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.
_____ /

COA No. 373259

BRIEF OF *AMICUS CURIAE* MICHIGAN FARM BUREAU IN SUPPORT OF APPELLANTS MICHIGAN TOWNSHIPS AND COUNTIES

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STATEMENT OF QUESTIONS PRESENTED

1. Agencies are creatures of statute and may exercise only the authority expressly granted to them by the Legislature. The MPSC's Order adds extratextual requirements to key statutory terms in PA 233 of 2023 and shifts the Legislature's chosen balance of power between the MPSC and local governments in siting large-scale energy projects. Are the challenged portions of the MPSC's Order contrary to law?

   Appellant's answer: No.

   Plaintiffs/Appellees' answer: Yes.

   Defendant/Appellee's answer: Yes.

   Amicus Curiae's answer: No.

   Trial court's answer: Yes.

2. Agencies may not circumvent the rulemaking process in issuing binding edicts implementing the law they administer. The MPSC's Order here purports to govern not only all future contested-case proceedings arising under PA 233 of 2023 but also to allow developers the ability to bypass local jurisdictions in siting projects. Are the new standards that the MPSC incorporates into its Order "rules" that should have been promulgated through rulemaking?

   Appellant's answer: No.

   Plaintiffs/Appellees' answer: Yes.

   Defendant/Appellee's answer: Yes.

   Amicus Curiae's answer: No.

   Trial court's answer: Yes.

STATUTORY PROVISIONS INVOLVED

MCL 460.1221: (a) "Affected local unit" means a unit of local government in which all or part of a proposed energy facility will be located.

…

(f) "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 moratorium on the development of energy facilities in effect within its jurisdiction.

…

(n) "Local unit of government" or "local unit" means a county, township, city, or village.

…

(p) "Nameplate capacity" means the designed full-load sustained generating output of an energy facility. Nameplate capacity shall be determined by reference to the sustained output of an energy facility even if components of the energy facility are located on different parcels, whether contiguous or noncontiguous.

MCL 460.1222: (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 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more. …

MCL 460.1223: (1) An electric provider or independent power producer that, at its option or as required by the commission, proposes to obtain a certificate for and construct an energy facility shall hold a public meeting in each affected local unit. At least 30 days before a meeting, the electric provider or IPP shall notify the clerk of the affected local unit in which a public meeting will be held of the time, date, location, and purpose of the meeting and provide a copy of the site plan as described in section 224 or the address of an internet site where a site plan for the energy facility is available for review. At least 14 days before the meeting, the electric provider or IPP shall publish notice of the meeting in a newspaper of general circulation in the affected local unit or in a comparable digital alternative. The notice shall include a copy of the site plan or the address of an internet site where the site plan is available for review. The commission shall further prescribe the format and content of the notice. For the purposes of this subsection, a public meeting held in a township is considered to be held in each village located within the township.

(2) At least 60 days before a public meeting held under subsection (1), the electric provider or IPP planning to construct an energy facility shall offer in writing to meet with the chief elected official of each affected local unit, or the chief elected official's designee, to discuss the site plan.

(3) If, within 30 days following a meeting described in subsection (2), 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, then the electric provider or IPP shall file for approval with each affected local unit, subject to all of the following:

(a) An application submitted under this subsection shall comply with the requirements of section 225(1), except for section 225(1)(j) and (s). An affected local unit may require other information necessary to determine compliance with the compatible renewable energy ordinance.

(b) A local unit of government with which an application is filed under this subsection shall approve or deny the application within 120 days after receiving the application. The applicant and local unit of government may jointly agree to extend this deadline by up to 120 days.

(c) The electric provider or IPP may submit its application to the commission if any of the following apply:

(*i*) An affected local unit fails to timely approve or deny an application.

(*ii*) The application complies with the requirements of section 226(8), but an affected local unit denies the application.

(*iii*) An affected local unit amends its zoning ordinance after the chief elected official notifies the electric provider or IPP that it has a compatible renewable energy ordinance, and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in section 226(8).

(d) An electric provider or IPP that submits an application to the commission pursuant to this subsection is not required to comply with subsection (1) or section 226(1), or the requirement to submit a summary of community outreach and education efforts pursuant to section 225(1)(j).

MCL 460.1226: (8) An energy facility meets the requirements of subsection (7)(g) if it will comply with the following standards, as applicable:

(a) For a solar energy facility, all of the following:

(*i*) The following minimum setback requirements, with setback distances measured from the nearest edge of the perimeter fencing of the facility:

Setback Description	Setback Distance
Occupied community buildings and dwellings on nonparticipating properties	300 feet from the nearest point on the outer wall
Public road right-of-way	Public road right-of-way
Nonparticipating parties	Nonparticipating parties

(*ii*) Fencing for the solar energy facility complies with the latest version of the National Electric Code as of the effective date of the amendatory act that added this section or any applicable successor standard approved by the commission as reasonable and consistent with the purposes of this subsection.

(*iii*) Solar panel components do not exceed a maximum height of 25 feet above ground when the arrays are at full tilt.

(*iv*) The solar energy facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling shall use the A-weighted scale as designed by the American National Standards Institute.

(*v*) The solar energy facility will implement dark sky-friendly lighting solutions.

(*vi*) The solar energy facility will comply with any more stringent requirements adopted by the commission. Before adopting such requirements, the commission must determine that the requirements are necessary for compliance with state or federal environmental regulations.

