

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Donald S. Owens, Jane E. Markey, Deborah A. Servitto

IN RE APPLICATION OF MICHIGAN ELECTRIC
TRANSMISSION COMPANY FOR
TRANSMISSION LINE

CHARTER TOWNSHIP OF OSHTEMO

Appellant,

Supreme Court No. 150695

v

MICHIGAN ELECTRIC TRANSMISSION
COMPANY, LLC

Court of Appeals No. 317893

Petitioner-Appellee,

MPSC No. U-17041

and

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellee.

**BRIEF ON APPEAL OF APPELLEE
MICHIGAN PUBLIC SERVICE COMMISSION**

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STATEMENT OF JURISDICTION

Appellee Michigan Public Service Commission (MPSC or Commission) states the jurisdictional summary provided by Appellant Charter Township of Oshtemo (the Township or Oshtemo or Oshtemo Township) is complete and correct.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The consent clause of article 7, § 29 of Michigan’s Constitution states that a utility may not use streets or public places without a municipality’s consent. Under article 7, § 17, a township has only those powers “provided by law,” and a municipality may not arbitrarily withhold or unreasonably condition its consent to a public utility’s use of its streets and public places. The Zoning Enabling Act and the Certification Act provide limitations on the conditions a township may place on its consent. Is the Certification Act constitutional?

Appellant’s answer: No.

Appellee MPSC’s answer: Yes.

Appellee METC’s answer: Yes.

Court of Appeals’ answer: Yes.

2. Oshtemo Township’s ordinance conditions municipal consent on a utility placing all wires and related facilities underground. Where the Commission found that the public utility’s proposed aboveground construction plan was reasonable, did the Commission have the authority to grant a certificate under the Electric Transmission Line Certification Act that preempted the conflicting ordinance?

Appellant’s answer: No.

Appellee MPSC’s answer: Yes.

Appellee METC’s answer: Yes.

Court of Appeals’ answer: Yes.

3. The consent clause of article 7, § 29 states that a utility may not use streets or public places without a municipality’s consent. The reasonable-control clause of this same section allows regulation of the utility’s use consistent with state law. Oshtemo’s ordinance goes beyond prescribing the manner of granting or withholding consent and regulates the location and construction of transmission lines. Does the ordinance fall under § 29’s reasonable-control clause?

Appellant’s answer: No.

Appellee MPSC’s answer: Yes.

Appellee METC’s answer: Yes.

The Court of Appeals did not address this question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 7, § 17 of Michigan's 1963 Constitution

Each organized township shall be a body corporate with powers and immunities provided by law.

Article 7, § 22 of Michigan's 1963 Constitution

Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. *Each 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.* No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.]

Article 7, § 29 of Michigan's 1963 Constitution

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. [Emphasis added.]

Electric Transmission Line Certification Act, MCL 460.561 *et seq*:

Sec. 568(4)-(6):

(4) The commission shall grant or deny the application for a certificate not later than 1 year after the application's filing date. If a party submits an alternative route for the proposed major transmission line, the commission shall grant the application for either the electric utility's, affiliated transmission company's, or independent transmission company's proposed route or 1 alternative route or shall deny the application. The commission may condition its approval upon the applicant taking additional action to

assure the public convenience, health, and safety and reliability of the proposed major transmission line.

(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 applicant has accepted the conditions contained in a conditional grant.

(6) A certificate issued under this section shall identify the major transmission line's route and shall contain an estimated cost for the transmission line.

Sec. 570(1):

(1) If 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.

Michigan Zoning Enabling Act, MCL 125.3101, *et seq.*

Sec. 205(1):

(1) A zoning ordinance is subject to all of the following:

- (a) The electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575.

INTRODUCTION

This case is about keeping the lights on. If Oshtemo gets its way, it will benefit in the short term, but we will all lose in the long term. It may not happen right away, but eventually, our aging electric system will fall into disrepair, utilities will not be able to build or fully repair, and the lights will go out in Michigan.

The Township argues that their goal is not to destabilize Michigan's power grid, or to prevent necessary infrastructure upgrades, but this is the inevitable outcome of Oshtemo's position in this case. Local governments look out for their jurisdictions. They rarely have the interest or resources necessary to see the larger picture. Utility infrastructure is ugly, and no one wants it in his or her back yard. Thus, local governments often oppose and attempt to block utility infrastructure improvements that enter their environs. But if every municipality in the state has the ability to block every utility infrastructure improvement for any reason, no matter how inconsequential, utilities will be unable to build any infrastructure. This is not mere conjecture – this is history.

The landscape before the Electric Transmission Line Certification Act (ETLCA or the Certification Act) was very different than it is today. A patchwork of local ordinances preventing infrastructure and piecemeal judicial decisions regarding the public necessity of particular transmission projects caused a major infrastructure problem in Michigan. No one was building transmission infrastructure. The Michigan Legislature recognized this growing problem. The Certification Act took the public-necessity question out of the hands of local judges and put it into the hands of the MPSC – an entity that could weigh competing

interests with the best interests of Michigan as a whole in mind. ETLCA also prevents local municipalities from unreasonably blocking construction of transmission infrastructure in their jurisdictions, which is exactly what Oshtemo attempted to do here. Oshtemo attempted to block a necessary solution to an identified system reliability problem that could cause widespread power outages in Kalamazoo and Battle Creek. This is why the MPSC's role is vital – Oshtemo is looking out for Oshtemo, but is not looking out for Kalamazoo and Battle Creek; it does not see the bigger picture.

The Michigan Constitution protects the rights of municipalities like Oshtemo to reasonably grant or withhold consent to utility activities within its borders and to exercise reasonable control over its roads and public spaces. But the Constitution does not grant a municipality an unchecked veto power over every necessary utility infrastructure project that happens to cross its borders. Oshtemo Township argues ETLCA is unconstitutional because it limits a municipality's ability to grant or withhold consent under article 7, § 29 of the Michigan Constitution. But article 7, § 17 of the Constitution specifically limits the powers of townships to those powers "provided by law," and that limitation applies to a township's power to withhold consent under § 29. Townships, unlike cities, do not have any inherent police powers. The township only has that power granted it by the Legislature via the Zoning Enabling Act, which makes all zoning specifically subject to ETLCA. As such, ETLCA provides the framework for deciding whether a municipality has unreasonably conditioned its consent.

Moreover, this Court has consistently held, since 1908, that a municipality may not arbitrarily withhold or unreasonably condition its consent to utility activities. But Oshtemo thinks it may place any reasonable condition, unfettered by state law. Such an interpretation must fail because the Legislature has the power to set out what conditions are unreasonable, and further, it would render nugatory the second sentence of article 7, § 29 regarding a municipality's reasonable control being subject to other provisions of the constitution. And, furthermore, Oshtemo Township concedes that its consent cannot be unreasonably withheld.

With respect to ETLCA, there can be no question the Commission's certificate and the ordinance conflict. One provides for location and construction of the line aboveground. The other provides for the location and construction of the line underground. The Commission did not err in finding its certificate took precedence over the Township's undergrounding ordinance.

Finally, this Court need not interpret the consent clause of article 7, § 29 to resolve this case. Oshtemo Township did not merely deny consent, and its ordinance does not merely establish a process for granting or withholding consent. Rather, Oshtemo revised a zoning ordinance regulating the location and construction of transmission lines underground, which falls into the legal framework of the reasonable-control clause, not the consent clause, of article 7, § 29. This Court has ruled unequivocally that in exercising reasonable control over its streets and public places, local ordinances must cede to conflicting state law. This Court should affirm.

