemaking procedure of the APA as authorized under MCL 460.1224(1). To the extent that the MPSC expresses concern that rulemaking would take too long, the APA permits an emergency rule making procedure.[11] The emergency rulemaking procedure, contained in MCL 24.248(1), provides in relevant part that:

> "If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 endorsed as an emergency rule, to 3 of which copies must be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule."

These alternative and available rulemaking procedures provide ample cover for the MPSC should this Court rule in favor of the Appellants and invalidate the October 10 Order.

II. THE MICHIGAN PUBLIC SERVICE COMMISSION'S ORDER OF OCTOBER 10, 2024, EXCEEDED THE COMMISSION'S AUTHORITY UNDER PUBLIC ACT 233 OF 2023 BY REDEFINING OR CREATING KEY TERMS IN CONTRAVENTION OF THE LEGISLATURE'S INTENT.

A. IMPROPER REDEFINING OF "AFFECTED LOCAL UNIT."

The October 10 Order improperly redefined the critical term "affected local unit" as used in PA 233 in a manner that exceeds the MPSC's statutory authority and contradicts legislative intent.

[11] A number of the briefs in favor of the October 10 Order complained about the amount of time it takes to formally adopt rules under the APA. While MTA contends that this complaint does not mean that the MPSC can simply ignore the plain statutory requirements, the emergency rulemaking procedures provide coverage for these situations. See MCL 24.348.

The MPSC possesses only the authority explicitly granted to it by the Michigan Legislature.[12] The term "affected local unit" is specifically defined in Act 233, and the MPSC does not have the authority to unilaterally alter this definition. While administrative agencies are entitled to some deference in interpreting statutes they are obligated to execute, such interpretations cannot conflict with the plain meaning of the statute or rewrite the statute entirely.[13]

Before discussing this argument in depth, it is important to know what we're playing for, so to speak. Being an "affected local unit" means receiving reasonable notice of hearings on a proposed project,[14] being given an opportunity to review and comment on a proposed project,[15] the right to intervene in the MPSC contested case hearing,[16] and the provision of substantial financial benefits.[17]

On the other hand, if a municipality is not considered an affected local unit, a project developer is not required to provide the municipality with *any* notice of a proposed project. The developer is not required to provide the municipality with any plans, proposed locations, traffic impacts, road damage assessments, fire and emergency response plans, or any other information concerning a project. And of course, the developer is also not required to provide any of the much-needed financial benefits which come along with these large, utility-scale renewable energy projects. As representatives of these local governments, we do not believe the stakes could be much higher. With these thoughts in mind, we turn to the statutory language surrounding this critical term and the MPSC's unlawful redefining of it.

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[12] *Arlie D. Murdock Revocable Living Trust v Mich Pub Serv Comm'n (In re Int'l Transmission Co)*, 304 Mich App 561, 570; 847 NW2d 684 (2014).
[13] *In re Rovas Complaint against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).
[14] MCL 460.1223(1) and MCL 460.1226(2).
[15] MCL 460.1224(2).
[16] MCL 460.1226(3).
[17] MCL 460.1226(1) and MCL 460.1227(1).

PA 233 defines "affected local unit" as "a unit of local government in which all or part of a proposed energy facility will be located."[18] The "local unit of government" is defined as "a county, township, city, or village."[19] The plain language of this provision makes no mention of zoning jurisdiction. Yet in the MPSC's October 10 Order, the definition of "affected local unit" has been artificially limited to include only that unit which exercises zoning jurisdiction.

Arguably, limiting the definition of affected local unit to only those with zoning jurisdiction makes some logical sense. As the MPSC opines, PA 233 is intended to take away zoning authority from certain local units of government, and so it makes sense that only those who lost some authority would be "affected" by the statute. However, neither the MPSC nor this Court has the authority to rewrite the plain language of a statute to fit what may be the more logical or preferred definition.

Tellingly, the very next section of PA 233 *does* make specific mention of zoning jurisdiction when it provides that "[a] local unit of government exercising zoning jurisdiction" may require a developer to obtain a certificate to construct their renewable energy project.[20] It is clear, then, that "local unit of government" is distinct from the authority exercising zoning jurisdiction. Otherwise, it would serve no purpose to include "exercising zoning jurisdiction" in MCL 460.1222(2). Courts must "avoid a construction that would render any part of a statute surplusage or nugatory."[21]

The Legislature's ultimate reasoning for defining the term in this way is impossible to fully uncover even with a detailed understanding of the legislative history. However, it is worthwhile to

[18] MCL 460.1221(a).
[19] MCL 460.1221(n).
[20] MCL 460.1222(2).
[21] *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010).

address the potential reasons for such a decision in order for this Court to understand why defining "affected local unit" in the manner that the Legislature did is not "absurd or unreasonable."[22]

The broader definition of "affected local unit" which the Legislature chose to implement provides more benefits to more municipalities than a definition which limits to only zoning jurisdictions. Rather than creating an "absurd result," the distinction between PA 233 and the MPSC's interpretation represents the compromise required when drafting almost any piece of controversial and impactful legislation.