(b) For a wind energy facility, all of the following:

(*i*) The following minimum setback distances, measured from the center of the base of the wind tower:

Setback Description	Setback Distance
Occupied community buildings and residences on nonparticipating properties	2.1 times the maximum blade tip height to the nearest point on the outside wall of the structure
Residences and other structures on participating properties	1.1 times the maximum blade tip height to the nearest point on the outside wall of the structure
Nonparticipating property lines	1.1 times the maximum blade tip height
Public road right-of-way	1.1 times the maximum blade tip height to the center line of the public road right-of-way
Overhead communication and electric transmission, not including utility service lines to individual houses or outbuildings	1.1 times the maximum blade tip height to the center line of the easement containing the overhead line

(*ii*) Each wind tower is sited such that any occupied community building or nonparticipating residence will not experience more than 30 hours per year of shadow flicker under planned operating conditions as indicated by industry standard computer modeling.

(*iii*) Each wind tower blade tip does not exceed the height allowed under a Determination of No Hazard to Air Navigation by the Federal Aviation Administration under 14 CFR part 77.

(*iv*) The wind energy facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling shall use the A-weighted scale as designed by the American National Standards Institute.

(*v*) The wind energy facility is equipped with a functioning light-mitigating technology. To allow proper conspicuity of a wind turbine at night during construction, a turbine may be lighted with temporary lighting until the permanent lighting configuration, including the light-mitigating technology, is implemented. The commission may grant a temporary exemption from the requirements of this subparagraph if installation of appropriate light-mitigating technology is not feasible. A request for a temporary exemption must be in writing and state all of the following:

(A) The purpose of the exemption.

(B) The proposed length of the exemption.

(C) A description of the light-mitigating technologies submitted to the Federal Aviation Administration.

(D) The technical or economic reason a light-mitigating technology is not feasible.

(E) Any other relevant information requested by the commission.

(*vi*) The wind energy facility meets any standards concerning radar interference, lighting, subject to subparagraph (*v*), or other relevant issues as determined by the commission.

(*vii*) The wind energy facility will comply with any more stringent requirements adopted by the commission. Before adopting such requirements, the commission must determine that the requirements are necessary for compliance with state or federal environmental regulations.

(c) For an energy storage facility, all of the following:

(*i*) The following minimum setback requirements, with setback distances measured from the nearest edge of the perimeter fencing of the facility:

Setback Description	Setback Distance
Occupied community buildings and dwellings on nonparticipating properties	300 feet from the nearest point on the outer wall
Public road right-of-way	50 feet measured from the nearest edge of a public road right-of-way
Nonparticipating parties	50 feet measured from the nearest shared property line

(*ii*) The energy storage facility complies with the version of NFPA 855 "Standard for the Installation of Stationary Energy Storage Systems" in effect on the effective date of the amendatory act that added this section or any applicable successor standard adopted by the commission as reasonable and consistent with the purposes of this subdivision.

(*iii*) The energy storage facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling shall use the A-weighted scale as designed by the American National Standards Institute.

(*iv*) The energy storage facility will implement dark sky-friendly lighting solutions.

(*v*) The energy storage facility will comply with any more stringent requirements adopted by the commission. Before adopting such requirements, the commission must determine that the requirements are necessary for compliance with state or federal environmental regulations.

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Michigan Farm Bureau is a grassroots organization that exists to promote and represent the interests of the agricultural industry across the State of Michigan. Michigan Farm Bureau was established in 1919, and it is Michigan's largest general farm organization with approximately 200,000 total members and 40,000 farmer members operating in 65 county Farm Bureaus. Its mission is to represent, protect, and enhance the business, economic, social, and educational interests of its members. As a general farm organization, Michigan Farm Bureau represents the full spectrum of Michigan's agricultural diversity, from crops and livestock to fruits and vegetables, greenhouses, forestry, and more.

Specific to the dispute in this case, many of Michigan Farm Bureau's 40,000 farmer members hold significant acreage of currently farmed property that may be affected by solar, wind, or energy storage developments, including the important question of who holds the authority to make siting decisions for the "solar energy facilities," "wind energy facilities," and "energy storage facilities" addressed by PA 233 of 2023. Whether decisions relating to those developments remain within the purview of local governments—who has traditionally held that role—or instead are submitted to a central state reviewing authority affects both the farmers who choose to pursue solar developments and those neighboring landowners adjacent to new solar, wind, or energy storage developments. As reflected in policies adopted by its members, Michigan Farm Bureau members believe that land-use decisions are best made by local communities, including planning and zoning decisions for energy siting and "mega site" development. And they very clearly oppose pre-

[1] The Michigan Agricultural and Forestry Organizations represented in this *amicus* brief affirm that no party to this case or their counsel authored this brief in whole or in part, and that no party or their counsel made any monetary contributions intended to fund preparation or submission of this brief. See MCR 7.212(H)(3).

emption of local zoning for these purposes. The process-oriented and jurisdictional questions raised by this litigation are accordingly of significant importance to Michigan Farm Bureau's membership. As a result, Michigan Farm Bureau participated in working group meetings with the Michigan Public Service Commission concerning the proceeding below. Moreover, *Amicus Curiae* Michigan Farm Bureau was a litigant in the recently decided Supreme Court case of *Michigan Farm Bureau v Department of Environment, Great Lakes, and Energy*, __ Mich ___; __ NW3d __ (2024) (Docket No 165166), which is discussed by both sides concerning the rulemaking issue raised in this litigation.