COUNTER-STATEMENT OF FACTS

Oshtemo Township's three-and-a-half page statement of facts (Oshtemo Township Brief, pp vii-x) is incomplete. The Commission submits the following counter-statement of facts.

The Michigan Legislature enacted the Electric Transmission Line Certification Act to prevent municipalities from interfering with construction and placement of Michigan's critical transmission infrastructure.

To understand the facts of this case, it is important have a basic understanding of the purpose of the Electric Transmission Line Certification Act. In 1995, Michigan was one of only seven states without a transmission-line certificate-of-need process. (8b; "Electric Transmission Line Siting Process," State Senator Mat J. Dunaskiss (April 4, 1995).) "Michigan's demand for electricity is increasing but opposition to constructing transmission infrastructure has stymied the utilities[] ability to meet the ever increasing demand of the consumer. Ultimately, this opposition inhibits economic growth." (*Id.* at 1b.) This opposition to infrastructure is often referred to as the "not in my backyard" phenomenon. In fact, in 1995, there were no major electric transmission lines under construction in Michigan. (*Id.* at 4b.)

State Senator Dunaskiss sponsored Senate Bill 409, which became PA 30 of 1995, the Certification Act, to fix the "not in my backyard" problem. He explained, "Developing a rational energy policy that assures adequate availability statewide is properly a state's responsibility." (*Id.* at 1b.) He noted, "Under the current system, developments to meet public energy needs are constructed much like a patchwork

quilt across the state without a uniform process.” (*Id.*) “This exposes 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 Office, Memorandum to the Technology and Energy Committee, Electric Line Certification, Tom Atkins, SB 409-414, March 22, 1995 at 1. Not only would the Certification Act bring all major transmission-line construction under the control of the MPSC, “[b]y providing that a PSC-issued certificate would preempt local ordinances and would be binding upon the court in a condemnation action, the bills would eliminate the current patchwork of local regulation and judicial decision-making.” Senate Fiscal Agency, Bill Analysis, K. Lundquist, SB 408-414, March 28, 1995, at 5.

In 1995, the Legislature enacted the Certification Act, MCL 460.561 *et seq.*, (1) “to regulate the location and construction of certain electric transmission lines”; (2) “to prescribe powers and duties of the Michigan public service commission and to give precedence to its determinations in certain circumstances”; and (3) “to prescribe the powers and duties of local units of government and officials of those local units of government.” Title, 1995 PA 30.¹ The Legislature recognized how vital a reliable transmission system is to our state when it enacted MCL 460.563:

¹ “Although an act’s title is not to be considered authority for construing an act, it is useful for interpreting the purpose and scope of the act.” *Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220, 230 (2012) citing *Mich Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 409 n 6 (2003).

“(1) Transmission of electricity is an essential service. (2) This act shall control in any conflict between this act and any other law of this state.”

The Certification Act created the process by which the MPSC decides whether the quantifiable and nonquantifiable public benefits of a proposed transmission line justify its construction, decides whether the proposed route is reasonable and feasible, and determines whether the proposed transmission line presents an unreasonable threat to public health or safety. MCL 460.568(5)(a)–(c). The Certification Act mandates Commission approval for major transmission lines. MCL 460.565. A major transmission line is one that is five miles or more in length “through which electricity is transferred at system bulk supply voltage of 345 kilovolts (kV) or more.” MCL 460.562(g), MCL 460.567(1). While a certificate is not mandatory for smaller transmission lines, the Certification Act does contain a voluntary process for Commission approval of these non-major transmission lines. MCL 460.569.

Often, a utility can reach easement agreements with affected landowners and municipalities when constructing non-major transmission lines. When these negotiations fail, however, the Certification Act provides a process where the utility can apply for a certificate from the Commission for the new transmission line. The certificate takes “precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice.” MCL 460.570(1). Furthermore, the certificate is “conclusive and binding as to the public convenience and necessity for that transmission line and its compatibility with the public health and safety or any zoning or land use

requirements” in a subsequent eminent domain proceeding. MCL 460.570(3). Voluntarily applying for a certificate of need for a non-major line confers benefits (avoiding unreasonable local opposition to transmission infrastructure and avoidance of public necessity determinations in future condemnation proceedings); but it also has significant drawbacks for a transmission company. Once a transmission company has applied for a certificate, the Certification Act prohibits any construction of the proposed line until the MPSC has issued a certificate of necessity: “If a . . . transmission company applies for a certificate under this section, the . . . transmission company shall not begin construction of the proposed transmission line until the commission issues a certificate for that transmission line.” MCL 460.569(1).

The Certification Act requires that the applicant include the following data in its application in support of its request for a certificate of public convenience and necessity (among other requirements):

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. [MCL 460.567(2)(d).]

Upon receipt of an application for a certificate of public convenience and necessity, the Commission must commence a contested-case proceeding. MCL 460.568(2). Any affected party, specifically including municipalities and landowners, may intervene as of right. *Id.* The Certification Act provides that the Commission must grant an application for 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 applicant has accepted the conditions contained in a conditional grant. [MCL 460.568(5).]

Thus, the Legislature limited the authority the Commission has in approving transmission-line certificates of necessity to a very constricted set of criteria. In addition, “[t]he Commission may condition its approval upon the applicant taking additional action to assure the public convenience, health, and safety and reliability of the proposed transmission line.” MCL 460.568(4). The certificate must also “identify the major transmission line’s route and shall contain an estimated cost for the transmission line.” MCL 460.568(6). The Commission has one year after an applicant’s filing date to grant or deny the application for a certificate. MCL 460.568(4).

The 2003 power outage caused increased federal and state focus on reliability.

In August of 2003, overloaded transmission lines hit unpruned foliage in Ohio causing a local blackout that cascaded into widespread distress on the electric grid. The blackout affected an estimated 50 million people in Michigan, seven other states, and Ontario, and shut down 508 generating units at 264 power plants. The economic costs of the blackout were massive, costing the United States between \$4

billion and \$10 billion.² Following the 2003 blackout, the federal government created the North American Electric Reliability Corporation³ (NERC) and regional independent system operators, which serve as NERC Planning Authorities. The Midcontinent Independent Transmission System Operator, Inc. (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, and Manitoba.⁴ (27b; 3 TR 86.) It is because the impact of transmission failures on our interconnected grid is so catastrophic that reliability standards for transmission systems exist, that they are enforceable, and that fines for violation of NERC standards are up to \$1 million per day.

METC discovered it had a system reliability problem, and MISO approved the Proposed Transmission Line as the most effective long-term solution.

During a routine planning session in 2007, METC determined that it has a reliability risk in the Kalamazoo area. (21b; 3 TR 80.) METC found that if one of

²U.S.-Canada Power System Outage Task Force *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations*, <http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/BalckoutFinal-Web.pdf> retrieved February 13, 2014, pp 1, 45-68, 74.

³ NERC promulgates and enforces mandatory federal transmission reliability standards. NERC may fine transmission companies up to \$1 million per day per violation. 16 USC 824o.

⁴ Mr. Capra's filed his testimony on July 31, 2012. Since that time, MISO has expanded to include parts of Mississippi, Louisiana, Arkansas, and Texas. Organization of MISO States, *Members* <<http://www.misostates.org/>> (accessed March 14, 2016).

the three 345/138 kilovolt (kV) transformers at its Argenta Station is taken out of service for any reason (including required maintenance), and another transformer fails, the remaining load “would be projected to overload the remaining transformer at system load levels at or below (and above) 85% of the peak system load level.” (20b; 3 TR 79.) The three transformers at the Argenta Station provide power to the entire Kalamazoo and Battle Creek areas. This situation does not meet NERC reliability standards. (27b; 3 TR 86.)