All local units of government, whether they exercise zoning jurisdiction or not, are affected by PA 233. The construction and operation of large-scale renewable energy projects has significant impacts within a community. Projects of this size bring a large influx of money to the community, require temporary housing for large numbers of workers, and generate dust, noise, and light that affects neighboring properties. These projects also require the hauling in of literal tons of materials, which can cause significant damage or degradation to local roadways. All of these issues affect a local unit, whether or not that unit happens to exercise zoning jurisdiction.

Another important point to raise is a political one. All local units are comprised of electors whose votes placed the legislators in office. The Legislature may have recognized, on some level, the need to obtain buy-in from *all* local units of government as they sought to enact this wide-reaching piece of legislation. To obtain that buy-in, at least in part, the Legislature provided that all local units would be considered "affected," and therefore eligible for the benefits that come along with said status.

[22] Appellee's Brief on Appeal at 28, citing *In re Procedure & Format for Filing Tariffs Under Michigan Telecom Act*, 210 Mich App 533 (1995).

While the MPSC may believe its interpretation leads to more efficient or desirable outcomes, it is not the role of an administrative agency to reshape legislative intent based on its own policy preferences. The Legislature has made its intent abundantly clear in its definition of the term "affected local unit," and neither the MPSC nor this Court should amend that definition to exclude a local unit that does not exercise zoning jurisdiction.

B. IMPROPER CREATION OF NEW "HYBRID FACILITIES."

As stated, the MPSC has no authority beyond what the Legislature has explicitly granted to it in clear and unmistakable language.[23] Where a statute and the administrative agency conflict, the statute necessarily controls.[24]

PA 233 establishes the facilities to which its preemptive power applies:

> "(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 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more."[25]

The Legislature did not choose to preempt all solar, wind, or energy storage facilities. Instead, as the intervening appellee notes, "[t]he Legislature was particularly troubled by the obstacles that utility-scale renewable energy projects faced when trying to obtain permitting through local government."[26] These troubles led the Legislature to preempt certain elements of local control, but only as to utility-scale renewable energy projects – those projects large enough

[23] *Arlie D Murdock Revocable Living Trust*, 304 Mich App at 570.
[24] *Emagine Entertainment, Inc v Dep't of Treasury*, 334 Mich App 658, 664; 965 NW2d 720 (2020).
[25] MCL 460.1222(1).
[26] Brief of Intervening Appellee Michigan Energy Innovation Business Council, et. al., at 3 (emphasis added).

to have a measurable impact on the State's renewable and clean energy goals. The MPSC usurped this legislative intent by creating a new category of "hybrid facilities," which capture an entirely new and unintended swath of projects not covered by PA 233. These so-called "hybrid facilities" are not mentioned in the text of PA 233, nor does their inclusion comport with the central purposes underlying PA 233.

Take, for example, a solar energy facility of 30 megawatts, coupled with 20 megawatts of energy storage. Neither of these, taken independently, meet the preemption threshold for PA 233. Looking at the plain language of PA 233, it is impossible to contemplate that this example project would be covered. The statute applies to any solar energy facility with a nameplate capacity of 50 megawatts or more – our example has only 30. The statute applies to any energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more – our example has only 20 megawatts of nameplate capacity and an unknown discharge capability. By the plain language of PA 233, this project does not meet the threshold. The MPSC's interpretation would nevertheless allow the nameplate capacity megawatt values to be added together for the purposes of the preemption threshold.

The MPSC's attempt to justify its creation of "hybrid facilities" by referencing the statutory definitions of "solar energy facility" and "wind energy facility" is misguided. While these definitions do mention that an energy storage facility can be a component of a solar or wind energy facility, this does not authorize the combination of those nameplate capacities for determining the preemption threshold. PA 233 includes in the definition of "solar energy facility:"

> 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; <u>energy storage facilities</u>; 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.

The MPSC argues that the inclusion of the term "energy storage facilities" within this definition authorizes their "hybrid facilities" and the mathematical addition of the nameplate capacities of the solar energy facility and the attached energy storage facility. But this analysis completely neglects that PA 233 applies only to energy storage facilities "with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more."[27] The MPSC's hybrid facility disregards the required energy discharge capability completely, and considers only the project's nameplate capacities, deleting an entire portion of the statute.

