

STATE OF MICHIGAN
IN THE SUPREME COURT

OSHTEMO, CHARTER TOWNSHIP OF,

Appellant,

Supreme Court Case No. 150695

v

Court of Appeals Case No. 317893

MICHIGAN PUBLIC SERVICE
COMMISSION and MICHIGAN
ELECTRIC TRANSMISSION
COMPANY, LLC

MPSC Case No. U-17041

Appellees.

**BRIEF ON APPEAL—APPELLEE MICHIGAN ELECTRIC TRANSMISSION
COMPANY, LLC**

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Michigan Electric Transmission Company, LLC ("METC") agrees with the Township's statement of jurisdiction.

DYKEMA GOSSETT, A PROFESSIONAL LIMITED LIABILITY COMPANY, CAPTOL VIEW, 201 TOWNSEND STREET, SUITE 900, LANSING, MICHIGAN 48933

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. IS THE ELECTRIC TRANSMISSION LINE CERTIFICATION ACT, 1995 PA 30 (“ACT 30”) CONSISTENT WITH THE FIRST SENTENCE OF CONST 1963, ART 7, § 29?

Appellee METC answers “yes.”

Appellee Michigan Public Service Commission presumably answers “yes.”

Appellant Oshtemo Township presumably answers “no.”

The Court of Appeals answers “yes.”

II. DID THE COURT OF APPEALS PROPERLY APPLY ACT 30’S PLAIN LANGUAGE, THE MICHIGAN CONSTITUTION’S PLAIN LANGUAGE, AND LONG-STANDING PRECEDENT INTERPRETING THAT LANGUAGE TO AFFIRM A MICHIGAN PUBLIC SERVICE COMMISSION ORDER THAT WAS BASED ON COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD?

Appellee METC answers “yes.”

Appellee Michigan Public Service Commission presumably answers “yes.”

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The Court of Appeals answers “yes.”

INTRODUCTION AND SUMMARY OF ARGUMENT

At its core, this case is about whether local governments may unreasonably balkanize the electric transmission system and jeopardize the electric grid in the face of contradictory state laws.

The Electric Transmission Line Certification Act, PA 30 of 1995, MCL 460.561 *et seq.* (“Act 30”), establishes a centralized process for state-level review and approval of the location and construction of certain electric transmission lines and was enacted by the Legislature to **avoid** unreasonable local interference with electric transmission projects.¹ This is because electric transmission lines address issues of statewide—not local—concern. In fact, the Legislature took the extraordinary step of declaring that electric transmission is an “essential service” to the state. MCL 460.563. This case is a perfect illustration of electric transmission’s statewide significance, because the uncontested record evidence demonstrated that, while the transmission line at issue is only approximately seven miles long and primarily located in only one township, the line’s effects are far-reaching. Without the line, the potential for serious reliability issues—including brownouts and blackouts in the Kalamazoo and Battle Creek regional areas—could result. (3 Tr. 80; appx. 4b).² The regional impact of such brownouts or

¹Indeed, the preamble to Act 30 specifically addresses such issues, and provides:

AN ACT to regulate the location and construction of certain electric transmission lines; to prescribe powers and duties of the Michigan public service commission **and to give precedence to its determination in certain circumstances; and to prescribe the powers and duties of certain local units of government and officials of those local units of government.** (Emphasis added).

²Citations to “Tr.” Are to the official transcript from the docket at the Michigan Public Service Commission. All transcript references are included in the Appendix.

blackouts, and the public interest in protecting against such catastrophes is obvious, and must be avoided.³

Because electric transmission projects have state-wide importance, Act 30 provides that once the Michigan Public Service Commission (the “MPSC” or the “Commission”) issues an order granting a certificate of public convenience and necessity (“Certificate”) under Act 30, that Certificate takes precedence over all conflicting local laws and ordinances regulating the location and construction of the approved transmission line. In other words, Act 30 eradicated a patchwork of local ordinances that would have complicated and prevented transmission line construction and instead created a single, centralized system allowing transmission owners to seek Commission approval for the siting and construction of transmission lines.

The Michigan Constitution grants municipalities the limited right to withhold consent to conduct utility business within their borders, as well as reasonable control over their streets and public places. Const 1963, art 7, § 29. Those rights, however, are not unfettered. Local municipalities do not have all-encompassing power to refuse consent. Local governments may only exercise their powers in a manner provided by state law—and they can only grant or withhold consent through an ordinance or resolution consistent with state law. Additionally, once consent is granted, any

³By way of example, the impact of regional and/or widespread blackouts can be massive. One extreme example of this occurred on August 14, 2003, when large portions of the Midwest and Northeast United States and Ontario, Canada, experienced an electric power blackout. The outage affected an area with an estimated 50 million people and 61,800 megawatts (MW) of electric load in the states of Ohio, Michigan, Pennsylvania, New York, Vermont, Massachusetts, Connecticut, New Jersey and the Canadian province of Ontario. Estimates of total costs in the United States range between \$4 billion and \$10 billion (U.S. dollars). See <https://www.ferc.gov/industries/electric/indus-act/reliability/blackout/ch1-3.pdf>

regulation of the utility operating within the municipality's jurisdiction must be "reasonable"—such regulation cannot impede upon matters of statewide concern.

Indeed, this Court has made clear that a local government cannot regulate public utilities—even when those utilities are in that local government's right-of-way—in a manner inconsistent with state law, especially where such regulation would intrude upon important statewide concerns:

Consistent with our longstanding precedent, we hold that a municipality's exercise of 'reasonable control' over its streets cannot impinge on matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law.

City of Taylor v Detroit Edison Co, 475 Mich 109, 112; 715 NW2d 28 (2006). These principles were recognized and applied by the Court of Appeals in this case.

Contrary to the Township's claims in its Brief on Appeal ("Township Brief"), Section 10 of Act 30 is not unconstitutional. Neither the MPSC nor the Court of Appeals "held that the municipal consent called for in Const 1963, art 7, § 29 was preempted by [Act 30]." (Township Brief, p 3). This issue in this case has **never** been about consent for METC to operate within the Township. METC has been operating within the Township's borders for years. The issue is about the Township's purported regulation of METC—i.e., whether the Township may unreasonably condition consent for a new transmission line on compliance with a regulation dictating the location and construction of the transmission line when that regulation is in conflict with a state law and a Commission order that directly address the line's location and construction. There is a difference between "consent" and "reasonable control," and the Township wants this Court to ignore that difference. The Township attempts to claim that its attempt to control (i.e. regulate) METC is about consent. But it is not. This case is about whether

local governments can ignore that the Constitution grants them only “reasonable control” over their streets. The Township seeks to reverse longstanding precedent and instead create a new patchwork approach to transmission line siting—something Act 30 was mean to prevent. The effect on the development of the State’s utility infrastructure, if the Township were correct, would be devastating.

Neither the Court of Appeals nor the Commission “struck down” the Ordinance. Instead, in conformance with the precise standards laid out by Act 30, the Commission issued an order on July 29, 2013 granting METC a Certificate under Act 30 and authorizing METC to construct an overhead transmission line along an approved route through the Township. In so doing, the MPSC properly concluded that the Township’s Utility Control Ordinance (the “Ordinance” or the “Township Ordinance”), which directly regulates the location and construction of transmission lines and required that METC construct portions of its transmission line underground, conflicted with the Certificate. Where such a conflict is present, Act 30’s plain and unambiguous language provides that the Certificate takes precedence over the Ordinance. After a thorough analysis of the record evidence, Act 30’s plain language, the Michigan Constitution, and binding precedent, the Court of Appeals properly affirmed the MPSC in its November 18, 2014 (the “Opinion”).

The Township’s arguments are meritless—none of them satisfy the heavy legal burden of proving a statute unconstitutional or overturning an MPSC Order. Act 30 is not unconstitutional, the Court of Appeals did not ignore Act 30’s plain language, and there is without question a conflict between the Certificate and the Ordinance. The

Opinion was consistent with long standing precedent, the plain language of statutes at issue, and the Michigan Constitution. This Court should affirm the Opinion.

COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY

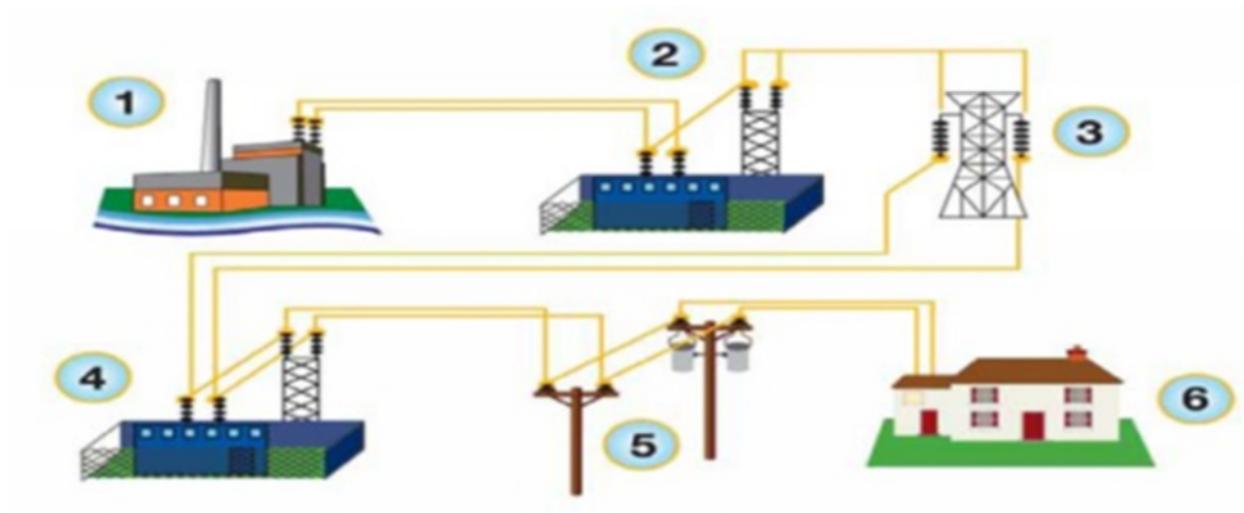
With very few citations to the record, and no recitation of the Ordinance, the Township's Brief provides an abbreviated "Statement of Facts" that leaves out a tremendous amount of relevant information. A proper factual context, however, is necessary for this Court to fully appreciate the Township's request to reverse the Court of Appeals. That context necessarily begins with a brief discussion of Act 30 and the MPSC's issuance of the Certificate.

A. A Brief Description of the Electric Grid.

Before discussion of this case's factual background, it may be helpful to place the subject matter at issue—electric transmission lines—into context. The electrical system has three separate and distinct functions. The first function, electric generation, is the process of producing electricity through the transformation of other forms of energy. A generating plant, such as a wind farm, a coal plant, or a nuclear power plant, is the facility where the equipment for converting energy into electric energy is located. The second function, transmission, is "[t]he act or process of transporting electric energy in bulk." *Electric Power Industry Glossary*, available online at www.energycentral.com. Usually, transmission lines operate at a potential of 69 kilovolts (i.e. 69,000 volts) or more.⁴ Act 30 defines a "transmission line" as "all structures, equipment, and real property necessary to transfer electricity at system bulk supply voltage of 100 kilovolts [i.e. 100,000 volts] or more." MCL 460.562(k). Transmission lines, in other words, carry

⁴By comparison, a standard home electric socket is typically 120 volts.

high voltage electricity from generating plants to the third system—distribution. Electric distribution consists of “[t]he system of wires, switches, and transformers that serve neighborhoods and businesses, typically lower than 69,000 volts. A distribution system reduces or downgrades power from high-voltage transmission lines to a level that can be used in homes or businesses.” *Electric Glossary, supra*. In summary, generation makes the electricity, transmission transports the electricity, and distribution takes the electricity into customers’ homes and businesses. The following diagram is a simple representation of this system:



In the above representation, 1 represents generation, 2 and 3 represent transmission (like the lines and substation at issue in this case), and 4, 5, and 6 represent distribution (such as the lines Detroit Edison, Consumers Energy, or Lansing Board of Water & Light use to bring electricity directly to homes and businesses). This case involves the location and construction of the facilities represented by 2 and 3 above—all in order to maintain electric reliability in the Kalamazoo area.

B. Act 30 Regulates the Location and Construction of Certain Electric Transmission Lines.

This case concerns the interpretation and application of Act 30—a law which regulates the “location and construction of certain electric transmission lines.” Preamble, Act 30. Recognizing the importance of electric transmission, Act 30 deems electric transmission an “essential service,” and provides that Act 30 “shall control in any conflict between this act and any other law of this state.” MCL 460.563(1), (2).

Act 30 applies to “major transmission lines,” and, in certain circumstances, “transmission lines.” At issue in this case is a “transmission line.” As is suggested by their names, the primary difference between a transmission line and a “major transmission line” is the length and voltage of the line. As previously noted, a “transmission line” under Act 30 is “all structures, equipment, and real property necessary to transfer electricity at system bulk supply voltage of 100 kilovolts or more.” MCL 460.562(k). A “major transmission line, on the other hand, “is a line of 5 miles or more in length wholly or partially owned by an electric utility, affiliated transmission company, or independent transmission company through which electricity is transferred at a system bulk supply voltage of 345 kilovolts or more.” MCL 460.562(g). While Act 30 requires utilities to seek Commission approval before constructing a “major transmission line,” seeking a Certificate for a “transmission line” is discretionary with the utility (in this case, METC). MCL 460.565; MCL 460.569. Because the transmission line at issue in this case is not a “major transmission line,” METC voluntarily sought a Certificate.

Act 30 requires an applicant seeking a Certificate to file an application with the Commission containing specific information:

An application for a certificate shall contain all of the following:

- (a) The planned date for beginning construction.
- (b) A detailed description of the proposed major transmission line, its route, and its expected configuration and use.
- (c) A description and evaluation of 1 or more alternate major transmission line routes and a statement of why the proposed route was selected.
- (d) If a zoning ordinance prohibits or regulates the location or development of any portion of a proposed route, a description of the location and manner in which that zoning ordinance prohibits or regulates the location or construction of the proposed route.**
- (e) The estimated overall cost of the proposed major transmission line.
- (f) Information supporting the need for the proposed major transmission line, including identification of known future wholesale users of the proposed major transmission line.
- (g) Estimated quantifiable and nonquantifiable public benefits of the proposed major transmission line.
- (h) Estimated private benefits of the proposed major transmission line to the applicant or any legal entity that is affiliated with the applicant.
- (i) Information addressing potential effects of the proposed major transmission line on public health and safety.
- (j) A summary of all comments received at each public meeting and the applicant's response to those comments.
- (k) Information indicating that the proposed major transmission line will comply with all applicable state and federal environmental standards, laws, and rules.
- (l) Other information reasonably required by the commission pursuant to rule.⁵

⁵To date, the Commission has not promulgated administrative rules applicable to Act 30.

MCL 460.567(2) (emphasis added). Upon filing, an applicant must provide an MPSC-approved notice of the application to every affected municipality and landowner on whose property a portion of the line will be constructed, as well as publishing in a newspaper of general circulation in the affected area. MCL 460.568(1).

In considering an application under Act 30, the Commission must conduct a contested case proceeding in which any affected landowner and municipality may intervene as of right. MCL 460.568(2). Section 8 of Act 30 establishes the parameters for the Commission's consideration in granting or denying an application for a Certificate after a contested case hearing:

- (5) The commission shall grant the application and issue a certificate if it determines all of the following:
 - (a) The quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.
 - (b) The proposed or alternative route is feasible and reasonable.
 - (c) The proposed major transmission line does not present an unreasonable threat to public health or safety.
 - (d) The application has accepted the conditions contained in a conditional grant.

MCL 460.568(5). If granted, a Certificate issued pursuant to Act 30 takes precedence over conflicting local ordinances, laws, rules, regulations, policies or practices that prohibit or regulate the location or construction of an approved transmission line. MCL 460.570(1). A Certificate is also conclusive and binding as to an approved transmission line's public convenience and necessity. MCL 460.570(3).

C. After Determining that the Proposed Transmission Line Was Necessary for Electric Reliability, METC Took Several Steps Before Seeking MPSC Approval to Construct the Line. Ultimately, the Township's Actions Forced METC to Seek Act 30 Approval.

The above-described framework provides the proper backdrop for consideration of the facts in this case. While the Township appears to be dismissive of the steps required prior to construction of a transmission line, it is important to recognize that preparing for and filing an Act 30 application is not an easy undertaking. METC undertook significant work before it filed its Act 30 application with the MPSC, including the investment of substantial time and resources over several years to set the foundation for its application:

- METC conducted planning studies and identified a reliability need;
- METC developed and evaluated numerous potential solutions to the identified reliability need;
- METC submitted the Proposed Transmission Line and nine other alternatives to the Midcontinent Independent Transmission System Operator, Inc. ("MISO") for evaluation in the 2009 MISO Transmission Expansion Plan ("MTEP");
- The proposed transmission line was evaluated by MISO and MISO stakeholders—including Commission Staff, METC, Consumers Energy, and others—through the MTEP process and approved in December 2009; and,
- METC began the route selection process and undertook significant outreach efforts with the local community.