In response to this reliability problem, METC identified several options to resolve it, and submitted them to MISO for evaluation in the 2009 MISO Transmission Expansion Plan (MTEP). (21b-23b, 25b; 3 TR 80-82, 84.) Among the options presented to MISO was the transmission line at issue in this case (the Proposed Transmission Line or Line). (*Id.*)

MISO first considered the Proposed Transmission Line in 2008 while “considering other feasible transmission alternatives” in a search for “the most effective long term solution” to the identified transmission reliability problem. (28b; 3 TR 87.) MISO, its stakeholders, and MSPC Staff considered the various options several times, including during meetings held on May 14, 2008, December 16, 2008, and July 17, 2009. (27b-28b, 39b; 3 Tr. 86-87, 357.) Ultimately, MISO’s Board of Directors approved the Proposed Transmission Line as the best alternative in December 2009. (29b; 3 TR 88.)

Following MISO approval, METC began planning the route and negotiating with local communities.

METC contracted with a private firm, Burns & McDonnell, to perform a route selection study for the Proposed Transmission Line. (METC Exhibit A-11 at 5.) Both METC and its contractor began making contact with local officials about the project in late 2010. (*Id.* at 10.) In December of 2010, METC and its contractor met with officials from Oshtemo to discuss the line and its route. (3 TR 161-2.) In early 2011, METC met with Oshtemo Township's supervisor, attorney, planner, clerk, and treasurer to discuss the Line. (*Id.*) Throughout 2011, METC continued to meet with Oshtemo officials and landowners. (61b-63b; 3 TR 162-164.)

Oshtemo Township amended its "Utility Control" ordinance specifically to block construction of the Proposed Transmission Line.

Shortly following a meeting between METC and landowners in late 2011, Oshtemo amended its "Utility Control" ordinance. Township witness Elizabeth Heiny-Cogswell testified that Oshtemo amended its ordinance when it thought that the Proposed Transmission Line would be built without there being a public hearing. (71b-73b; 3 TR 293-295.) Oshtemo's concerns related to the fact that there is no requirement that a utility seeking to build a non-major transmission line hold a public hearing. Nor is there any requirement of MPSC approval prior to a transmission company seeking to condemn property it needs to construct a new non-major transmission line. The Electric and Gas Corporations Act, MCL 486.251, *et seq.*, provides that "an independent transmission company shall have the power to condemn property that is necessary to transmit electricity for public use" MCL

486.252. Moreover, while this power is subject to both the Certification Act and the Uniform Condemnation Procedures Act, the Certification Act does not require a certificate for non-major transmission lines.

Therefore, in response to the Proposed Transmission Line's construction, Oshtemo adopted Ordinance No. 525 that amended Ordinance No. 114 to prohibit utilities from constructing lines without first securing the approval of the township board, submitting construction plans and environmental studies, and making a showing of necessity to the township prior to approval. (99a; Oshtemo Board Resolution No. 525.) According to the newly amended ordinance, METC would also have to bury portions of the line underground. (105a; Oshtemo Utility Control Ordinance No. 114.)

The Township's newly amended ordinance provides, in pertinent part:

- (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 . . .*
- (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 . . .

- (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...* 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. [105a-106a; Oshtemo Utility Control Ordinance No. 114 (emphasis added).]

Therefore, to comply with the new ordinance, METC would have to submit plans and studies to the Township for approval, would have to bury portions of the line underground, and would have to make a showing of necessity for the line, among other requirements. (*Id.*) And the Township would have the authority to “determine the location” of the proposed transmission line. (*Id.*) The ordinance also imposes penalties for a failure to comply with its provisions. (*Id.* at 107a.)

METC determined compliance with Oshtemo's new ordinance would be too costly, so it began preparing to file an application for a certificate in hopes of avoiding the ordinance.

METC determined that the cost of "constructing the line underground would be approximately 5-7 times more per mile." (100b; METC Exhibit A-24.) Building underground is more expensive than stringing overhead wires because it requires "(1) more complex and expensive underground cables (compared to bare overhead wires); (2) significant excavation and civil engineering work; and, (3) increased labor costs due to installation of the cables, duct banks, and terminations." (101b; METC Exhibit A-40.) In addition, on an ongoing basis, it is much more expensive to maintain underground lines as maintenance costs for underground lines "are much higher than the maintenance costs for overhead lines." (102b; METC Exhibit A-40 p 2.) Apparently because of the increased cost of building underground and complying with the township application process, METC decided to seek a certificate-of-need from the Commission.

During the summer of 2011, METC's contractor conducted a new route-selection study incorporating comments from landowners. (55b; METC Exhibit A-11, p11.) METC attended an Oshtemo Township meeting and advised them of the proposed and alternate routes, discussed the Certification Act process, and advised them that METC would hold a public meeting. (62b; 3 TR 163.) In June of 2012, METC held a public open house followed by a public meeting in Oshtemo Township where several individuals commented. (63b; 3 TR 164.)

Staff witness Lynn M. Beck testified that METC met all requirements for meeting with the public and municipal officials as set forth in MCL 460.566. (85b; 3 TR 324.)

METC filed its application for a certificate, and the MPSC conducted a contested case.

On July 31, 2012, and pursuant to Public Act 30 (MCL 460.565), METC filed its application with the Commission for a certificate of public convenience and necessity. The application indicated that METC intends to construct a transmission line, “other than a major transmission line,” which consists of “two overhead double-circuit 138 kV lines with a 220-foot right-of-way running through Oshtemo Township, Kalamazoo County, and an electrical transmission substation in Almena Township, Van Buren County, Michigan.” (93b; 07/31/12 Application, p 4.)

METC sought a certificate under Section 9 of Act 30, which authorizes an independent transmission company to file an application for a certificate for a proposed transmission line other than a major transmission line. MCL 460.569.

Along with its application, METC pre-filed 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. (7/31/12 Application.) The Certification Act requires applicants to include certain data in its application. MCL 460.567(2)(a)-(l). The direct testimony and exhibits pre-filed by METC satisfied this basic requirement.

The Commission issued its notice of hearing, scheduling a prehearing conference. (8/20/12 Notice of Hearing.) METC served the notice of hearing on all affected municipalities and landowners as required by the Commission. (9/6/12 Proof of Service.)

At the prehearing conference, the administrative law judge granted the motions to intervene of Oshtemo Charter Township and numerous landowners.⁵ (1 TR 14–16.) The parties conducted discovery, submitted testimony, offered their witnesses for cross-examination, and all parties waived cross-examination of expert witnesses at the evidentiary hearing. The ALJ bound the pre-filed testimony and exhibits of METC, the Landowners, Oshtemo Township, and Staff into the record. The ALJ closed the record, which consists of 365 pages of transcript and 137 exhibits.

METC and Staff supported METC’s application; the Landowners and the Township opposed it.

The parties submitted briefs and reply briefs to the ALJ. Both METC and Staff argued that the Commission should grant a certificate for the Proposed Transmission Line. Oshtemo Township opposed the grant of a certificate. Unsurprisingly, Oshtemo Township took the “not in my back yard” position, which focused on opposition to the location of the Line. The Township suggested alternate routes would be preferable or less costly. The Township argued that if the Commission did approve the Line, that it should condition the certificate on

⁵ There were additional intervening parties not involved in this application.

compliance with the Township's zoning ordinance. Finally, the Township argued the grant of a certificate would be unconstitutional (although the Township did not brief the issue on appeal to the Court of Appeals).