For the reasons that follow, *Amicus Curiae* Michigan Farm Bureau opposes the MPSC's expansion of its jurisdiction in the Order challenged by Appellants the Michigan Township and Counties. That Order upsets the balance struck by the Legislature in adopting PA 233, limiting but nonetheless preserving local authority over the siting of energy developments. Michigan Farm Bureau therefore asks the Court to vacate the Order—or at least those portions of the Order challenged on appeal—and respectfully submits this *amicus* brief in the hopes of further illuminating these questions for the Court.

INTRODUCTION

It is black-letter law that agencies are creatures of statute, and they hold only those powers expressly granted by the Legislature. Yet, here, the Michigan Public Service Commission ("MPSC") initiated proceedings on its own accord to issue an Order it claimed would apply to all future matters arising under PA 233 of 2023 and then proceeded to rewrite key statutory definitions in that new law. In doing so, the MPSC upset the careful balance of power between the MPSC and "affected local units" of government that the Legislature struck in that law—which limits the conditions local governments may impose in siting wind or solar developments but nonetheless preserves their important authority over such projects in most other instances. In contrast to this legislatively achieved balance, the MPSC significantly tilted the scales in favor of its own exercise of power on those projects.

That result is contrary to law. And the Order's newly added definitions for "compatible renewable energy ordinance" ("CREO"), "affected local unit" ("ALU"), and "hybrid facilities" cannot be squared with the text of PA 233. Indeed, the MPSC obliquely alludes to this inconsistency in repeatedly arguing that these definitions are merely "reasonable" rather than that they are commanded by the text of the law. (See, e.g., MPSC Br., pp. 21.) Not only is the Order unlawful and contrary to a plain reading of the statute, but it is also bad policy that undermines the Legislature's crafted compromise in this matter. Local input on such projects matters as local governments are often close to the agricultural and economic impacts of such projects. So, preserving the Legislature's chosen objectives of streamlining these projects but nevertheless allowing locals control on siting where an ordinance is not obstructionist is both consistent with the text of PA 233 and good policy, too.

For those reasons and for the arguments more fully addressed by the Township and Counties, the Michigan Farm Bureau therefore respectfully asks this Court to vacate the MPSC's Order and remand for further proceedings.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus Curiae Michigan Farm Bureau adopts the Statement of Facts and Proceedings presented in the January 3, 2025 Brief Appellants Michigan Townships and Counties. (Brief of Appellants, pp. 2–14.)

STANDARD OF REVIEW

Amicus Curiae Michigan Farm Bureau adopts the Standard of Review presented in the January 3, 2025 Brief Appellants Michigan Townships and Counties. (Brief of Appellants, pp. 15–16.)

ARGUMENT

I. The MPSC unlawfully rewrote key definitions in PA 233, thereby upsetting the balance the Legislature struck in limiting but nonetheless preserving local siting authority.

The MPSC's Order is unlawful as the agency added language to PA 233 that the Legislature never provided, thereby shifting the Legislature's careful allocation of authority between the MPSC and local governments. Though agencies are creatures of statute exercising only the powers granted to them, *O'Halloran v Secretary of State*, __ Mich __; __ NW3d __ (2024) (Docket Nos 166424 and 166425); *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582; 810 NW2d 110 (2011), the MPSC's rewriting of PA 233 effectively usurped power that the Legislature withheld. It does so by narrowing the definitions of "compatible renewable energy ordinance" and "affected local unit," lowering the prerequisite nameplate capacity for qualifying projects, and imposing an extratextual shot-clock on local officials.

Because these changes are inconsistent with the statute, this Court should reverse and vacate the challenged portions of the Order.

A. MPSC's narrowed definition of "compatible renewable energy ordinance" is contrary to several provisions of the statute.

First, MPSC rewrites the definition of "compatible renewable energy ordinance"—which is a key term that allows local governments to maintain control over siting as long as they do not add "more restrictive" demands than certain specified provisions of the law. MCL 460.1221(f) (defining CREO); see also MCL 460.1223(3) (permitting an "affected local unit *[that] has a compatible renewable energy ordinance*" to require the developer to submit for an approval) (emphasis added). The statute defines CREO as merely "an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive *than the provisions included in section 226(8)*." MCL 460.1221(f)

(emphasis added). Those provisions address a limited set of parameters—setback distances, fencing demands, height limitations, sound limitations, acceptable lighting or required light-mitigation, radar interference standards, and other "more stringent requirements" for these parameters if set by the Commission. See MCL 460.1226(8)(a)(*i*)–(8)(a)(*vi*), (8)(b)(*i*)–(8)(b)(*vii*), (8)(c)(*i*)–(8)(c)(*v*). In other words, a CREO is measured against the baseline of certain specified parameters, and a CREO cannot be "more restrictive" than the specific standards set for *those* parameters.