Furthermore, the MPSC conducted a thorough analysis of METC's actions, the validity of METC's proposal, and considered input from all interested parties—including the Township. Each of these steps, which were extensively detailed in the record, is briefly discussed in more detail below.

1. **METC identified a reliability need and obtained federal approval for the Proposed Transmission Line through the FERC Order 890 open and transparent planning process.**

METC is a Michigan-based corporation engaged in the FERC-jurisdictional transmission of electricity throughout the western and northern portions of Michigan's Lower Peninsula. (3 Tr. 76; appx. 2b). METC is totally independent from all electric utilities generating or distributing electricity to retail customers. (*Id.*). In other words, METC **only** is involved in transmission—it does not generate or distribute electricity. It focuses its efforts solely on the transmission system. As part of its utility operations, METC performs yearly planning assessments of its transmission system. This ensures that “the METC system meets all relevant planning criteria and is in compliance with mandatory NERC reliability standards.” (3 Tr. 80; appx. 4b). These assessments allow METC to “identify potential planning criteria violations and develop solutions to these potential violations, including, among other things, reconfigurations and/or additions to the transmission system.” (*Id.*). During METC's 2007 assessment, METC discovered that the unavailability of two of the three 345/138 kV transformers that constitute the primary source of power for the Kalamazoo area “would be projected to overload the remaining transformer at system load levels at or below (and above) 85% of the peak system load level.” (3 Tr. 79; appx. 3b). In other words, METC identified a reliability problem that would occur if two out of three transformers on METC's system in the Kalamazoo area were unavailable for any reason. METC again identified these same overloads in the 2008 planning assessments. (3 Tr. 80; appx. 4b).

Because of the identified overloads, METC began a process of identifying several options to resolve the problem. (3 Tr. 81-82, 84; appx. 5b-7b).⁶ METC then submitted the Proposed Transmission Line, along with 8 other alternatives, to MISO for evaluation. (3 Tr. 80-81; appx. 4b-5b). MISO is the NERC Planning Authority (i.e. the federally endorsed entity) responsible for reliable transmission in parts of Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, North Dakota, South Dakota, Wisconsin, Arkansas, Mississippi, Louisiana and Manitoba. (3 Tr. 86; appx. 8b).

In reviewing proposed reliability projects, MISO follows what is known in the electric utility industry as the “FERC Order 890 transmission planning process.” FERC Order 890 requires that transmission providers such as METC participate in a coordinated and open planning process that satisfies nine separate “planning principles”: Coordination; Openness; Transparency; Information exchange; Comparability; Dispute resolution; Regional coordination; Economic planning studies; and, Cost allocation. See generally *FERC Order 890*, Docket Nos. RM05-17-000 & RM05-25-000 (Feb. 16, 2007). Generally, this means that the FERC Order 890 Planning Principles require “an open and transparent planning process.” (3 Tr. 87; appx. 9b). MISO utilizes a process known as MTEP to satisfy these FERC-mandated obligations in conducting its regional planning of transmission systems. (3 Tr. 86; appx. 8b).

MISO’s process ensures “the reliability of the regional transmission system and identifies transmission expansion necessary to support the competitive supply of electric power.” (3 Tr. 87; appx. 9b). The process incorporates “the views of many

⁶Citations to “Exhibits” or “Ex.” are citations to those exhibits officially part of the record in this case. Cited exhibits are included in the appendix.

stakeholders and regulators,” while making sure that “transmission projects developed by individual Transmission Owners such as METC will be properly integrated with each other and the region and subjected to scrutiny by and through the MISO stakeholder process.” (*Id.*). As testified to by MPSC Staff, the MPSC’s Generation and Certificate of Need section participates in MISO’s process. (3 Tr. 354; appx. 19b). Indeed, they have a “history of involvement in the MTEP process, providing feedback and recommendations on the various transmission projects reviewed by MISO” in the Michigan region. (3 Tr. 358; appx. 21b).

MISO considered the line proposed by METC (the “Proposed Line” or “Line”) in 2009. (3 Tr. 87; appx. 9b). This consideration involved “considering other feasible transmission alternatives” in an attempt to determine “the most effective long term solution” for reliability and the mitigation of transmission constraints. (*Id.*). The Line was considered several times by MISO and its stakeholders, including during meetings held on May 14, 2008, December 16, 2008, and July 17, 2009. (3 Tr. 86-87; appx. 8b-9b). Stakeholders had an opportunity to consider, evaluate, and comment on the Proposed Line during this process. In fact, as noted by MPSC Staff Witness Steven E. Kulesia, MPSC Staff participated and “conducted a review” of the Proposed Line during the MTEP process. (3 Tr. 357; appx. 20b). MISO approved the Proposed Line in December 2009—its analysis “helped to verify that the project is needed and that other solutions, such as generation re-dispatch would not be feasible.” (3 Tr. 88; appx. 10b).

2. After receiving MISO approval, METC began the route evaluation and community outreach process.

Once MISO confirmed the electric reliability need for the transmission line, METC began community outreach before developing the line’s route (i.e., the route the line

would take to get from point A to point B). In October of 2010, METC retained Burns & McDonnell—an international engineering, architecture, and consulting firm—to undertake a route selection study, develop alternative routes, and provide a recommendation for route alignment for the line. (Exhibit A-11, p 5; appx. 22b). Burns & McDonnell instantly began contacting government officials about the project. (*Id.* at p 10; appx. 23b).

In December 2010, METC and Burns & McDonnell held a meeting with Oshtemo, Alma, Antwerp, and Texas Township officials, Kalamazoo and Van Buren County officials, and Michigan Department of Transportation officials to gather information and discuss the Line. (3 Tr. 161-62; appx. 15b-16b). Four months later, METC met with the Township supervisor, attorney, planner, clerk, and treasurer to discuss the Proposed Line and seek information from the Township. (*Id.*). Several field visits and phone calls followed, along with discussions with the Township’s Downtown Development Authority. (*Id.*). To give Township employees a better understanding of the proposed line and to address concerns raised by local residents, METC met with Township employees in June 2011. (*Id.*). METC also held a “leadership summit” with elected officials and Western Michigan University officials during this time. (*Id.*).

Later, on June 23, 2011, METC held an “open house where maps and other relevant information were available for public review and METC representatives were available to discuss issues and answer questions.” (*Id.*). In July 2011, METC met with a representative from the Twelve Oaks Subdivision Home Owners Association to discuss the Line. (3 Tr. 164; appx. 18b). On August 29, 2011, METC once again met with the Township Supervisor and attorney to discuss the proposed line. (3 Tr. 162;

appx. 16b). Two months later, METC met with several other landowners. (3 Tr. 164; appx. 18b). Then in November 2011, METC invited all landowners along identified routes to attend an informational meeting at the Holiday Inn. (3 Tr. 162; appx. 16b). During the entire period, METC continued to have ongoing discussions with landowners in the area. (3 Tr. 163; appx. 17b).

3. The Township officially opposed the Proposed Transmission Line in November 2011.

Shortly after the informational meeting at the Holiday Inn, the Township amended its “Utility Control” ordinance. (3 Tr. 117; appx. 11b; Exhibit A-9; appx. 24b-29b). As admitted by Township witness Elizabeth Heiny-Cogswell, this amendment was passed **in direct response** to METC’s announcement of a desire to construct the Line. In relevant part, the amended “Utility Control” ordinance provides:

(a) No public or private utility shall hereafter install, construct, relocate or replace any line, pole, main, tower, building, structure or appurtenance thereto within the public streets, roads, alleys or right-of-ways within the Township without first securing the approval and consent to the same by the Township Board or its duly authorized representative. This requirement shall not apply to repair of existing utility facilities nor construction of service connections for gas, electrical, telephone, or communication systems leading from such utility distribution lines to single family homes or isolated business or industrial buildings or structures being provided with such utility service. It shall apply, however, to multiple family developments and multiple commercial and/or industrial developments. The Township recognizes the present existence of utility poles and attachments. New utility lines, wires and other related equipment and facilities may be attached to existing utility poles, if and to the extent that the existing poles can accommodate new attachments. Existing utility poles and attachments may be maintained, replaced and upgraded only with poles and attachments of the same essential characteristics and size.

(b) Any public or private utility seeking such approval and consent **shall submit plans showing the location of the**

proposed installation, construction or facility; the height, depth and size thereof; and its proximity to existing improvements and other utility facilities within the Township, as well as the public streets, roads, alleys or rights-of-way. The plans shall be accompanied by the documents required in subsection (c) below. Commencing November 25, 2011, all public or private utilities who seek to construct utility lines, wires and related equipment and facilities along, across, over, and/or adjacent to any public street in the Township shall be required to place all lines, wires and/or related facilities and equipment underground within the public road right-of-way and to a point within 250 feet either side of said public right-of-way. For purposes of this Ordinance, utility lines, wires and/or related facilities and equipment shall include, but not be limited to, lines, wires, equipment and facilities used for electric transmission and distribution, telecommunications, cable television, internet service and other similar purposes.