The more straightforward and logical purpose for including the term "energy storage facilities" as part of a wind or solar project is to ensure that, where a developer who has already met the threshold for solar or wind independently also wants to add a small amount of energy storage to their site, they can do so without needing to reach the energy storage threshold of 50 megawatts capacity and 200-megawatt discharge capability. The inclusion of this term is not intended to negate the plain language of MCL 460.1222.

Adding further confusion to the hybrid facility concept is the MPSC's creation of hybrid wind and solar facilities. The October 10 Order includes as eligible projects: "Wind facilities, including hybrid or co-located facilities comprised of wind with solar and/or storage having a nameplate capacity of 100 MW or more."[28] While argument can at least plausibly be made regarding the combination energy storage to either a wind or solar project, there is absolutely no statutory basis for combining the nameplate capacities of wind and solar project and setting the

[27] MCL 460.1222(1)(c) (emphasis added).
[28] October 10 Order, pg. 85.

threshold for those projects at 100 megawatts. The preemption of local authority over this type of hybrid project is created from whole cloth and completely contradicts the straightforward language of PA 233.

For example, take a project with a nameplate capacity of 70 megawatts of wind energy and 30 megawatts of solar energy. Neither of these facilities meet the straightforward preemption threshold. Nor does the definition of a wind energy facility or solar energy facility include the other. And yet, the MPSC would preempt this project because the total nameplate capacity of the two projects adds up to the more or less arbitrary total of 100 megawatts. The Legislature was fully capable of applying PA 233 to smaller projects, and indeed did just that during the legislative process by reducing the requirement for solar facilities from 100 megawatts to 50 megawatts.[29] The Legislature was also more than capable of specifically establishing this fourth type of "hybrid" project which adds together the megawatt values of several smaller projects. However, the Legislature chose to preempt only those projects which meet the specific threshold values provided in PA 233.

As noted above, perhaps there is some sound policy basis behind the MPSC's decision to add together the megawatt values for projects. But policy decisions are not the purview of the MPSC. Decisions regarding the preemptive effect of the statute are to be made by the Legislature. The MPSC is tasked with administering the statute, not rewriting it.

[29] *Brief of Amicus Michigan House of Representatives* at 19.

C. EXCESSIVE PREEMPTION OF LOCAL ZONING AUTHORITY UNDER A COMPATIBLE RENEWABLE ENERGY ORDINANCE.

The MPSC engages in further impermissible overreach in its October 10 Order when redefining the legislative definition of a Compatible Renewable Energy Ordinance (CREO). The MPSC transforms a CREO from a measured and limited preemption of zoning authority to complete zoning preemption. This change by the MPSC was not intended by the Legislature and is not reflected in the language of the statute.

Public Act 233 provides a regulatory scheme for an electric provider or independent power producer (hereafter referred to as a "developer") to pursue a state certificate from the MPSC for the construction of a utility-scale renewable energy facility. As an initial matter, it is the developer's choice whether to pursue a state certificate or to pursue local approval through a process outside the scope of PA 233.

Should the developer choose to pursue a state certificate, there are two paths for project approval. One path takes the developer through an approval process with the MPSC, while the other path allows for a local approval process if all affected local units timely notify the developer that they have a CREO. Under PA 233, a CREO is defined as:

> [A]n ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8). A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction.[30]

A CREO cannot be more restrictive than the provisions included in Section 226(8) of PA 233.[31] Section 226(8) delineates siting regulations for each of the three types of renewable energy facilities (wind, solar, and energy storage). For solar energy facilities it addresses setbacks,

[30] MCL 460.1221.
[31] MCL 460.1226(8).

fencing, height, sound, and dark sky lighting. For wind energy facilities it addresses setbacks, sound, light mitigation, shadow flicker, height, radar interference, or other relevant issues determined by the MPSC. For energy storage facilities it addresses setbacks, compliance with national fire protection standards, sound, and dark sky lighting. Section 226(8) does not delineate any other siting requirements.

If a CREO establishes a requirement that is more stringent than the requirement as contained in Section 226(8), then the developer can bypass the local unit and seek a state certificate from the MPSC. For example, 226(8) requires that "[s]olar panel components do not exceed a maximum height of 25 feet above ground when the arrays are at full tilt."[32] A township which adopted a CREO limiting the height of solar panel components to 20 feet would be plainly more restrictive than 226(8)'s allowance of 25 feet, and therefore invalid.