But the MPSC has gone much further. Its Order adopts "a *narrow* definition for a CREO." (Order, p. 18.) That definition says "a CREO may *only* contain those requirements expressly outlined in Section 226(8)" and that it "may *only* contain the setback, fencing, height, sound, and other applicable requirements expressly outlined" in that section but "may not contain *additional requirements* more restrictive than those specifically identified in that section." (*Id*.) In other words, whereas the Legislature defined a CREO as one that did not add "more restrictive" standards than those set for specific parameters—e.g., requiring more than a 50-foot setback from the public road right-of-way for a solar energy facility, MCL 460.1226(8)(a)(*i*)—MPSC has confined CREOs so that they may not speak to anything *other* than those specified parameters.

Yet that is not what the Legislature said. Illuminating this point, the Legislature spoke to "more restrictive" or "more stringent" requirements in a few places. Among those, MCL 460.1226(8)(a)(*vi*), 460.1226(8)(b)(*vii*), and 460.1226(8)(c)(*v*) envisioned that MPSC *can* impose "more stringent requirements" than those explicitly detailed in those subsections for certain parameters if "necessary for compliance with state or federal environmental regulations." *Id*. That legislative circuit breaker giving the MPSC the discretion necessary to comply with environmental regulations illustrates the point in the definition of CREOs, too. A CREO may not set "more

restrictive" requirements beyond those expressly set for defined parameters. But that does not mean that a CREO may not address *anything* other than those parameters.

Indeed, as Appellants point out, MPSC's rewriting of the term CREO would forbid local governments from addressing in an application the *exact same* items that the MPSC *must* review under MCL 460.1225(1)(a)–(1)(s) when considering an application. Moreover, it would essentially nullify any meaningful local review process as a "parallel" alternative procedure to the MPSC's centralized review under PA 233. That is not the balance that the Legislature struck in drafting PA 233. And it should not be accepted by this Court. The Court should reverse and vacate the portion of the Order addressing the definition of CREOs.

B. MPSC's substitute definition for "affected local unit" ignores the Legislature's express definition, which looks only to the location of a project in determining which governments are entitled to notice and participation rights.

The MPSC's Order likewise adds language to the defined term "affected local unit" that is simply not there. Whereas the Legislature defined "affected local unit" exclusively by geography, see MCL 460.1221(a) (defining "affected local unit" as "a unit of local government *in which all or part of a proposed energy facility will be located*"), the MPSC's Order redefines the term to turn on a local unit of government's zoning jurisdiction. (Order, p. 9) (declaring "the term ALU should be restricted to *only those local units of government that exercise zoning jurisdiction*."). That added requirement is nowhere in PA 233.

Instead, MPSC has merely appendaged text to the statute that is not there, contrary to cardinal principles of statutory interpretation. When the Legislature defines a term, that definition controls. *In re AST*, 342 Mich App 801, 802; 996 NW2d 492 (2022); *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). And an agency's application of the law "cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Rovas*, 482 Mich 90, 103; 754 NW2d 259 (2008). Nor may a court (or agency) "add, subtract, or modify a statute

out of judicial preference." *In re Certified Questions*, 506 Mich 332, 356; 958 NW2d 1 (2020). Accordingly, MPSC's extratextual demand that a local unit of government must "exercise zoning jurisdiction" to qualify as an ALU is improper.

And this issue matters for several reasons. Redefining "affected local unit" changes: (1) who is entitled to a public meeting addressing the project, MCL 460.1223(1); (2) who is entitled to meet with a project developer to discuss a site plan, MCL 460.1223(2); (3) who is entitled to a copy of a site plan when a developer files an application with the MPSC, MCL 460.1224(2); (4) who is entitled to the "1-time grant" allowed under MCL 460.1226(1); (5) who may intervene "by right" in a contested case involving an application, MCL 460.1226(2); and (6) who must the developer "enter into a host community agreement with," MCL 460.1227(1). For each of these concerns, the Legislature took the broad view: *every* "affected local unit" would have a right to notice, to informed participation, and to benefit from the development. Geography would be all that matters—*i.e.,* that "all or part of a proposed energy facility will be *located*" in the "affected local unit." MCL 460.1221(a). Thus, for the easy-to-imagine instance where a project straddles more than one "affected local unit," then *both* such governmental entities would receive notice and have a right to participate. And, in simpler cases, both the "county" and the "township" in which a project is located would have those rights. See MCL 460.1221(n) (defining "local unit of government" or "local unit" as "a county, township, city, or village").

Elsewhere in its text, PA 233 reflects the Legislature's perspective that *more than one* "affected local unit" is envisioned in most (if not all) instances. Public meetings are directed to be held "in *each* affected local unit." MCL 460.1223(1) (emphasis added). The developer is directed to meet "with the chief elected official of *each* affected local unit . . . to discuss the site plan." MCL 460.1223(2) (emphasis added). Site plans are to be submitted "to the clerk of *each* affected

local unit." MCL 460.1224(2) (emphasis added). Grants are given "to *each* affected local unit." MCL 460.1226(1) (emphasis added). But, importantly, recognizing that there are circumstances where a project may involve more than *two* "affected local units," the total demanded grant is to be capped at $75,000 "*per* affected local unit" and $150,0000 "in total." *Id*. (emphasis added). In other words, the Legislature envisioned circumstances where there would be more than two "affected local units"—an unlikely prospect if "affected local unit" is defined by zoning jurisdiction, which (as the MPSC points out on appeal) is often a mutually exclusive power. (MPSC Br., pp. 34–35); see MCL 125.3102(x); MCL 125.3209.