(c) The Township Board or its duly authorized representative shall not unreasonably withhold such approval and consent where the proposed facilities are **shown to be necessary for the servicing of customers and for the protection or promotion of the health, safety and general welfare of the community.** A utility must provide a detailed description of the project, its location and an explanation of why the location was chosen for the proposed utility lines, wires or related equipment, as well as a description of any alternate locations considered and why they were not selected; an analysis of the Township Zoning Ordinance and whether any portion of the utility lines, wires or related equipment are located in a zoning district with additional compliance requirements; all information supporting the underlying need of the project; an environmental study of the area affected; information addressing potential effects on public health and safety, as well as any other information requested by the Township. The Township shall have the right and authority to determine the location of the same within the public right-of-way, street, road, alley or public place including verification that the same complies with the Township zoning requirements and the obligation and responsibility, if any, incident to such location and installation imposed upon such utility. Notwithstanding any other provision of this Ordinance once the plan, supporting documents and all

documents requested by the Township have been submitted, if no action is taken by the Township Board within 90 days, the approval and consent required by this Ordinance shall be conclusively presumed, and the utility shall be entitled to proceed with construction in accordance with its plans as submitted. However, **the Township may choose to hold a public hearing on the request, depending upon the impact on the community. If a public hearing is held, the utility will be required to attend and present its plan and specifications as required under this Ordinance to the Township Board in a public format, subject to questioning by the Board and its experts.**

(3 Tr. 117-119; appx. 11b – 13b (emphasis in original); Exhibit A-9; appx. 24b-29b).

The plain language of the amended ordinance—which is at the heart of the Township’s claims—requires transmission lines within public rights-of-way **or** within 250 feet of public rights-of-way be located underground, mandates that METC provide alternate route locations for review by the Township Board, and even purports to require METC to prove the transmission line’s necessity by filing an application with the Township board.

(*Id.*).

4. In the face of the Township’s new ordinance, METC undertook another routing study, held further community outreach, and began preparing to file the application.

The cost of “constructing the line underground would be approximately 5-7 times more per mile.” (Exhibit A-24; appx. 39b).⁷ Such cost increases are due to “(1) more complex and expensive underground cables (compared to bare overhead wires); (2)

⁷As METC pointed out at the hearing, however, “if an exhaustive analysis and determination of the exact parameters and requirements of an underground installation for this particular project were performed, it would increase the estimate to an even greater multiplier.” (Exhibit A-24, appx. 39b). At this time, after further analysis, METC now believes that underground line construction costs would range from an estimated \$33.8M to \$36.7M per mile, which is roughly 10-11 times the cost per mile. And this estimate is still without the benefit of any interpretation or guidance provided by the Township regarding the Ordinance, which means that the estimate could increase.

significant excavation and civil engineering work; and, (3) increased labor costs due to installation of the cables, duct banks, and terminations.” (Exhibit A-40; appx. 40b-41b). Furthermore, such additional costs do not even account for the increased maintenance costs for underground lines, “which are much higher than the maintenance costs for overhead lines.” (*Id.*) For these reasons—not to mention the notion of having township board evaluate the “necessity” for electric transmission infrastructure—it soon became apparent that compliance with the Ordinance would be costly, time-consuming, and unpredictable. As such, METC made the decision to seek a Certificate from the Commission to approve the construction of the line above ground. In other words, METC decided to seek a Certificate from the MPSC pursuant to Act 30, so that the MPSC—a body with actual experience in utility infrastructure analysis—would review and analyze the Line and its route under Act 30’s standards, and could approve a route and the construction of the Line above ground, instead of pursuant to the Ordinance.

Because METC had “engaged landowners in discussions and negotiations focused on obtaining easements” since the original route study was conducted, which provided “additional information” and showed that “several changes in circumstances” had occurred since the original route study was released in June 2011, METC retained Burns and McDonnell to conduct a new route selection survey. (3 Tr. 133; appx. 14b; Exhibit A-11; appx. 22b-23b). This new study included further landowner input and “incorporated alignments contained in options and easements obtained from various landowners along the route as well as segment and route options responding to questions and concerns raised by local officials and property owners.” (3 Tr. 133; appx 14b).

METC also conducted further outreach activities. On June 5, 2012, METC offered in writing to meet with the Township supervisor. (Exhibit A-13; appx. 30b). In response, the Township invited METC to attend the Township's June 12, 2012 meeting. (3 Tr. 163; appx. 17b). METC attended that meeting and "previewed the proposed and alternate routes" for the transmission line, "discussed the Act 30 process," and notified the Township Board of future public meetings that METC would be holding. (*Id.*; Exhibit A-14; appx. 31b-34b). METC also offered in writing to meet with the Almena Township Supervisor. (Exhibit A-15; appx. 35b). On June 26, 2012, METC held a public open house followed by a public meeting in Almena Township. (3 Tr. 163; appx. 17b). The open house contained METC booths on several topics and allowed interested persons to speak with METC personnel in an informal manner about the route, right-of-way, the need for the line, and environmental issues. (*Id.*). After the open house, METC held a public meeting where members of the public were invited to make any comment on the record that they so desired. (*Id.*). The next day, on June 27, 2012, METC followed the same format and hosted a public open house and public meeting in Oshtemo Township. (3 Tr. 164; appx. 18b). Several individuals attended the open house and public meeting and made comments. (*Id.*; Exhibit A-18; appx. 36b-38b). After the public meetings, METC continued to reach out to landowners until it filed its application with the MPSC.

D. The MPSC Conducted a Contested Case Pursuant to the Administrative Procedures Act and Granted METC the Certificate to Construct an Overhead Transmission Line.

On July 31, 2012, METC filed its application in this proceeding requesting a Certificate. (Dkt. # 0001). The application was accompanied by prefiled direct testimony and exhibits of Carlo P. Capra, Jason Sutton, Stephen G. Thornhill, Gary R. Kirsh, Steven J. Koster, J. Michael Silva, Dr. Mark A. Israel, and Dr. Dwight Mercer. At

the prehearing conference, after accepting METC's proof of service of the notice of hearing and publication, the Administrative Law Judge ("ALJ") granted the interventions of several landowners, the Township, and Consumers Energy. (3 Tr. 19; appx. 1b). Commission Staff was also a party to the case. The Township, Landowners, and Staff all filed direct prefiled testimony, and METC submitted rebuttal testimony.⁸ The evidentiary hearing occurred on January 29, 2013. All witnesses' testimonies and exhibits were bound into the record, and the parties stipulated to the submission of several additional exhibits. Throughout the entire proceeding, most parties conducted extensive discovery, with thousands of pages of documents and interrogatory answers being served over the course of five months.

MPSC Staff supported METC's application, and the landowners and the Township opposed it. While there were several points of contention between the parties during the Commission proceedings which were then raised on appeal, the only issue of contention remaining in this case is whether METC must comply with the Ordinance if the MPSC approved METC's application and issued an order granting a Certificate.

Following the issuance of a proposal for decision by the ALJ and briefing by all parties, on July 29, 2013, the Commission issued a 27-page Order granting METC the Certificate. (Appx. 205a). The Commission approved the transmission line's route as reasonable and feasible, and noted that "the Commission's grant of the CPCN preempts Oshtemo's ordinance." (*Id.*, pp. 25-26).⁹ The Township and several landowners appealed as of right to the Court of Appeals.

⁸The prefiled testimonies referenced herein later became part of the record. METC has included in the appendix any testimony cited, but not the entire record.

⁹The Commission's order also addressed many other issues contested by the

E. The Court of Appeals Affirmed the MPSC and Held that the Certificate took Precedence Over the Ordinance and that Act 30 was Constitutional.

On November 18, 2014, the Court of Appeals issued the Opinion, which affirmed the MPSC's order granting the Certificate. The Opinion pointed out that once the Commission "issued [the Certificate] allowing METC to build such a line, Oshtemo Township's ordinance conflicted with [the Certificate]." (Opinion, p 11). The Court of Appeals noted that "[u]nder the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township's conflicting ordinance that required that a portion of the transmission line be constructed underground." (*Id.*) The Opinion rejected the Township's argument that such a conclusion violated the Township's constitutional authority to regulate municipal affairs and rights-of-way:

MCL 460.570(1) is not an unconstitutional blanket usurpation of Oshtemo Township's ability to pass regulations and ordinances regarding its municipal affairs. The Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29. See *Lansing*, 275 Mich App at 433; see also Const 1963, art 7, § 22.