The Commission granted METC's application for a certificate.

The ALJ issued her proposal for decision, finding that the proposed route was reasonable and feasible, and that the Line did not pose an unreasonable threat to health or safety. The ALJ also recommended that the MPSC deny METC's application because the ALJ believed the Line's quantifiable and nonquantifiable benefits did not justify its construction. The ALJ also recommended that if the Commission did grant a certificate, that it be conditioned on METC burying a portion of the line in compliance with Oshtemo Township's zoning ordinance, or reopening the record for additional proofs regarding whether the line should be above or below ground. (200a; 4/29/13 Proposal for Decision at 64.)

METC, Staff, the Landowners, and Oshtemo Township filed exceptions and replies to exceptions to the ALJ's proposed findings in the proposal for decision. On July 29, 2013, the Commission issued its 27-page order. The Commission granted the application for a certificate, finding that the quantifiable and nonquantifiable benefits of the Proposed Transmission Line justified its construction and that the route was both reasonable and feasible. (225a-227a; 7/29/13 Order, p 23-25.) The Commission rejected objections to the route and other alternatives. The Commission also stated that its grant of the certificate preempted Oshtemo

Township's zoning ordinance and did not require METC to bury the line. (227a-228a; 7/29/13 Order, p 25-26.) Oshtemo Township appealed.⁶

The Court of Appeals affirmed the Commission's grant of a certificate and its precedence over Oshtemo Township's conflicting ordinance.

In its November 18, 2015 per curiam opinion, the Court of Appeals affirmed the Commission's grant of the certificate, rejecting the Township's (and other appellants') arguments that the Line was not needed, was not reasonable, and was not feasible and that the certificate took precedence over the ordinance by statute. Oshtemo Township did not raise at the Court of Appeals the question whether ETLCA is unconstitutional because it violated article 7, § 29; however, this issue was raised by amici, and the Court of Appeals addressed the issue. The Court of Appeals explained that the argument "that Act 30 preempted Oshtemo Township's ordinance and is unconstitutional ignores the clear language of constitutional provisions, MCL 460.570(1), and binding precedent." *In re Application of Michigan Electric Transmission Co*, 309 Mich App 1, 19 (2014). The Court of Appeals found the Commission was entitled to find that METC did not have to comply with the undergrounding ordinance, though this finding was not mandatory. *Id.* The Commission was entitled to accept record evidence that undergrounding portions of the line would be more costly and thus less favorable than the alternative. *Id.* The Court of Appeals explained that once the PSC issued the certificate allowing METC

⁶ Several other parties also opposed the certificate and appealed the Commission's decision to the Court of Appeals. These other parties did not seek leave to appeal from the Court of Appeals' decision.

to build a line entirely above ground, Oshtemo Township's ordinance conflicted with the certificate. *Id.* "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." *Id.* at 20. The Court of Appeals explained that "[t]he 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." *Id.*, citing *City of Lansing v State*, 275 Mich App 423, 433 (2007); see also Const 1963, art 7, § 22. The Court of Appeals rejected Oshtemo Township's argument that the Commission was required to determine if the ordinance conflicted with "some state law other than the [certificate of public convenience and necessity]" stating that 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.*

The Court of Appeals also rejected Oshtemo Township's argument that Act 30 impermissibly delegates legislative power to the Commission. Oshtemo does not make similar impermissible-delegation-of-legislative-power arguments in this appeal. Ultimately, the Court of Appeals found that "[t]he issues raised by appellants and amici in these consolidated cases are without merit and do not warrant reversal. . ." *Id.* at 21. It is from this opinion Oshtemo Township appeals.

STANDARD OF REVIEW

The standard of review for MPSC orders is generally narrow in scope and limited to determining whether the Commission's order is lawful and reasonable. The Michigan Legislature has established the standard of review for Commission orders. In § 25 of the Railroad Act, the Legislature identified the manner in which MPSC orders are to be reviewed by providing that all rates, classifications, regulations, practices, and services fixed by the Commission are deemed *prima facie* lawful and reasonable. MCL 462.25. Further, § 26(8) of the Railroad Act places a heavy burden of proof on an appellant to show by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. MCL 462.26(8).

This Court has explained how difficult it is for an appellant to prove that a MPSC order is unlawful or unreasonable. To find a Commission order 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 re MCI Telecomms Compl*, 460 Mich 396, 427 (1999), quoting *Giaras v Public Service Comm*, 301 Mich 262, 269 (1942). Likewise, in the same decision, the Court stated that "[t]he hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.*

While an appellant always has the burden of proving that a Commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating the appellant's arguments depending on the nature of the agency decision involved. For judicial or quasi-judicial decisions where a hearing is

required, the agency's decision must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Dowerk v Twp of Oxford*, 233 Mich App 62, 72 (1998). Even in these "substantial evidence" cases, however, Michigan courts have held that § 26 of the Railroad Act does not grant appellate courts all of the powers traditionally vested in a court of equity, nor the power to make *de novo* findings of fact. See *In re Rovas Compl*, 482 Mich 90, 101 (2008). Rather, a court should not substitute its judgment in place of the Commission's factual findings or regulatory judgment. *Consumers Power Co v Public Service Comm*, 196 Mich App 687, 691 (1992). If an administrative agency's finding of fact is supported by evidence—even if there is conflicting evidence—it is the general rule that the agency's findings are conclusive upon the reviewing court. *Bejin Co v Public Service Comm*, 352 Mich 139, 153 (1958).

In contrast, the MPSC's legislative or quasi-legislative judgments may not be overturned unless the Commission exceeded its statutory authority or abused its discretion. *In re Rovas Compl*, 482 Mich at 100-101; *Coffman v State Board of Examiners in Optometry*, 331 Mich 582, 589-590 (1951) (holding that the Legislature may confer authority to administrative agencies to exercise discretion and promulgate rules to carry out a statute's purpose, and holding that courts will only interfere if the administrative body abuses its discretion). An abuse of discretion does not occur unless "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254

(2005). Moreover, the abuse-of-discretion standard must be given a more deferential review than *de novo*: “[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.”

Maldonado v Ford Motor Co, 476 Mich 372, 388 (2006), citing *People v Babcock*, 469 Mich 247, 269 (2003).

Generally, issues of constitutional and statutory construction are questions of law reviewed *de novo*. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115 (2006). In *Bonner v City of Brighton*, 495 Mich 209, 221 (2014), this Court explained its analysis of constitutional challenge to statutes:

We review *de novo* questions of constitutional law; however, this Court accords deference to a deliberate act of a legislative body, and does not inquire into the wisdom of its legislation. The decision to declare a legislative act unconstitutional should be approached with extreme circumspection and trepidation, and should never result in the formulation of a rule of constitutional law “broader than that demanded by the particular facts of the case rendering such a pronouncement necessary.” [*Id.* (internal citations omitted).]

The *Bonner* Court explained, “Every reasonable presumption or intendment must be indulged in favor of the validity of the 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.” *Id.* citing *Cady v Detroit*, 289 Mich 499, 505 (1939).