Nor does the law suggest that "affected local unit" is coextensive with "local units of government *that exercise zoning jurisdiction*." (Order, p. 9) (emphasis added). Indeed, the Legislature proved that it could write those exact words when it meant them. It did so in MCL 460.1222(2), stating that "[a] local unit of government *exercising zoning jurisdiction* may request the commission to require" a developer "to obtain a certificate for that facility from the commission." (Emphasis added). Different words mean different things. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009). Thus, the Legislature's use of different words to define "affected local unit" shows it did not mean to limit such ALU's to "*only* those local units of government *that exercise zoning jurisdiction*." (Order, p. 9.) And the MPSC's insertion of words those words into MCL 460.1221(a) is contrary to the statute's plain language.

MPSC contends that reading this definition according to its plain terms is "not reasonable." (MPSC Br., p. 35.) It argues that PA 233 demands writing a jurisdictional requirement as a precondition to the definition of an ALU. (*Id*., p. 36.) Yet, in support, it provides only a circular argument that cherry-picks those instances in the statute that refer to an "affected local unit" when

it is *also* a government exercising zoning authority. (*Id*.) That is not inherently the case. Rather, the cited sections of PA 233 not only reference an "affected local unit" but *also* modify that term, by providing that the ALU either: (1) is "exercising zoning jurisdiction," MCL 460.1222(2); or (2) "*has* a compatible renewable energy ordinance." MCL 460.1223(3). And, of course, the latter (having a CREO) necessarily means that the ALU would have zoning jurisdiction because the existence of a CREO presumes such jurisdiction over zoning and siting. See MCL 460.1221(f).

In other words, there is no need to "harmoniz[e] the term . . . with the overall statutory structure" because there is no conflict in the statute to reconcile nor any ambiguity to clarify. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999) ("If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible."). When the Legislature said "affected local unit" and meant to apply the term broadly to all governments where "all or part of a proposed energy facility will be *located*," it used the term without modification. MCL 460.1221(a). When the Legislature said "affected local unit" and meant to apply the term to "*only* those local units of government *that exercise zoning jurisdiction*," (Order, p. 9), then it made that clear, too, by conditioning a provision on the "affected local unit" exercising jurisdiction or having a CREO. See MCL 460.1222(2) & MCL 460.1223(3).

The MPSC did not need to write language into the statute as it did in its Order. There was no ambiguity to address. *In re MCI*, 460 Mich at 411. This Court should vacate this portion of the Order. MCL 462.26(8); (Opin., p. 9.)

C. MPSC's added definition of "hybrid facilities" unlawfully expands the agency's power by effectively lowering the prerequisite "nameplate capacity."

Next, MPSC's Order unlawfully expanded the agency's authority beyond what the Legislature envisioned by effectively reducing the required "nameplate capacity" for qualifying

facilities. PA 233 only applies to a certain size of project. Specifically: (1) "[a]ny solar energy facility *with a nameplate capacity of 50 megawatts* or more"; (2) "[a]ny wind energy facility *with a nameplate capacity of 100 megawatts* or more"; or (3) "[a]ny energy storage facility *with a nameplate capacity of 50 megawatts* or more and an energy discharge capability of 200 megawatts hours or more." MCL 460.1222(1)(a)–(1)(c) (emphasis added). And "nameplate capacity" is defined to mean "the designed full-load sustained *generating output* of an energy facility." MCL 460.1221(p) (emphasis added).

Creating the terms "hybrid energy facilities" or "hybrid projects" that are nowhere found in the law, the MPSC adopted its staff suggestions that: (1) "hybrid 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," and (2) "hybrid 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." (Order, pp. 4–5) (emphasis added). In other words, MPSC unilaterally determined that the threshold "nameplate capacity" set by MCL 460.1222(1)(a)–(1)(c) should be calculated *not* individually and on the basis of each type of facility (as set out in the cited provisions) but rather on a *combined* or aggregate basis for any project that incorporates more than one type of facility. (Order, pp. 4–6.) The result of this MPSC "finding" is to effectively reduce the required "nameplate capacity" for each project to qualify for MPSC's certification process. So, for example, a combined solar-and-wind facility that has a generating output of 45 MW of solar and 65 MW of wind power would qualify for MPSC's siting process under PA 233 even though neither the solar

nor the wind portions of that "hybrid" facility would meet the express requirements of MCL 460.1221(1)(a)–(1)(c).[2]

Like above, the MPSC's Order here contradicts the statute's plain terms. MCL 460.1221(1)(a)–(1)(c) unambiguously conditions the application of the Part 8 alternative siting process (and, hence, of MPSC's jurisdiction over siting such facilities) on a "solar facility" or "wind energy facility" meeting the specified "nameplate capacity" threshold. *Id*. Nowhere does any such provision suggest otherwise. Moreover, the inclusion of "energy storage facilities" as components in the definition of "solar energy facility," MCL 460.1221(w), and "wind energy facility," MCL 460.1221(x), does not allow MPSC to erase the jurisdictional thresholds for wind and solar projects and apply them to "wind facilities combined with solar" as provided in its Order. (Order, p. 5.) The Court should vacate this portion of the MPSC's Order.