(Opinion, p 11, citing *Lansing v State of Michigan*, 275 Mich App 423; 737 NW2d 818 (2007), Const 1963, art 7, §§ 22, 29). The Opinion also rejected the Township's contention that the MPSC was required to find a conflict between the Ordinance and some other state law, finding that such argument "finds no support in the language of any portion of Act 30, particularly not in MCL 460.570(1), or in any case law." (*Id.*) Finally, the Opinion held that Act 30 "is not an unconstitutional delegation of power."

parties. Because the Township has only raised issues about Act 30's and the Certificate's effect on the Ordinance, this brief does not address those issues.

(*Id.*)¹⁰ On December 19, 2014, the Township filed with this Court its Application for Leave to Appeal. The Court granted leave on December 23, 2015, and asked the parties to brief “whether the Electric Transmission Line Certification Act, 1995 PA 30, effective May 17, 1995, is consistent with the first sentence of Const 1963, art 7, section 29.” (Appx. 42b).

ARGUMENT

I. STANDARD OF REVIEW.

The Township asks this Court to reverse a Court of Appeals affirmance of a Commission order interpreting a statute the MPSC is charged with administering and strike down a portion of Act 30 as unconstitutional. In order to overturn a Commission order, the burden of proof is on the party aggrieved by the order to “show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.” *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999), citing MCL 462.26(8). To successfully demonstrate that an order is unlawful, “there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment.” *Id.*, citing *Giaras v Public Service Comm’n*, 301 Mich 262, 269; 3 NW2d 268 (1942). To prove a Commission order unreasonable, a party must show that the order is unsupported by the evidence. *City of Marshall v Consumers Power Co (On Remand)*, 206 Mich App 666, 676; 523 NW2d 483 (1994), *lv den*, 449 Mich 861; 535 NW2d 793 (1995), citing *Associated Truck Lines, Inc v Public Service Comm’n*, 377

¹⁰The Opinion also rejected arguments raised by landowners relating to the line’s necessity and route, and Constitutional Due Process. Because the Township has not raised those holdings, they will not be addressed by METC.

Mich 259; 140 NW2d 515 (1966). In addition, the Commission's interpretation of a statute that the Commission is charged with administering is "entitled to respectful consideration and ought not to be overruled without cogent reasons." *In re Rovas*, 482 Mich 90, 108; 754 NW2d 259 (2008), citing *Boyer-Campbell v Fry*, 271 Mich 282, 296-97; 260 NW 165 (1935).

Finally, although the constitutionality of a statute is a question of law that is reviewed de novo, *Tolsdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001), **statutes are presumed to be constitutional.** *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004). Indeed, "[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Phillips*, 470 Mich at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

The Township asks this Court to disregard the Commission's factual findings and interpretation of Act 30, the Court of Appeals' interpretation of Act 30's plain language, and the presumption that all statutes are constitutional. The Township cannot satisfy any of the burdens required to be successful, and this Court should issue an order affirming the Court of Appeals.

II. ACT 30 DOES NOT CONFLICT WITH A LOCAL GOVERNMENT'S ABILITY TO GRANT CONSENT TO A PUBLIC UTILITY'S USE OF HIGHWAYS, STREETS, ALLEYS, OR OTHER PUBLIC PLACES.

In its December 23, 2015 Order granting the Township's application for leave to appeal, this Court directed the parties to include among the issues to be briefed "whether [Act 30] is consistent with the first sentence of Const 1963, art 7, § 29." (Appx. 42b). Accordingly, the Township first argues that the Court of Appeals and the

Commission “each held that the municipal consent called for in Const 1963, art 7, § 29 was preempted by [Act 30],” contending that article 7, section 29 of the Michigan Constitution “is emasculated, gutted and negated outright by legislative enactment in [Act 30].” (Township Brief, p 3).

The Township mischaracterizes the Opinion and the MPSC Order. Neither the MPSC nor the Court of Appeals held that Act 30 “preempted” the Constitution. The Court of Appeals specifically rejected this notion:

Contrary to arguments made by Oshtemo Township and its supporting amici, the PSC did not hold that Act 30 preempted all local regulation by the Township and did not eliminate the authority granted to Oshtemo Township by Const 1963, art 7, § 29 to control its roads and rights-of-way. The arguments that Act 30 preempted Oshtemo Township’s ordinance and is unconstitutional ignore the clear language of the Constitution, MCL 460.570(1), and binding precedent.

Const 1963, art 7, § 29 makes a utility’s use of public places and rights-of-way subject to local approval. A local government is authorized to enact resolutions and ordinances relating to such matters; however, those enactments are “subject to the constitution and law.” Const 1963, art 7, § 22.

(Opinion, p 10). As this quote makes clear, the Court of Appeals did not conclude that Act 30 “preempted” the Constitution. Regardless, for the reasons explained below, the Township’s arguments are invalid. Act 30 does not violate article 7, section 29.

A. The Certificate Takes Precedence Over the Ordinance Because the Ordinance Conflicts with the Certificate and Regulates the Location and Construction of the Transmission Line Covered by the Certificate.

Before discussing article 7, section 29 of the Michigan Constitution, it is first important to set forth the dispute underlying the Township’s claim that Act 30 violates article 7, section 29. Namely, that the Certificate takes precedence over the Ordinance

and that a conflict between Act 30 and the Ordinance exists. Only once it is clear that the Ordinance purports to regulate the Proposed Line's construction and location in direct contravention of the Certificate does article 7, section 29's provisions become relevant.

1. Section 10 of Act 30 Applies to the Line's Construction and Location Because the Certificate and the Ordinance Conflict.

The Township amended the Ordinance in direct response to the Proposed Line. The Ordinance requires transmission lines within public rights-of-way or within 250 feet of public rights-of-way be located underground. (3 Tr. 118; appx. 12b; Ex. A-9; appx. 24b-29b). This is a problem, because underground line construction is 5 to 7 times more expensive to build, and is much more difficult and expensive to maintain. (Ex. A-24; appx. 39b; Ex. A-40; appx. 40b). The Ordinance also requires utilities to "submit plans showing the location of the proposed installation, construction or facility; the height, depth and size thereof; and its proximity to existing improvements and other utility facilities within the Township, as well as the public streets, roads, alleys or rights-of-way." (3 Tr. 118; appx. 12b; Ex. A-9; appx. 24b-29b.) Furthermore, the Township may hold a hearing and require a utility to prove a project's necessity, among other things. (*Id.*). Avoiding this process—which would require expensive and unnecessary undergrounding of transmission lines as well as a public hearing before an openly hostile elected board with no utility experience or knowledge of transmission planning—was a chief reason METC filed its application with the MPSC.

Section 10 of Act 30 is clear: "[i]f the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a

transmission line for which the commission has issued a certificate.” MCL 460.570(1). Based on this plain language, the Opinion concluded “once the PSC issued CPCN allowing METC to build such a line, Oshtemo Township’s ordinance conflicted with the CPCN. Under the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township’s conflicting ordinance that requires that a portion of the transmission line be underground.” (Opinion, p 11).

The Ordinance goes well beyond the Township’s “consent” to anything. It very clearly **regulates** the transmission line’s location and construction. It reserves the Township’s right to “determine the location” of the line, and allows the Township to require that the transmission line be constructed underground. (Ex. A-9; appx. 246-296). The Certificate, on the other hand, approved METC’s application to construct an “overhead transmission line” that would be located on a very specific route. This means that the Ordinance was a “conflicting local ordinance,” and that under Act 30’s plain and unambiguous language, the Commission’s Order “take[s] precedence” over the Ordinance. MCL 460.570(1). As recognized by the Court of Appeals, it is the Certificate—issued pursuant to Act 30—that conflicts with the Ordinance. (Opinion, pp 10-11). Once it is determined that the Certificate conflicts with the Ordinance, the analysis is simple—Section 10 of Act 30 applies. And because the Certificate issued by the MPSC allows for above-ground construction, METC need not comply with the Ordinance’s requirement to construct the Line underground. It is this conflict—the Certificate preempting the Ordinance’s requirements pursuant to Section 10 of Act 30—that the Township takes issue with. This statutory construct, however, does not violate the Michigan Constitution.

B. Act 30 Does Not Violate Article 7, Section 29 by Allowing A Certificate to Take Precedence Over A Conflicting Ordinance Prohibiting or Regulating the Location or Construction of a Transmission Line Covered by the Certificate.

- 1. Article 7, section 29 addresses local control over a public utility's use of public areas and includes three separate clauses.**

Michigan courts have articulated three rules for interpreting constitutional provisions. See *National Pride at Work v Governor*, 274 Mich App 147, 156-57; 732 NW2d 139 (2007). First, “[t]he primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.” *Id.* at 157. The Court will “apply[] each term’s plain meaning at the time of ratification.” *Id.* (emphasis added). If the Constitution uses technical or legal terms of art, then the courts will construe that term in its technical, legal sense. *Id.* The Court’s task, in general, however, is to “ascertain and give effect to the common understanding of the text at the time of ratification.” *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 39-40; 703 NW2d 822 (2005), citing *Wayne Co v Hathcock*, 471 Mich 445, 468-69; 684 NW2d 765 (2004).