Importantly, though, PA 233 does not prohibit a CREO from containing other zoning regulations or terms that are not in conflict with those specified in 226(8). This comports with well-settled principles surrounding the Michigan Zoning Enabling Act and preemptive statutes.

The MZEA provides for a comprehensive statutory system authorizing municipalities to adopt a zoning ordinance to broadly regulate land uses within their communities.[33] Many municipalities in the State engage in zoning, designating such things as the proper zoning district for certain land uses, the compatibility of certain uses, allowed principal uses, allowed accessory uses, regulations such as minimum building setbacks, maximum height, maximum lot coverage, and the size of principal and accessory buildings.

[32] MCL 460.1226(8)(iii).
[33] MCL 125.3201(1)

A municipality's zoning authority under the MZEA is broad and must be liberally construed in favor of the local municipality.[34] This rule of construction is provided for both by statute and by the Michigan Constitution of 1963. This Constitutional mandate generally militates against the finding that a local municipality's zoning authority under the MZEA is preempted. The Michigan Constitution of 1963, Art. VII, §34, provides that:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

This authority constitutionally supports the Township's zoning authority over other provisions in a CREO that do not conflict with the limitations contained in Section 226(8). The October 10 Order improperly redefined the legislature's definition of a CREO to now read:

> Compatible renewable energy ordinance" or "CREO" 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 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. A local unit of government is considered not to have a CREO if it has a moratorium on the development of energy facilities in effect within its jurisdiction. (Empasis added)

Importantly, as highlighted, the MPSC added a new provision that a CREO may not contain additional requirements beyond those specifically identified in Section 226(8). This is in contravention to the constitutional and statutory protections granted to municipal zoning regulations. The Legislature outlined the specific elements and requirements which it wanted to restrict. A township's zoning authority is undoubtedly preempted as to those items specifically listed in Section 226(8). However, where the Legislature did not specifically preempt, the authority

[34] *Frens Orchards, Inc. v Dayton Township*, 253 Mich App 129, 132; 654 NW2d 346 (2002).

of a municipality to regulate zoning under the MZEA and the constitution should be retained and liberally construed in the municipality's favor.

The case of *DeRuiter v Byron Twp*, 505 Mich 130, 147; 949 NW2d 91 (2020) provides further support for this position. *DeRuiter* analyzed whether the Michigan Medical Marihuana Act ("MMMA") preempted a local ordinance proscribing where medical marihuana could be cultivated. The MMMA provided that cultivated marihuana plants had to be located in an enclosed locked facility. The Township required that the patient/caregiver could only engage in cultivation in a residential zoning district. The plaintiff in the case was cultivating in a commercially zoned property, and challenged the township's residential limitation. As relevant here, the Michigan Supreme Court held that:

> "the MMMA does not nullify a municipality's inherent authority to regulate land use under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, so long as the municipality does not prohibit or penalize all medical marijuana cultivation, like the city of Wyoming's zoning ordinance did in *Ter Beek II*, and so long as the municipality does not impose regulations that are unreasonable and inconsistent with regulations established by state law."[35]

The exact same analysis applies here. The restriction in Section 226(8) does not "nullify a municipality's inherent authority to regulate land use under the Michigan Zoning Enabling Act […]." The additional language added by the MPSC in its October 10 Order unreasonably restricts what can be included in a CREO, nullifying the municipality's inherent authority to regulate land use. The Legislature enacted a measured approach to ensure that those certain factors listed in Section 226(8) are not further limited by a CREO. The MPSC's Order goes much further and preempts all other zoning regulations. Such overreach goes beyond the plain language of PA 233 and the statutory and constitutional authority granted to Michigan municipalities.

[35] *DeRuiter*, 505 Mich at 146. (internal citations omitted).

Finally, it should be noted that municipalities are still bound by all other statutory and constitutional limitations on zoning authority. Most relevant here, a municipality cannot adopt a CREO which results in exclusionary zoning. As provided in MCL 125.3207:

> "A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful."

To the extent that a municipality attempted to adopt a CREO which completely prohibited the development of a renewable energy project within its boundaries, such restriction would be appropriately analyzed under already-existing rules of exclusionary zoning. Any attempts by the Appellee or others to imply that the request of the Appellant would permit a complete prohibition of renewable energy projects is therefore without merit.

CONCLUSION

For the reasons stated above, we ask this Honorable Court to vacate the October 10 Order of the Michigan Public Service Commission, or in the alternative, vacate those portions of the October 10 Order challenged herein.

Respectfully submitted,

Dated: April 15, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 6,072 countable words as calculated by the word process program used in its creation. The document is set in Times New Roman, and the text is 12-point 2.0 spaced type.

Respectfully submitted,

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