D. MPSC's effort to impose additional timing requirements on local units of government is unsupported by the statute.

Finally, the MPSC's Order departs from the plain language of the statute by adding a new timing demand for local units of government to identify whether they have a CREO in response to a developer. The law unambiguously provides that "the chief elected official of each affected local unit" has "30 days *following a meeting described in subsection (2)*"—or a meeting between the developer and the chief elected official or the chief's designee "to discuss the site plan," MCL 460.1223(2)—to "notif[y] the electric provider or IPP . . . that the affected local unit has a compatible renewable energy ordinance." MCL 460.1223(3) (emphasis added). In other words,

[2] As a further example, under the MPSC's Order, a "hybrid" project that combines a 25 MW "solar energy facility" with 25 MW of onsite energy storage would meet the 50 MW threshold for "solar energy facility[ies]" even though its "generating output" is just 25 MW of energy and, thus, it would not meet the 50 MW "nameplate capacity" threshold applicable to solar energy facilities. See MCL 460.1221(p) (defining "nameplate capacity"); MCL 460.1222(1)(a) (setting threshold).

the *only* statutory deadline runs from the "meeting" between the developer and the local official. *Id.* But the MPSC added to this, imposing an extra-statutory demand: "if [the local 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, pp. 11–12.) Thus, the MPSC has effectively divested "affected local units" of jurisdiction and usurped authority over siting processes in circumstances not addressed by PA 233 at all—*i.e.*, when a local official follows the law but nonetheless runs afoul of this concocted deadline.

The text is clear: local officials have until "30 days *following a meeting*" with the developer. MCL 460.1223(3). MPSC's rewriting of this requirement to "30 days *following receipt of an offer to meet*" contradicts the Legislature's chosen deadline. (Order, p. 11.) This Court should reverse.

II. If the Court looks beyond express statutory terms, the MPSC's actions also violate the Administrative Procedures Act.

Because the MPSC's Order violates the plain language of PA 233 on these points and is therefore "unlawful," MCL 462.26(8), this Court need not go further in its analysis. Nonetheless, if it disagrees, then it should hold that the MPSC's added demands and usurpation of jurisdiction is also an unlawful circumvention of the Administrative Procedures Act ("APA"), MCL 24.201 *et seq*. In short, the MPSC created new requirements expressly intended to govern in future contested-case proceedings and also directly affecting the authority of local units of government over siting in their jurisdiction *outside* of such future agency processes. (Order, p. 77) ("This order applies to electric providers and independent power producers filing for a certificate from the Commission pursuant to [PA 233] . . . .") Those binding directives should have *at least* been submitted through rulemaking. Because they were not, they are procedurally invalid, and the Order should be vacated.

A. The APA's rulemaking process ensures that binding agency directives are fully and appropriately vetted—including providing for legislative oversight.

Standards or policies of general applicability implementing the law enforced by the agency are "rules" no matter how an agency labels them. *Detroit Base Coalition for Human Rights of Handicapped v Dept of Soc Servs*, 431 Mich 172, 183; 428 NW2d 335 (1988). "Rules" are *any*: (1) "agency regulation, statement, standard, policy, ruling, or instruction"; (2) "of general applicability"; (3) that implements or applies law enforced or administered by the agency, or prescribes the organization, procedure, or practice of the agency; and (4) "in itself, has the force and effect of law," with some limited exceptions. MCL 24.207; *Mich Farm Bureau v Dep't of Environment, Great Lakes, and Energy*, __ Mich ___; __ NW3d __ (2024) (Docket No 165166). Those exceptions are expressly listed and narrowly construed. See MCL 24.207(a)–(s); *AFSCME, AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996) Moreover, "in order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *Id*.

Importantly, the definition of a "rule" does not hinge on whether or not a "rule" is promulgated. *Id*.; MCL 24.207. Rather, Michigan courts have invalidated "rules" that were never promulgated. For example, this Court in *AFSCME* held that the conditions of a standard-form contract used by the Department of Mental Health in contracting with a few hundred group home providers constituted "rules" under MCL 24.207. 452 Mich at 5–6. The contract set standards for care and staff training requirements for these group homes. *Id*. at 7–8. And the Department's contract was inflexible, offered to the providers without negotiation. *Id*. at 5–6. This Court thus held that they were "rules" that were required to be promulgated. *Id*. at 3. Because they had not been, they could not be enforced via the standard-form contract. *Id.* at 5–6.

Likewise, the Michigan Court of Appeals held in *Delta Co v Dep't of Natural Resources*, 118 Mich App 458; 325 NW2d 455 (1982) that conditions of a license for solid waste disposal facilities (*i.e.*, what would now be an operating license under Part 115 of NREPA, see MCL 324.11512), that required a licensee's adherence to 31 departmental guidelines and policies were also "rules" under the APA. The court observed that the agency's conditioning a license on a person's acceptance of such guidelines made the guidelines "effectively . . . rules under the guise of guidelines and policies." *Id*. at 468. The court rebuked the agency, noting that "[t]he rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies." *Id*., citing *Mallchok v Liquor Control Comm*, 72 Mich App 341; 249 NW2d 415 (1976). And the court admonished that "[t]he rulemaking procedures of the APA may not be circumvented." *Id*.