Second, and collateral to the first rule, “to clarify [the] meaning [of a constitutional provision, if the meaning may be questioned], the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered.” *Id.*, citing *In re Proposal C*, 384 Mich 390, 405; 185 NW2d 9 (1971). If, however, the constitutional language is clear, reliance on extrinsic evidence is inappropriate. *Id.* Finally, the last rule of constitutional construction is that “wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does.” *Id.*, citing *In re Proposal C*, *supra* at 406.

Article 7, section 29 of the Michigan Constitution addresses local control over public utilities' use of public places and the transaction of local business:

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county township city or village for wires poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Const 1963, art 7, § 29. A plain reading of this constitutional provision shows that there are three separate clauses, each addressing a separate issue: (1) consent; (2) franchise; and, (3) reasonable control. See *TCG Detroit v City of Dearborn*, 261 Mich App 69, 79; 680 NW2d 24 (2004) (concluding that § 29 has three distinct clauses concerning three different powers) and *City of Lansing v State of Michigan*, 275 Mich App 423, 431; 737 NW2d 818 (2007) (holding that “[f]rom a plain reading, it is clear that § 29 addresses three distinct areas,” being “consent,” “franchise,” and “reasonable control.”). The Township’s arguments address the first of these clauses. Specifically, the Township claims that Act 30 “operates to dispense with the local municipalities’ consent for utilities to operate within its jurisdiction [and] is repugnant to the Michigan Const 1963, art 7, § 29.” (Township Brief, p 7). Thus, the Township is claiming (in response to this Court’s request to address the issue) that Section 10 of Act 30 violates the “consent” clause of article 7, section 29. The Constitution’s plain language, the facts of this case, and binding precedent do not support that argument.

2. **The consent clause does not grant local governments the unfettered right to withhold consent to a utility project. A local government's ability to grant or withhold consent is constrained by state law, and a local government cannot unreasonably or arbitrarily withhold consent.**

While there have been many cases interpreting article 7, section 29 and its predecessor article 8, section 28 of the 1908 Constitution, very few have addressed directly and analyzed the "consent" clause. Those cases that have conducted such an analysis, however, demonstrate that although article 7, section 29 grants local governments the ability to withhold consent for a public utility to use public places within the government's boundaries, that right **is not** unfettered.

In interpreting the 1908 provision,¹¹ this Court explained that "public utilities were placed under control of the local authorities, and the local authorities may control **within reason** the use of their streets for any purposes whatsoever not inconsistent with the State law." *People v McGraw*, 184 Mich 233, 238; 150 NW 836 (1915) (emphasis added). Furthermore, the constitutional provision does not "divest the legislature of jurisdiction over municipalities and **they still must find their powers in statute, either directly or by charter authorized by general law.**" *City of Niles v Mich Gas & Elec Co*, 273 Mich 255, 262; 262 NW 900 (1935) (emphasis added) citing *City of Kalamazoo v Titus*, 208 Mich 252, 265; 175 NW 480 (1919) and 2 1908 Constitutional Debates, p 1432. And this Court has made clear that article 7, section 29 consent cannot be

¹¹The 1908 constitution provided: "No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships." Const 1908, art 8, § 28.

“refused arbitrarily and unreasonably... .” *Union Twp v Mt Pleasant*, 381 Mich 82, 90; 158 NW2d 906 (1968). This means that “the grant of authority is not absolute.” *City of Lansing v State*, 275 Mich App 423, 432; 737 NW2d 818 (2007), citing *Union Twp, supra*.

Furthermore, article 7, section 29 “does not specify the manner by which consent is to be granted or withheld.” *City of Lansing*, 275 Mich App 432-33. This means that the provision is not “self-executing.” *Id.*, fn 4, citing *Ferency v Sec of State*, 409 Mich 569, 590-91; 297 NW2d 544 (1980) and *Hamilton v Sec of State*, 227 Mich 111, 116-17; 198 NW 843 (1924) (Fellows, J., dissenting). Because article 7, section 29 is not self-executing, a “local government must exercise its authority through the passage of ordinances or resolutions.” *City of Lansing*, 275 Mich App 433, fn 4. In other words, a local government may only grant or withhold consent by exercising a power granted by the Legislature. This is important, because article 7, section 22 states that “[e]ach such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, **subject to the constitution and law**,” and article 7, section 17 of Michigan’s Constitution provides: “[e]ach organized township shall be a body corporate **with powers and immunities provided by law**.” See also *Detroit Edison Co v Richmond*, 150 Mich App 40, 47-48, 388 NW2d 296 (1986) (townships “have no police power on their own, but only have those power and immunities which are provided by law.”) This means that the Township’s ability to pass an ordinance purporting to condition the Township’s consent on compliance with an ordinance is very limited: “[b]ecause a city’s general authority to adopt resolutions and ordinances is subject to the constitution and law, and a city’s authority to grant or

withhold consent to use its highways, streets, alleys, and other public places can only be exercised through an ordinance or resolution, it follows that a city's ability to grant or withhold consent is also subject to the constitution and laws." 275 Mich App at 433. Indeed, as recognized by the Opinion, "[a] local government is authorized to enact resolutions and ordinances relating to such matters; however, those enactments are 'subject to the constitution and law.'" (Opinion, p 11, citing Const 1963, art 7, § 22). The Court of Appeals has made similar findings in the past, noting that the "gist" of article 7, section 29 cases was "that a city has the implied power to contract for rates to be charged consumers as a condition of granting consent to the use of its rights-of-way, **but that implied power must give way to the state's legislative power to set rates when the state exercises that power.**" 261 Mich App at 87 (emphasis added).

In this instance, the Township is attempting to condition consent upon compliance with the Ordinance—which clearly conflicts with Act 30. The State, through the Legislature, has exercised its power to regulate transmission line routing. The Ordinance requires the Township board (elected officials with no experience in utility issues) to determine the route. But Act 30 requires the Commission to study the route and alternate routes and find a "feasible and reasonable" route. MCL 460.568(5)(b). The Ordinance requires the Township board to make a necessity determination. But Act 30 requires the Commission to determine whether the line presents an unreasonable threat to public health and safety and whether the line's quantifiable and nonquantifiable public benefits justify its construction. MCL 460.568(5)(a)(c). Further, as discussed seriatim, the Ordinance's undergrounding provisions directly conflict with the Certificate—which has preemptive power under Section 10 of Act 30. See MCL

460.570(1). Furthermore, and perhaps most importantly, **the Michigan Zoning Enabling Act specifically states that all township zoning is subject to Act 30.** See MCL 125.3205(1)(a). This is an issue that the Township has **never** addressed in this proceeding. In Michigan, local units of government have no inherent authority on their own to regulate zoning. The State must specifically grant them authority. *Lake Township v Sytsma*, 21 Mich App 210, 212, 175 NW2d 337 (1970). Accordingly, the Township's authority to pass any ordinance addressing transmission line siting—such as the Ordinance at issue—is limited by the Michigan Zoning Enabling Act, which states that all zoning is “subject to” “[t]he electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575.” MCL 125.3205(1)(a). This is a clear and valid act by the Legislature to statutorily limit a municipality's authority and control with respect to utilities and public areas through zoning ordinances.¹²

The Township takes issue with this analysis, claiming that, if the legislature may limit a municipal body by virtue of article 7, section 22 (and presumably article 7, section 17, although the Township never addresses this argument), “the consent required in § 29 is not in fact required.” (Township Brief, p 13). But this is not the case. Consent by a local government is still required, but, by their very nature, local governments are

¹²Act 30 provides more protection to the local unit of government and allows much more local regulation than the statute that was in issue in *City of Lansing, supra*. In that instance, the utility did not obtain consent, and the Legislature enacted a law noting that in the limited circumstance that applied to the utility in question the utility was “not required to obtain the consent of the governing body of the city, village, or township... .” *Id.*, quoting MCL 247.183. The Court of Appeals concluded a city's authority to adopt resolutions denying consent was limited by the Legislature, and the Legislature had “the authority to limit the manner and circumstances under which a city may grant or withhold consent under § 29.” *Id.* at 433. This Court denied leave. Surely, if MCL 247.183 withstands scrutiny, Act 30 must as well. Act 30 addresses all of the concerns raised by the Township—including the route's reasonableness and the public's health and welfare, while also considering the State's interest in having safe and reliable electric service.

creatures of statute, and may only exercise those powers granted to them. Article 7, section 29, because it is not self-executing, does not provide local governments with an unfettered right to consent—the Legislature limit local governments’ regulations and restrictions. Thus, local governments cannot condition article 7, section 29 consent in those instances where the Legislature has limited the local government’s authority to pass an ordinance or resolution conditioning such consent. In this instance, the Legislature recognized the transmission grid’s importance to society, and decided to limit a local government’s ability to regulate the location or construction of a transmission line if a utility went through the Act 30 process and obtained a Certificate from the MPSC. Consequently, Act 30 does not violate the consent clause of article 7, section 29. The Township has failed to provide any “cogent reasons” for overturning the MPSC’s order (*Rovas, supra*), and cannot carry its heavy burden of overturning the presumption of constitutionality of a statute. This Court should affirm the Court of Appeals.