Whether a state statutory scheme preempts or takes precedence over a local ordinance is also a question of statutory interpretation generally reviewed *de novo*. *Capital Area Dist Library*, 298 Mich App at 227. However, this Court has held that

an agency's statutory interpretation is entitled to the "most respectful consideration" and should not be overturned without "cogent reasons." *In re Rovas Compl*, 482 Mich at 93. At the same time, appellate courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation. *Id.* In *In re Rovas*, this Court reaffirmed the *Boyer-Campbell Co v Fry* standard of review for agencies' statutory interpretations. *In re Rovas Compl*, 482 Mich at 103. The *Boyer-Campbell* standard of review states that while agency interpretations are not controlling, they are an aid, and courts should give them weight when construing doubtful or obscure laws that the agency administers. *Boyer-Campbell Co v Fry*, 271 Mich at 296-297. The *Boyer-Campbell* Court even held that agency interpretations are "sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." *Id.*

These standards apply to each of the following arguments. Accordingly, Oshtemo Township and the Landowners has the heavy burden of proving by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. MCL 462.26(8). The Landowners have not shown by clear and satisfactory evidence that the Commission failed to follow a mandatory statutory provision or that it abused its discretion in any way. *In re MCI Telecomms Compl*, 460 Mich at 427; MCL 462.26(8). Nor has the Township established that the Certification Act is unconstitutional.

ARGUMENT

I. **The Certification Act is constitutional.**

This Court should uphold the constitutionality of the Certification Act for three independent reasons. First, the authority of townships are established by article 7, § 17, which expressly limits their authority to law as established by the Legislature. Second, the Certification Act is consistent with the first sentence of article 7, § 29 regarding consent irrespective of § 17. Third, Oshtemo Township concedes that it must act reasonably on its authority to withhold consent, and the Legislature has the authority to make a final determination on this question of reasonableness.

A. **Under article 7, § 17, townships have only the powers “provided by law,” and therefore township ordinances remain subject to state statutes.**

Article 7, § 17 of the Constitution provides: “[e]ach organized township shall be a body corporate with powers and immunities provided by law.” Indeed townships, unlike cities, “have no police power on their own, but only have those powers and immunities which are provided by law.” *Detroit Edison Co v Richmond*, 150 Mich App 40, 47-48 (1986); *Hanslovsky v Twp of Leland*, 281 Mich 652, 655 (1937) (no organized township has any power or authority, except that prescribed by law).

In other words, townships, like other municipalities, have no inherent authority on their own to regulate zoning. The State must specifically grant them such authority. *Lake Township v Sytsma*, 21 Mich App 210, 212 (1970). And townships, like other municipalities, derive their authority to enact zoning

ordinances from the Zoning Enabling Act, MCL 125.3201, *et seq.*, which specifically provides that “(1) A zoning ordinance is subject to all of the following: (a) The electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575” MCL 125.3205. Finally, the Certification Act provides that a certificate takes precedence over any conflicting ordinance. MCL 460.570(1).

In short, the constitutional flow of authority is clear: (1) under article 7, § 17, the township’s authority is not unlimited but rather is controlled by law; (2) the law that gives townships the authority to enact zoning ordinances in the first place (i.e., the Zoning Enabling Act) specifically provides that zoning ordinances are subject to another relevant statute (the Certification Act); and (3) the Certification Act provides that a certificate of necessity trumps a conflicting ordinance.

Because the first sentence of article 7, § 29 addresses “the consent of the duly constituted authority of the . . . township,” it must be read against the backdrop of both § 17 and applicable statutes, because it is, as just explained, § 17 and those statutes that provide that the authority mentioned in § 29 to townships.

One related point is worth addressing on the issue of constitutional authority. In his criticism of the *City of Lansing v State* decision, Justice Markman suggested that article 7, § 22 (which says that city and village ordinances are “subject to the constitution and law”) does not modify article 7, § 29 because § 22 is more general than is § 29. *City of Lansing v State*, 480 Mich 1104, 1105 (2008) (Markman, J., dissenting). But this debate is irrelevant here, because § 22’s limitation applies only to cities and villages, and not also to townships (and counties), as § 29 does.

Rather, even in the absence of § 22, Oshtemo’s zoning ordinance is still constrained by state law because of the express limitation on *township* authority set out in § 17: “Each organized township shall be a body corporate with powers and immunities provided by law.” (See also 99a, 103a; Oshtemo Township “Utility Control” Ordinance Nos. 525 and 114.)

Furthermore, Justice Markman’s criticism may not be leveled at § 17. The second canon of construction provides that “[w]hen there is conflict between general and specific provisions in a constitution, the specific provision must control.” *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-40 (1978) citing *McDonald v Schnipke*, 380 Mich. 14, 20 (1968); *Hart v Wayne County*, 396 Mich. 259, 273 (1976). However, in this case there is no conflict between the constitutional provisions. Rather the constitutional provisions are harmonious. This Court has said, “[w]here, as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both. This is so because, both having been adopted simultaneously, neither can logically trump the other.” *Straus v Governor*, 459 Mich 526, 533 (1999) citing *Kunzig v Liquor Control Comm*, 327 Mich 474, 480–481 (1950). Thus, a township’s authority to withhold consent under § 29 is not absolute, but is bound by law as set out in § 17.

B. The Certification Act is consistent with the first sentence of article 7, § 29 because it does not impermissibly interfere with a municipality's right to grant or withhold consent.

As explained more fully above, ETLCA allows transmission companies to petition for a certificate of necessity for construction of transmission lines in Michigan. At issue is the Commission's July 29, 2013 order granting METC a certificate under the Certification Act to construct an overhead transmission line. Section 10 of ETLCA is unambiguous: "[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). The Township claims ETLCA violates article 7, § 29 of Michigan's 1963 Constitution, which provides that the use of highways and other public places by utilities must be subject to local approval:

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to 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.

The Township interprets this provision as granting municipalities the right to consent or withhold consent to utility activities within their borders unfettered by state law. As the preceding section explains, that is not accurate – § 17 establishes that a township's authority arises from statute and thus may be constrained by

statute. But separate from that point, even the Township agrees that the right to consent conferred by the Constitution is not absolute. Oshtemo states it is clear that “such consent not be arbitrary or unreasonably withheld or conditioned.” (Oshtemo Brief, p 14.) This statement is consistent with a century of this state’s jurisprudence.

In *City of Lansing*, 275 Mich App at 429, 433, the Court of Appeals held that the Legislature has the authority to limit the manner and circumstances under which a city may grant or withhold consent under article 7, § 29. The Court explained that although § 29 purports to grant municipalities the absolute authority to grant or withhold consent to a utility to use its highways, streets, alleys, or other public places for the placement of utility facilities, “our Supreme Court has stated that consent cannot be ‘refused arbitrarily and unreasonably’” *Id.* at 432, citing *Union Twp*, 381 Mich 82, 90. “Hence, the grant of authority is not absolute.” *Id.* The *City of Lansing* Court explained further that “[i]n order to give effect to [article 7, § 29], a city must exercise its authority to grant or withhold consent through its general power to adopt resolutions and ordinances relating to its municipal concerns.” *City of Lansing*, 275 Mich App at 433. The *City of Lansing* Court found that the constitutional provisions of article 7, § 29 were bound by those of article 7, § 22, granting municipalities the “power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.” *Id.* The *City of Lansing* Court reasoned:

Because 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.* [*Id.* (emphasis added).]

Thus, under the *City of Lansing*, a city's constitutional authority to grant or withhold consent is always constrained by state law.

The Court of Appeals in this case relied upon the *City of Lansing* explaining that “[t]his Court found that because MCL 247.183(2) limited a local government’s authority in a narrow manner, the statute was a proper exercise of the Legislature’s authority to limit the manner and circumstances under which a city may grant or withhold consent under § 29.” (237a (internal citations omitted).)