Significantly, when an agency sidesteps rulemaking in developing its standards and policies, it skips important, legislatively demanded steps like filing a regulatory impact statement, MCL 24.245(3), cost-estimating rule impacts, *id*., submitting its standards to JCAR review, MCL 24.245a, and providing the public with APA-rulemaking compliant notice-and-comment, MCL 24.243(1), and—key here—addressing concerns like the impact of a rule upon local government revenues. MCL 24.245(3)(x). Yet those procedures exist precisely because the Legislature has "recognized a need to 'ensure that none of the essential functions of the legislative process are lost in the course of the performance by agencies of many law-making functions once performed by our legislatures.'" *Detroit Base Coalition*, 431 Mich at 178.

B. MPSC's expansion of jurisdiction and authority beyond the Legislature's careful balance here should have been submitted to rulemaking.

Applied here, the MPSC's expansion of its jurisdiction by narrowing the definitions of both CREO and ALU, lowering the threshold nameplate capacity to allow developers to bypass local siting procedures, and imposing an extratextual time limit that will curtail local jurisdiction's

exercise of authority under CREOs are "rules" that should have been promulgated. The MPSC's response to this charge is twofold. It says that: (1) the added definitions in its Order are merely "interpretive statements" that do not have the force of law and are exempt from rulemaking under MCL 24.207(h); and (2) alternatively, the Order falls within the "permissive power" exemption under MCL 24.207(j).

The first claimed exception is closely tied to the definition of "rule." *Mich Farm Bureau*, __ Mich at __, Slip op *11. The MPSC claims that the Order does "not alter rights, impose obligations, or have a present, binding effect" but merely "explained to affected local units, developers, and anyone else with interest, how it was interpreting the Act . . . ." (MPSC Br., p. 51.) To the contrary, the Order directly unambiguously declares its binding effect on future proceedings. (Order, p. 77) (noting "[t]he Commission *adopts* the final Application Filing Instructions and Procedures . . . *to be used* by electric providers and independent power producers seeking to obtain a certificate" for siting a project and declaring that "[t]his order *applies* to electric providers and independent power producers filing for a certificate from the Commission") (emphasis added). And, outside of those proceedings, it purports to reset the balance in jurisdiction between ALUs and the MPSC—redefining which local units of government developers can bypass or ignore when siting a project, who is entitled to notice or participation in a project, which communities will benefit from the development, and even who has a right to intervene at the MPSC. See, e.g., MCL 460.1223(1)–(4); MCL 460.1224(2); MCL 460.1227(1). That is no mere explanation of how MPSC will interpret the Act—it directly and immediately affects local communities by depriving them of jurisdiction. Accordingly, although the MPSC attempts to rely upon *Michigan Farm Bureau*, this case is distinct from the Supreme Court's analysis because there is an immediate effect on local governments, allowing developers to bypass their siting procedures.

On the second, the MPSC relies on the statement 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." (MPSC Br., p. 53), citing MCL 460.1224(1) (emphasis mine). And it claims that the Order was a mere exercise of MPSC's "discretion to establish application filing requirements by order, which was an exercise of permissive statutory authority" under MCL 24.207(j). (*Id.*, p. 55). Yet, though *part* of the Order addressed "application filing requirements," (Order, pp. 44–48), and the MPSC attached a 90-page addendum of "Application Filing Instructions and Procedures" to the Order, (Order, pp. 79–168), the challenged provisions go beyond merely providing "instructions" on how to file "a site plan required under section 223 or 225" at the MPSC. See MCL 460.1224(1). Rather, by redefining CREO and ALU, the MPSC's Order fundamentally adjusts the jurisdictional balance between the MPSC and local units of government under PA 233. That is beyond the scope of the Legislature's contemplation that the MPSC would "establis[h]" filing requirements "by commission rule or order to maintain consistency between applications." MCL 460.1224(1). Therefore, it is not merely a "permissive exercise of power" granted under MCL 24.207(j) but rather the establishment of substantive "rules."

Mich Trucking Ass'n v Mich Pub Serv Comm, 225 Mich App 424; 571 NW2d 734 (1997) is distinct. There, the statute "directly and explicitly authorize[d] the PSC to implement, ***either by rule or order***, a safety system for motor carriers," *Id*. at 430, and there was no question that the MPSC's exercised authority fit within the legislatively provided power. But, here, MPSC's Order is not within the scope of MCL 460.1224(1). Instead, the Order extends beyond the limited, administrative power the Legislature granted to the MPSC to "maintain consistency between applications" as contemplated in that subsection. *Id*.

Consequently, neither exception to the definition of "rule" applies. Accordingly, if this Court does not merely hold the MPSC's Order to be unlawful as contrary to the plain language of the law, then it should hold that these provisions are "rules" that should have been promulgated.

III. The MPSC's rebalancing of state and local authority is not only contrary to the Legislature's intent but also bad policy.

Finally, the practical implications of this dispute underscore the wisdom of the balance struck by the Legislature in their choice to preserve local siting control when a local government otherwise accepts the Legislature's established siting standards and thus has a CREO in place. The MPSC upset that balance. This Court should restore it by vacating the Order below.