3. Concluding that the Township could withhold consent based on compliance with the Ordinance would render article 7, section 29’s “reasonable control” clause nugatory surplusage.

METC agrees with the Township that article 7, section 29 also includes the Township’s “right to reasonable control of streets and public places.” (Township Brief, p 8). But unlike the Township, METC believes that there must be some meaning given to that right. Under the Township’s arguments, “consent” becomes a way for the Township to regulate a utility contrary to a state law. Indeed, the Ordinance at issue

here is not really about “consent”—it is an attempt to regulate transmission line construction.¹³

It is a fundamental principle of statutory construction, which generally applies to the construction of the constitution, see *Council 23, AFSCME v Wayne Co Civil Service Comm*, 32 Mich App 243; 188 NW2d 206 (1971), that every word should be given meaning, and no word should be treated as surplusage or rendered nugatory if at all possible. *State Bar of Michigan v Galloway*, 422 Mich 188; 369 NW2d 839 (1985). Thus, no constitutional provision should be read so as to nullify a different provision. *In re Request for Advisory Opinion Regarding the Constitutionality of 2005 PA 71*, 479 Mich 1; 740 NW2d 444 (2007). Yet that is exactly what the Township is asking this Court to do. At bottom, the Township asks this Court to allow it to condition “consent” on an unreasonable regulation.

In addition to the consent clause, Michigan’s Constitution grants local governments “reasonable control” over their streets and public places. See Const 1963, art 7, § 29. The Opinion also recognized that “Const 1963, art 7, § 29 makes a utility’s use of public places and rights of way subject to local approval.” (Opinion, p 10). In 2006, this Court reconciled the City of Taylor’s “constitutional authority to exercise ‘reasonable control’ over its streets with the [Commission’s] broad regulatory control over public utilities.” *City of Taylor*, 475 Mich at 112. In *City of Taylor*, the plaintiff city passed an ordinance that required the underground relocation of utility wires along

¹³In fact, METC has had “consent” to operate within the Township for years. The record below made clear that METC has two existing transmission lines within the Township’s boundaries. The Ordinance is not about granting consent—it is about determining necessity, studying a route, and **regulating** the line’s location and construction.

Telegraph Road at the utility company's sole cost. The defendant utility company challenged the ordinance, claiming that it conflicted with certain rules and regulations promulgated by the Commission. This Court recognized that "if" a state law—in that particular case a Commission regulation—conflicts with a local ordinance, **the local ordinance must cede**. To that end, the Court ruled that "...a local unit of government may exercise control over its 'highways, streets, alleys, and public places' **as long as that regulation does not conflict with state law.**" *Id.* at 108 (emphasis added). The Court then reaffirmed Michigan precedent holding that "a municipality's exercise of reasonable control over its streets **cannot impinge upon matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law.**" *Id.*, at 112. Thus, under this Court's prior holding in *City of Taylor*, a local government cannot impinge on matters of statewide concern, nor can it regulate inconsistent with state law. In this instance, the Ordinance does both.

There can be no question that Act 30's subject matter—the location and construction of electric transmission lines—is a matter of statewide concern. In fact, Act 30 even pronounces that "[t]ransmission of electricity is an essential service." MCL 460.563. This declaration, along with Act 30's legislative history and the evidence in this case, demonstrates the importance of electric transmission to the State and Region.

In 1995, the Legislature determined that electric transmission lines were so important that the State should create a centralized siting authority. Before Act 30, transmission line projects were governed by a localized process that resulted in a patchwork of differing regulations. At that time, transmission line projects exposed "multi-county projects, **designed primarily for the economic benefit of the state**, to

the construction and siting whims and uncertainties of each local jurisdiction traversed by the planned transmission line.” Senate Majority Policy Analysis: Electric Line Certification, Tom Atkins, SB 408, March 22, 1995 (emphasis added). Accordingly, a “[s]tate-level siting authority would be preferable to what they consider a patchwork of regulations, and would ensure the uniform balancing of competing interests.” *Id.* In other words, the Legislature, recognizing the statewide importance of transmission projects, determined that in certain instances, a centralized siting authority should be able to consider evidence and issue an order taking precedence over a patchwork of local regulations aimed at stopping transmission line projects.

The record evidence in this case also proves that electric transmission projects are a matter of statewide significance. Despite being only approximately 7 miles long and located primarily in one township, the transmission line will be interconnected to the broader electric transmission grid. Importantly, despite its relatively short length and limited location, the transmission line **will alleviate the potential for brownouts and blackouts in the Kalamazoo and Battle Creek regions.** (3 Tr. 80; appx. 4b). It will also increase load serving capacity and create a more efficient system that will require less power produced (i.e. less generation of power) during peak times. (3 Tr. 88; 3 Tr. 360; appx. 8b). Despite these region-wide critical benefits, Oshtemo Township attempted to serve as a roadblock to the line’s construction, and even passed the Ordinance in direct response to learning that METC desired to build the transmission line. This was done with no regard to the fact that the cost of “constructing the line underground would be approximately 5-7 times more per mile.” (Exhibit A-24; appx. 39b).¹⁴

¹⁴As noted in footnote 8, *infra*, the costs would likely be much higher than the original estimate on the record.

In other words, the Township had no regard for the statewide issues involved, and only had local interests—whatever those might be—in mind. Such actions undoubtedly “impinge on matters of statewide concern,” and are not permitted under *City of Taylor*. This holds especially true here, where the Ordinance conflicts with state law.

In conflicting with the Certificate, not only does the Ordinance impinge on matters of statewide concern, perhaps more importantly, it conflicts with state law—which is absolutely prohibited under *City of Taylor*. In *City of Taylor*, the plaintiff city passed an ordinance that required the underground relocation of electric utility lines along Telegraph Road at the electric utility’s cost. *Id.* at 118-119. Under statutory authority granted to it by the Michigan Public Service Commission Act, PA 3 of 1939, MCL 460.6 (the “MPSC Act”), however, the Commission had promulgated rules governing the replacement of existing overhead distribution lines. *Id.* at 118. The electric utility challenged the City of Taylor’s ordinance, claiming that it conflicted with the MPSC’s rules. *Id.* This Court recognized that “if” a state law conflicts with a local ordinance, the local ordinance must cede. Although the Court transferred the case to the Commission to ultimately determine if there was a conflict between the ordinance at issue and the MPSC’s rules, in so doing, the Court pronounced that “a local unit of government may exercise control over its ‘highways, streets, alleys, and public places’ **as long as that regulation does not conflict with state law.**” *Id.* at 108. In other words, if the Commission found that the City of Taylor’s ordinance conflicted with the Commission’s rules, the City’s ordinance would be invalid.

The analysis from *City of Taylor* applies in this instance, and leads to the conclusion that the Certificate takes precedence over the Ordinance. Just as the

Commission had statutory authority to promulgate rules governing relocation of distribution lines in *City of Taylor*, the Commission in this instance had statutory authority to issue orders under Act 30 addressing the location and construction of electric transmission lines. In fact, the Commission's authority in this instance is even **clearer** than the general authority involved in *City of Taylor*. At issue in that case were rules promulgated by the MPSC pursuant to its **general regulatory authority** created by the MPSC Act, which grants the MPSC "complete power and jurisdiction to regulate all public utilities [including]...all other matters pertaining to the formation, operation, or direction of public utilities." *City of Taylor*, 475 Mich at 118, citing MCL 460.6. Act 30, however, grants the Commission much more specific authority by creating an application, notice, and contested case process to address transmission line location and construction, and specifically directing the Commission to issue orders on such applications within one year. MCL 460.568(3). And the limitations on the Township go beyond those imposed by Act 30. As noted previously, the Michigan Zoning Enabling Act also states that all zoning is "subject to" "[t]he electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575." MCL 125.3205(1)(a).