The Township argues this Court should ignore the *City of Lansing* analysis and instead adopt Justice Markman’s reasoning in his dissent from this Court’s denial of an application for leave to appeal the *City of Lansing* decision. But in addition to the fact that it did not address § 17, even Justice Markman’s dissent from denial did not definitively state that the first clause of article 7 § 29 is an absolute right not subject to any limitation for reasonableness. Rather, Justice Markman indicated he would have granted leave to appeal in order to consider the issue. *City of Lansing v State*, 480 Mich at 1104-05 (Markman, J, dissenting). It is important to recall that the statute at issue in *City of Lansing* was very different from the statute at issue in the case at bar.

In *City of Lansing*, the Court of Appeals noted that because the state statute in question limited a “local government’s authority to grant or withhold consent to the use of a narrow class of public property by a specific type of utility, it [was] a

proper exercise of the Legislature’s authority to limit the manner and circumstances under which a city may grant or withhold consent under § 29.” *Id.* at 433-434. But even that limited statute, MCL 247.183, was far more restrictive of a municipality’s authority to grant or withhold consent, than ETLCA is, because that statute completely removed the municipality’s ability to withhold consent at all, rather than merely prohibiting conflicting ordinances (as does ETLCA). *Id.* That statute was the type of provision that Justice Markman was concerned about – MCL 247.183 completely eliminated the city’s right to exercise its constitutional rights.

The limitations at issue in *City of Lansing* on a municipality’s authority to grant or withhold consent under MCL 247.183 placed a far greater restriction on municipal authority over rights-of-way access than does ETLCA. MCL 247.183 provides that utilities need not obtain municipal consent to construction and maintenance of “utility lines and structures, including pipe lines, longitudinally within limited access rights-of-way and under any public road, street or other subsurface that intersects any limited access highway at a different grade.” For example, MCL 247.183 applies to “any utility.” In contrast, the Certification Act applies only to a very small subset of utilities: entities owning electric transmission assets necessary to transfer electricity at 100 kilovolts or more. MCL 460.562(a), (e), (f), (k). Further, MCL 247.183(2) does not require the Commission to review and approve the utility’s plan to build new lines or structures longitudinally within the right-of-way. There is no test a utility must meet before it may construct longitudinally within the right-of-way. Act 30, by contrast, requires the affiliated

transmission company to file a petition seeking Commission permission for a certificate of public necessity, and the Commission may only grant that permission if it meets specific statutory requirements. MCL 460.568(5). And it is only once an affiliated transmission company has proven the statutory requirements that the Commission may grant a certificate, and it is only once the Commission grants such a certificate that a municipality's authority over its rights-of-way and public places are restricted. MCL 460.570(1). Moreover, that restriction is limited to preventing municipalities from prohibiting or regulating "the location or construction of a transmission line for which the commission has issued a certificate" in such a way that conflicts with the certificate. *Id.* This is a far cry from the restriction in MCL 247.183, which completely prohibits a municipality's right to withhold consent to construction of lines longitudinally within its rights-of-way. MCL 247.183.

Because ETLCA does not completely remove a municipality's ability to exert reasonable control, or withhold consent as in MCL 247.183, this Court does not need to reach the type of analysis conducted in *City of Lansing* regarding the scope of the evisceration of municipal consent. Under ETLCA, municipalities maintain their right to grant or withhold consent and may enact ordinances, so long as they are consistent with the certificate.

Justice Markman expressed concerns regarding the *City of Lansing* Court's failure to treat the first and third clauses of article 7 § 29 differently, arguing that, at least arguably, they should be treated differently because the first sentence does not use the word "reasonably." *City of Lansing*, 480 Mich at 1105 (Markman, J,

dissenting). However, the *City of Lansing* Court was not the first to consider the consent clause of article 7, § 29 or determine conditions must not be unreasonable. This Court, in *Union Township*, found that consent of a municipality cannot be “refused arbitrarily and unreasonably.” *Union Twp*, 381 Mich at 90, citing *People ex rel Maybury v Mutual Gas Light Co*, 38 Mich 154, 155 (1878), and OAG 1926-28 p 103. Given this Court has long held that municipal consent may not be withheld arbitrarily or unreasonably conditioned, stare decisis weighs in favor of following this Court’s precedent.

The Court of Appeals took a thorough look at cases interpreting the consent clause in *TCG Detroit v City of Dearborn*, 261 Mich App 69 (2004). In *TCG Detroit*, a telecommunications company sued the city alleging the city violated the Michigan Telecommunications Act (MTA) by failing to issue a permit, placing certain conditions, and setting certain fees pursuant to city ordinance. The Court of Appeals examined whether the MTA, which provides that a local government may not exact compensation for telephone companies’ access to its right-of-way in excess of certain costs in granting a permit impermissibly impinged on the grant of authority to local governments provided in article 7, § 29. *Id.* at 76. The city argued that inherent in the consent clause was the right to condition that consent by charging “any reasonable compensation.” *Id.* at 79. The *TCG Detroit* Court did not agree. Following discourse on the origins of the consent clause, the *TCG Detroit* Court undertook an analysis of all prior cases interpreting the consent clause.

These cases fell into two general groups. The first group consisted of *Boerth v Detroit City Gas Co*, 152 Mich 654 (1908), *Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146 (1918), *Kalamazoo v Titus*, 208 Mich 252 (1919), *Traverse City v Citizens Telephone Co*, 195 Mich 373 (1917), *Traverse City v Michigan Railroad Comm*, 202 Mich 575 (1918), and *City of Niles v Michigan Gas & Electric Co*, 273 Mich 255 (1935). These cases stood for the proposition 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.” *TCG Detroit*, 261 Mich App at 87.

The second group of cases is comprised of *Detroit v Detroit United Railway*, 172 Mich 136 (1912), *Detroit, Wyandotte & Trenton Transit Co v Detroit*, 260 Mich 124 (1932), *People ex rel Maybury*, 38 Mich at 155, *Union Twp*, 381 Mich at 90, and *North Star Line, Inc v City of Grand Rapids*, 259 Mich 654 (1932). This second group of cases stands for the following proposition:

[W]here the activity being conducted on a city’s right-of-way is purely local, the city retains broad authority over the terms of its consent However, where the Legislature has occupied the field, a city retains only such power as is strictly referable to the reasonable control of its streets, which does not include the power to prohibit the activity [W]here the consent of the city is required, . . . consent cannot be refused arbitrarily or unreasonably. [*TCG Detroit*, 261 Mich App at 93-94.]

Unlike the *City of Lansing* case, which dealt with a statute that disposed of a municipality’s ability to withhold consent, the question in *TCG Detroit* was “whether the state can constitutionally limit [Dearborn’s] rights under the

Constitution by limiting the amount it can charge as a condition of consent.” *Id.* at 94. This question is very similar to the question here, which is whether the state can constitutionally limit Oshtemo’s rights under the Constitution by limiting construction and location as a condition of consent. Thus, the *TCG Detroit* case is more on point than is the *City of Lansing* case.

The *TCG Detroit* court found that under the reasonable control clause there is an implied power to condition consent, but that “this implied power is exercised by entering into contracts with providers, not by unilaterally imposing the terms of the grant of consent. The latter would constitute an attempt to exercise a state legislative function.” *Id.* at 95-95. The *TCG Detroit* Court explained, “the implied power to contract is subject to the superior legislative powers of the state.” *Id.* at 95. There is no express legislative grant of the power to fix fees other than by contract, and since the Constitution does not expressly grant that right to the cities, it remains with the state. *Id.* Because the state has the power to set rates, when it does so, it thereby sets “the outside parameters of a city’s powers to contract.” *Id.*

The *TCG Detroit* Court then focused upon the consent clause and the question “whether the state can limit the city’s ability to state the terms on which its consent will be granted.” *Id.* at 96. As in this case, the City of Dearborn conceded that there is a reasonableness limitation, but argued that it could impose any condition that is reasonable unfettered by state law. *Id.* The *TCG Detroit* court found that:

[E]ven under the consent clause, the power to set fees is an implied permissive contractual authority, and not a broad legislative authority.