A. Local governments are best situated to make siting decisions for large-scale energy developments.

Undoubtedly, local governments are the best-situated actors to make siting decisions for large-scale industrial developments like the energy projects implicated by PA 233. See MCL 460.1222(1)(a)–(1)(c) (setting "nameplate capacity" thresholds). Siting new energy developments implicates not merely the broad social and political question of replacing one form of electrical generation with another but also raises concerns like "the swaths of land that must be sacrificed, the impacts on local ecosystems" and other "social and economic effects that may be salient to the local community." Huling, *The Grass Isn't Always Greener*, Public Management (July 2023). Local governments not only have a keen awareness of the economic and social tradeoffs that might affect a particular development and the conditions to be placed upon it, but they are also closer and more accessible to the constituents and communities impacted by any project. *Id*. That is why local governments hold both general authority over zoning decisions, see MCL 125.3101, *et seq.*; MCL 125.3201(1), and a police-power authority in the first place. Moreover, whereas local residents in rural communities are unlikely to participate in proceedings before the MPSC, they

often know and regularly interact with their Township officials and can provide important input and information to assist in a project's development.

Accounting for those locally driven considerations is especially key for agricultural communities that will feel the long-term impacts of energy development projects intended to operate for 20, 30, 40, 50, or more years. As part of a larger, nationwide trend, see, e.g., *Insight: As solar capacity grows, some of America's most productive farmland is at risk* <www.reuters.com/world/us/solar-capacity-grows-some-americas-most-productive-farmland-is-risk-2024-04-27> (accessed April 9, 2025) (noting USDA data finding 76.2 million—or 8%--fewer farmland in 2023 than in 1997), Michigan agricultural land faces significant pressures. The number of farms in Michigan has shrunk over the past couple of decades from 53,315 farms in 2002 to just 45,581 today. U.S. Department of Agriculture, *2022 Census of Agriculture (Michigan)* <www.nass.usda.gov/AgCensus> (accessed April 4, 2025). Large-scale energy developments that require significant acreage to be deployed place further strain on the already limited and heavily competitive market for agricultural acreage. Nationally, the U.S. Department of Energy has projected that solar energy alone will require 10.4 million acres of land (about 30% larger than the State of Maryland) over the next few decades. American Farm Bureau, *Solar Energy Expansion and its Impacts on Rural Communities*, <https://www.fb.org/market-intel/solar-energy-expansion-and-its-impacts-on-rural-communities> (accessed April 10, 2025). And modeling by the American Farmland Trust found that 83% of projected solar development will occur on agricultural land. *Id*., citing Sorenson, Nogeire, and Hunter, *Potential Placement of Utility-Scale Solar Installations on Agricultural Lands in the U.S. to 2040*, American Farmland Trust (Nov. 2022).

Farm net income has declined by $41 billion since 2022; farmers have lost more than a quarter of their annual income—making farming more financially difficult each year. American

Farm Bureau, *2024 Farm Income Decline Confirmed in USDA Update*, <https://www.fb.org/market-intel/2024-farm-income-decline-confirmed-in-usda-update> (accessed April 14, 2025). And the secondary impacts from expanded energy developments requiring a massive land base can include upward pressure on land rental rates, disproportionately negative impacts on specialty crops that operate under smaller contracts within finite acreage, and negative impacts on erosion soil health in surrounding areas. See *Insight: As solar capacity grows, supra* (noting possible long-term topsoil and erosion impacts).

Allowing local control over siting decisions where such control is exercised in a good-faith and reasonable manner keeps decisions within the community that most feels their impacts. Local officials are much more likely to be familiar with local soil types, the makeup of crops produced within their areas, and how deployment of a particular parcel may impact long-term soil health, local agriculture, and the local economy. For example, local officials are more likely to understand how imposing minor conditions like the installation of berms or other soil and erosion protective measures may impact neighboring farmland essential to a small farms' growth of specialty crops. Though small in comparison to a project, such conditions often have long-term, lasting environmental and economic effects. Because those effects are often permanent—and farms, once lost, are not guaranteed to return—allowing such decisions to be made by the communities most affected by them is crucial.

B. These policy implications demonstrate why the Legislature's chosen allocation of jurisdiction in PA 233 should not be upset.

Admittedly, these policy implications are not the role of this Court to decide. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003) ("[I]t is not the role of the judiciary to second-guess a legislative policy choice"). That is a role properly reserved for the

People's elected representatives. *Citizens Protecting Mich's Constr v Secretary of State*, 503 Mich 42, 60; 921 NW2d 247 (2018). And that is exactly the point of this litigation.

The Legislature carefully struck a balance in PA 233 to enable local communities to retain control of siting decisions by establishing a "compatible renewable energy ordinance." MCL 460.1223(3). In other words, the Legislature allowed local siting to continue while imposing certain limitations—such as that they could not have an outright moratorium and that they could not impose "more restrictive" conditions for certain specified parameters. See, e.g., MCL 460.1221(f) (defining CREO to exclude a local unit that "has a moratorium on the development of energy facilities in effect within its jurisdiction"). But, as explained above, the MPSC's Order upset this balance and has effectively wrested any discretion from local officials on siting large-scale utility projects by denying them the ability to exercise even the reasonable discretion allotted to the MPSC in its own parallel application process. See Section I.A–I.D, *supra*.

This Court should restore the Legislature's vision by vacating its Order.

CONCLUSION AND RELIEF REQUESTED

For those reasons, *Amicus Curiae* Michigan Farm Bureau respectfully requests that this Court reverse and vacate the MPSC's Order in whole. Alternatively, it should vacate those portions of the MPSC Order challenged in this appeal.

Respectfully submitted,

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