To the extent that Article 7, section 29 of Michigan's Constitution did not "save" the City of Taylor's ordinance where the ordinance conflicted with MPSC rules promulgated under the MPSC's general regulatory authority granted by the MPSC Act, there can be no question that Article 7, section 29 does not "save" the Ordinance where it conflicts with a certificate issued pursuant to a very specific statutory mandate as set forth in Act 30. It would be nonsensical to conclude that local ordinances cannot conflict with valid MPSC rules promulgated under general authority, but somehow **can** conflict

with a validly issued MPSC certificate pursuant to specific statutory authority. The Court of Appeals recognized this point. Indeed, the Opinion includes a lengthy discussion of the *City of Taylor* case. (Opinion, p 9).

Yet the Township asks this Court to ignore this analysis and the *City of Taylor* holding in its entirety. The *City of Taylor* Court held that a local government **cannot** regulate inconsistent with state law. The Township, however, claims that it may regulate inconsistent with both Act 30 and the Michigan Zoning Enabling Act by claiming that compliance with the inconsistent regulation is required to have consent to operate within the Township. Such an argument is invalid—it swallows the *City of Taylor* holding and entirety. And it renders the “reasonable control” provision nugatory surplusage. There would be no reason to provide that a local government may only have “reasonable control” over the use of rights-of-way if that local government may condition “consent” on any “unreasonable” control conflicting with state law that it so desires. Were this the case, the City of Taylor could have simply told Detroit Edison that the City would not consent to Detroit Edison’s operation of the line in question unless Detroit Edison paid for the relocation. In other words—the City of Taylor could have forced Detroit Edison to comply with its ordinance. But this Court said that if the ordinance conflicted with the MPSC’s rules, the ordinance was unenforceable. To ensure that the “reasonable control” clause retains meaning, the same reasoning must apply in this instance. The Township has provided no “cogent reasons” to overturn the MPSC, and cannot satisfy the heavy burden of proving a statute unconstitutional. To grant the Township’s request, reverse the Opinion, and hold that a Certificate does not take precedence over the Ordinance would be to completely ignore Act 30 and the *City*

of *Taylor* holding—the Court of Appeals recognized this, and rejected the Township’s arguments. This Court should as well.

III. THERE IS A CONFLICT BETWEEN ACT 30 AND THE ORDINANCE.

The Township also claims that the Ordinance is not “in conflict with state legislation in the form of [Act 30].” (Township Brief, p 14). The Township claims that the “Michigan Public Service Commission was obligated to construe the Townships’ ordinances as consistent with state law if at all possible,” and failed to consider whether the Ordinance was preempted. (*Id.* at p 16). Amazingly, the Township claims that the Ordinance “does not regulate the location or the construction of the proposed transmission line....A fair reading of the statute [sic] would be that the Township’s Public Utility Ordinance cannot dictate the location of the line within the Township nor dictate how the line is built or constructed. The request to bury a limited portion of the line does neither. Appellees cannot cite any state law whatsoever which controls or requires the power lines in this case to travel overhead. Therefore, there is no conflict between the local ordinance and state law.” (*Id.* at p 18). It goes on to state that the Ordinance “does not control the route.” (Township Brief, p 26). It is unclear how any of these claims support the relief requested by the Township, and the township does not explain the connection between its claims and reversing the Opinion. Regardless, the Township’s claims do not withstand scrutiny.

As recognized by the Opinion, and as discussed in several sections of this brief, there is a clear conflict between the Certificate, which authorized an above-ground line, and the Ordinance, which required portions of the line to be constructed underground. (Opinion, p 11). Indeed, the Court of Appeals expressly considered the conflict as follows:

METC used Act 30 to apply for a CPCN to build a new transmission line. In making its application, METC was required to include any zoning ordinance that would affect, i.e., regulate the location or construction of, the proposed route. MCL 460.567(2)(d). Oshtemo Township's relevant ordinance, if applicable, would require METC to locate a portion of its proposed transmission line underground. The ordinance did not provide for any exceptions to this requirement. METC determined that locating a portion of the proposed line underground would be prohibitively expensive, and so sought a CPCN for a line to be constructed entirely above ground. The PSC was entitled to accept METC's evidence regarding the cost and preferability of constructing a line above ground, notwithstanding the fact that the record also contained contradictory evidence. See *Great Lakes Steel Div of Nat'l Steel Co v Public Service Comm*, 130 Mich App 470, 481-482; 344 NW2d 321 (1983). **The PSC issued a CPCN allowing METC to construct a transmission line that was entirely above ground. The PSC was entitled to find that METC was not required to comply with Oshtemo Township's ordinance, but was not required to do so. However, once the PSC issued CPCN allowing METC to build such a line, Oshtemo Township's ordinance conflicted with the CPCN. Under the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township's conflicting ordinance that required that a portion of the transmission line be constructed underground.** MCL 460.570(1) is not an unconstitutional blanket usurpation of Oshtemo Township's ability to pass regulations and ordinances regarding its municipal affairs. The Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29. See *Lansing*, 275 Mich App at 433; see also Const 1963, art 7, § 22. The argument that the PSC's analysis was required to expand beyond the conclusion that the CPCN took precedence over Oshtemo Township's conflicting local ordinance, and that the PSC was required to determine if the ordinance conflicted with some state law other than the CPCN, finds no support in the language of any portion of Act 30, particularly not in MCL 460.570(1), or in any case law.

(Opinion, pp 10-11 (emphasis added)).

The MPSC similarly concluded that under sections 3 and 10 of Act 30 the “grant of the CPCN preempts Oshtemo’ s ordinance.” (MPSC Order at 26). As there was a blatant conflict between the Certificate and the Ordinance, the Certificate controlled. As the Court of Appeals explained, the Ordinance requires that a portion of the Line must be constructed below ground; the Certificate permits the construction of the Project above ground. A conflict could not be clearer. And that is without even considering the route study and necessity requirements found in the Ordinance. It is not clear how the Township can state that the Ordinance “does not control the route” when the Ordinance provides, in part, that:

A utility must provide a detailed description of the project, **its location and an explanation of why the location was chosen for the proposed utility lines, wires or related equipment**, as well as a description of any alternate locations considered and why they were not selected; an analysis of the Township Zoning Ordinance and whether any portion of the utility lines, wires or related equipment are located in a zoning district with additional compliance requirements; all information supporting the underlying need of the project; an environmental study of the area affected; information addressing potential effects on public health and safety, as well as any other information requested by the Township. **The Township shall have the right and authority to determine the location of the same within the public right-of-way, street, road, alley or public place...**

(3 Tr. 118; appx. 12b). The Ordinance’s plain language—which is never cited by the Township in any brief—contradicts the Township’s arguments.

The Township also cites *Detroit Edison Co v City of Wixom*, 382 Mich 673; 172 NW2d 382 (1969), to contend that the MPSC has no authority to determine transmission line routes (Township Brief, p 21), claims that the *City of Taylor* dealt with Act 30 and transmission lines (Township Brief, pp 16-17) and argues that the Ordinance

does not conflict with MPSC rules 460.511 through 460.519. (Township Brief, pp 22-23). The Township has raised these arguments at each level, and at each level, METC has explained that each of these claims are irrelevant and wrong. First, the *Wixom* case was decided 26 years before Act 30 became law. Thus, it did not address the issues raised in this matter. Indeed, at the time of *Wixom*, “the public service commission statute d[id] not vest the commission with authority to determine the routes of high tension lines except as those routes bear upon ‘rates, fares, fees, charges, services, rules, conditions of service,’” a statement which no longer holds true. *City of Wixom, supra*, 683. So the case is irrelevant. Second, as already explained, *City of Taylor* had nothing to do with transmission lines—it dealt with the relocation of distribution lines. Thus, it was not an adjudication under Act 30. Act 30 never came up in the case. And finally, METC has never claimed that Rules 460.511 through 460.519 are applicable. Those deal with distribution lines and were not promulgated under Act 30. In short, none of the Townships arguments regarding the lack of a “conflict” between Act 30 and the Ordinance make sense. The arguments ignore the record completely, cite irrelevant or outdated law, and have no merit. For those reasons, the arguments should be rejected.

CONCLUSION

The Township cannot overcome its legal burdens. The arguments presented are meritless. The Court of Appeal’s affirmance of the MPSC was proper. Act 30 is not unconstitutional, the Court of Appeals did not ignore Act 30’s plain language, and the Court of Appeals clearly analyzed and considered the conflict between the Certificate and the Ordinance. The Constitution provides that townships are limited by law in their actions, and the Legislature has limited the Township’s ability to impose the Ordinance

upon the Line. This is not about “consent” in the typical sense—it is about the Township attempting to condition “consent” on an unreasonable regulation that conflicts with state law.

The Opinion was consistent with long standing precedent, the plain language of the statutes at issue, and the Michigan Constitution. The Township has failed to demonstrate any reason for this Court to reverse the Court of Appeals’ Opinion. Consequently, this Court should affirm the Court of Appeals.

Respectfully submitted,

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By /s/Shaun M. Johnson

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