The city can negotiate a contract setting forth fees, but cannot unilaterally impose a fee pursuant to this clause. The city can possibly withhold consent from anyone not willing to pay its fee, but the city cannot withhold consent unreasonably or arbitrarily. Thus, the extent of the city's right is that it may require as a condition of consent that a reasonable fee be paid, and may withhold consent from those who do not agree to pay the reasonable fee. [*Id.*]

This is no different than the situation here. Here, the power to regulate the location and construction (underground) is not a broad legislative authority, as that authority has specifically been delegated to the Commission under ETLCA. Rather, there is an implied permissive contractual authority. And there is a constitutional reservation of reasonable control (which must cede to any conflicting state law). *City of Taylor*, 475 Mich at 117-118, citing *People v McGraw*, 184 Mich 233 (1915).

Dearborn's complaint was that it wanted to impose a fee that was different from the fee set out in the MTA. So, the next question was "whether the right of consent is so broad as to preclude the state from setting the fees a city can charge if it does consent." *Id.* Similarly, here, Oshtemo's complaint is that it wants to impose a condition (underground) that is different from the condition (aboveground) set by the Commission in the Certificate under the Commission's broad legislative authority. The *TCG Detroit* Court noted that "[b]y its terms, the consent provision of [article] 7, § 29 only addresses consent, not the right to charge for that consent." *Id.* at 97. So, the question then was whether the city had an "unqualified right to negotiate any fee than can be regarded as reasonable, without legislative constraint on the terms of the fee. That is, does the Constitution guarantee that implied authority against interference by the Legislature? We conclude it does not." *Id.*

The *TCG Detroit* Court addressed the point raised by Justice Markman in his *City of Lansing* dissent, that the consent clause does not use the word “reasonable,” and also noted that it does not have the introductory clause “except as otherwise provided in this constitution.” But even apart from the fact that both of those cases involved cities, not townships, and so did not address article 7, § 17, the *TCG Detroit* Court found that these qualifications were not the basis for the Supreme Court’s decisions in the two groups of cases it had analyzed. “Rather, the discussion focuses on the nature of municipal and state legislative powers, and the principle that the municipality only has such powers as are expressly granted. Here what is expressly granted is the right to give or withhold consent.” *Id.* Even under the consent clause, the right to set fees or place any other condition on consent is permissive and implied. *Id.* Thus, the *TCG Detroit* Court explained, “the same analysis that is applied to the third clause would support the conclusion that with respect to the first clause (consent clause), the Legislature can set fees as long as it does not impermissibly infringe on the right to grant or withhold consent.” *Id.* This same analysis, when applied to the Certification Act, produces the same result. Other than the powers reserved to it under the reasonable control clause, the township has only implied rights to condition its consent. Both implied rights and the rights conferred in the reasonable control clause are constrained by state law. So, Oshtemo Township may impose such conditions on consent that are reasonable, and are not in conflict with state law. ETLCA is constitutional, as it does not

infringe on the township's ability to grant or withhold consent, it merely establishes the parameters of the conditions the Township may place on that consent.

Finally, the Township's argument that it may place any reasonable condition on its consent, even if it is in conflict with state law, cannot succeed. If that were the case, then the third clause of article 7, § 29 would be rendered surplusage or nugatory. It is a longstanding principle of statutory construction, also applicable to interpretation of constitutions, that "courts 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.' *Johnson*, 492 Mich 169, 177, citing *State Farm Fire & Cas Co*, 466 Mich 142, 146. If municipalities may place any condition they choose on their consent, of what value is the reasonable-control clause?

Municipalities could avoid the effect of the reasonable-control clause by claiming their conflicting ordinances were merely conditions on granting consent. This cannot have been the intention of the people in setting out the first clause of article 7, § 29. In fact, the people continued this constitutional provision in 1963 without making any substantive change from how it appeared in the 1908 Constitution.

The Supreme Court consistently applied the consent clause (see the two groups of cases analyzed in *TCG Detroit* discussed above) from 1908 forward placing limitations on the exercise of municipal consent. If this interpretation were repugnant, no doubt the drafters of the 1963 Constitution would have changed the language of this clause. The ELTCA recognizes this traditional interpretation of the consent clause and does not seek to enjoin municipal consent, but merely

defines the parameters within which municipalities may condition their consent. The Electric Transmission Line Certification Act is constitutional.

C. The Legislature holds the power to determine what conditions on municipal consent are unreasonable.

As this Court has long held, municipal consent may not be unreasonably conditioned. Even Oshtemo Township agrees on this point. Who then determines what conditions are unreasonable? As this Court said in *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306, 327 (2004), citing *In re Brewster Street Housing Site*, 291 Mich 313, 333 (1939): “Unlike the federal constitution, our Constitution ‘is not a grant of power to the legislature, but is a limitation upon its powers.’” Therefore, this Court explained, “the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States.” *Id.* citing *Attorney General v Montgomery*, 275 Mich 504, 538 (1936). The right to prescribe what conditions are unreasonable has not been reserved to some other branch of government in the Constitution, and as such, must lie with the Legislature.

II. ETLCA establishes that municipal conditions on consent are unreasonable if they are in conflict with a certificate granted by the MPSC.

In enacting ETLCA, the Legislature determined that any conditions municipalities might place on location or construction of a transmission line that are in conflict with a certificate are unreasonable. MCL 460.570. Thus, this Court need not interpret article 7, § 29. Rather, this Court may find that the Certification

Act merely determines certain circumstances under which a municipality is unreasonably withholding or conditioning its consent.

The Legislature believed that “[t]he Public Service Commission [was] best equipped to evaluate” transmission projects. (1b; “Electric Transmission Line Siting Process,” State Senator Mat J. Dunaskiss (April 4, 1995).) As such, the Legislature drafted MCL 460.570, which provides “If the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance . . . that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate.” Furthermore, the Legislature required the Commission to consider any existing ordinances in making its determination. MCL 460.567(2)(d) provides that in its application for a certificate, a utility must provide, “[i]f 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.”

In this case, METC provided information to the Commission in its application regarding Oshtemo’s zoning ordinance, and the Commission considered whether the Township’s condition, here undergrounding of transmission lines, was reasonable. The Commission duly considered the Township’s ordinance and its experts’ testimony about the reasons for the ordinance. The Township claimed below that the Commission erred by giving their arguments short shrift, but, this statement is plainly untrue, as the Order sets out the Township’s arguments and evidence in

detail. It is clear from actually reading the order that the Commission considered all of the Township's evidence and arguments in making its determination that METC did not need to bury the transmission line.

A. The Commission found underground construction costs were not reasonable.

The Township argued below that the Commission should have conditioned the certificate on METC building portions of the Line underground to comply with the Township's ordinance. However, METC proved the increased cost and burden that underground transmission line construction would carry. Specifically, METC noted, "[c]onstructing the line underground would be approximately 5-7 times more per mile." (100b; METC Exhibit A-24.) METC has also indicated that this estimate is a conservative estimate and it is likely that the cost could be greater than initially estimated: "[I]f 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." (101b; METC Exhibit A-40.) Further, in addition to the installation cost estimates, METC has explained that while it has estimated "installed costs," the maintenance costs for underground lines will be much higher over their service life as compared to overhead lines. (102b; METC Exhibit A-40 p 2.)

Despite the fact that the Township was the party who proposed underground construction, the Township failed to provide any testimony about the costs related to constructing the line underground, the impact on ratepayers, the added costs in

maintenance over the course of the line's service life, or the additional burdens caused by underground construction of the transmission line. Instead, the Township merely proposed underground construction, due to conformity with a local ordinance, without making any effort to prove underground construction was reasonable.

A party asserting an affirmative issue bears the burden of supporting its position. *Bunce v Secretary of State*, 239 Mich App 204, 216-217 (1999). Here, that is Oshtemo, as the Commission explained:

[T]he burden of proof demonstrating the practicality and expense of undergrounding these portions of the line in accordance with the ordinance, was Oshtemo's, not METC's. And the Commission finds that Oshtemo failed to carry its burden; it merely offered a proposal and expected METC to undertake the required analysis. The Commission therefore rejects the recommendation in the [proposal for decision] that the [certificate of public convenience and necessity] be conditioned on METC's compliance with the ordinance, and the alternative recommendation that the record be reopened [227a-228a; 7/29/13 Order p 26.]

Essentially, METC has presented information, through evidence admitted into the record, demonstrating that underground construction would greatly increase the cost of the line and increase maintenance costs over the line's service life. The Township provided no evidence to the contrary. The Commission thus determined that the Township's condition that METC bury the transmission line was not reasonable and did not condition the Certificate upon it.

Oshtemo Township argues that its ordinance does not "add expediently to the cost" and that "by limiting most of the underground segments to approximately 500 feet[,] METC/ITC should avoid heat build-up issues or difficulties in locating

underground outages.” (Oshtemo Brief, p 26.) Finally, Oshtemo argues that “the cost to comply with the local ordinance in this case will likely not exceed the contingent amount of the proposed project.” (*Id.*) However, it is important to note that none of these arguments are based upon record evidence. The Commission made its reasonableness determination based on the record before it, which was entirely devoid of any such evidence.

B. The Township’s unreasonable condition must cede to conflicting state law.

Section 10 of ETLCA is unambiguous: “[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). The Commission determined “that under the plain language of Sections 3 and 10 of Act 30, the Commission’s grant of [METC’s Certificate] preempts Oshtemo’s ordinance.” (227a; 7/29/13 Order, p 26.) If Oshtemo’s undergrounding condition had been reasonable, the Commission would have conditioned the Certificate upon compliance with the Township’s condition. But it was not. And, as the Township has said, its “consent cannot be arbitrarily withheld or unreasonably conditioned.” (Oshtemo Township Brief, pp 12, 14, 28-29.) It is the province of the Legislature to determine what conditions are or are not reasonable, and the Legislature delegated that authority to the Commission via the

Certification Act. The Commission did not err in finding that the certificate takes precedence over the conflicting ordinance.

C. The Township’s argument that there is no conflict between the ordinance and state law fails because the certificate is state law.

The Township takes the untenable position that its ordinance is not in conflict with state law, and so the certificate does not take precedence over the ordinance. In reality, the crux of the Township’s argument is that the Commission should have been required to find a conflict between the ordinance and some independent state law or regulation other than the certificate. But this position is not supported by the law, which states that “[i]f the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance. . . .” MCL 460.570(1). Thus, the conflict is between the certificate and the ordinance—not the ordinance and some other state law.

Where Oshtemo’s analysis goes off the rails is when it argues that the proper analysis is whether the ordinance is in conflict with some state law or regulatory scheme *other than the certificate*. But this argument ignores the plain language of the statute: “that certificate shall take precedence over a conflicting local ordinance.” *Id.* The Township’s analysis might carry some weight if the statute instead said the Commission’s decision would not be constrained by local ordinances that are in conflict with state law. This type of language would time the analysis prior to the grant of the certificate. Then it would be relevant whether there is a

separate statute or regulation prohibiting undergrounding of wires.⁷ In any case, this type of language does not appear in the statute. Rather, the statute focuses solely on whether the local ordinance conflicts with the *certificate*.

Similarly unavailing is the argument that the MPSC ignored the “conflict with state law” standard prescribed by the *City of Taylor* case. Once again, the Township misapprehends the timing of the conflict analysis in an Act 30 case and the significance of the *City of Taylor* decision. It is vital to recall that the *City of Taylor* case had nothing to do with Act 30. As part of a major reconstruction by the Michigan Department of Transportation of Telegraph Road through the City of Taylor, construction plans called for undergrounding of utility lines. *City of Taylor*, 475 Mich at 113. Detroit Edison agreed to relocate the lines underground, but would not agree to pay for it. In response, the City of Taylor enacted Taylor Ordinance 00-3344, which required all public utilities with lines adjacent to highways to relocate the lines underground at the utility’s sole expense. *Id.* Despite the ordinance, Detroit Edison refused to pay for undergrounding and ultimately the City of Taylor filed a complaint in circuit court to enforce its ordinance. *Id.* at 113-114. Detroit Edison moved for summary disposition arguing that the Commission had primary jurisdiction over the dispute. *Id.* at 114. It was in this context that the question became whether the City of Taylor’s ordinance was

⁷ It is interesting to note that if this analysis were necessary it would still fail, as MCL 460.554(1) requires that transmission lines at all highway crossings be not less than 22 feet *above* ground level, and even a cursory view of the route reveals several highway crossings within Oshtemo Township along the approved route. METC Exhibit A-11 at 42 (4-11).

in conflict with state law. The Supreme Court referenced Michigan Admin Rules 460.516 and 460.517 regarding line location, then referred the matter to the Commission to determine whether there was a conflict between the ordinance and the administrative rules. *Id.* at 119-120.

Thus, the *City of Taylor* conflict analysis is irrelevant here because the Township's argument assumes that the conflict analysis happens *before* the Commission grants a certificate pursuant to Act 30. But Act 30 specifically provides that the *certificate* takes precedence over any conflicting ordinance "that prohibits or regulates the location or construction of a transmission line for which the commission *has issued* a certificate." MCL 460.570 (emphasis added). The words "has issued" indicate the past tense. And given that Oshtemo's "Utility Control" Ordinance requires underground construction, and the certificate requires aboveground construction, no complex legal analysis was necessary to determine the existence of a conflict. (227a; 7/29/13 Order.) One says "under"; the other says "over." *Id.* The conflict could not possibly be clearer, and the Commission was not required to devote more than a sentence to determining there was a conflict and the Oshtemo ordinance must cede.

No more availing are the Township's claims that the certificate does not take precedence over its ordinance because it enacted the ordinance before METC filed its application. (Oshtemo Township's Brief pp 20-21.) Citing *Detroit Edison Co v City of Wixom*, 382 Mich 673 (1969), the Township claims that case is distinguishable because Detroit Edison has a "vested property right" prior to filing

its application (Oshtemo Township's Brief, p 20). The Michigan Supreme Court decided the *Detroit Edison* case 26 years before the Certification Act became law. It did not address the issues raised in this appeal. The Certification Act allows a utility to seek a Certificate after a municipality passes an ordinance. If it did not, there would be no reason to require an applicant to include "a description of the location and manner in which [a] zoning ordinance prohibits or regulates the location or construction of the proposed route." MCL 460.567. Recently, our Supreme Court reiterated the longstanding principle of statutory construction that "courts 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.' *Johnson v Recca*, 492 Mich at 177 (2012), citing *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich at 146 (2002).

The Township also relies on the *Detroit Edison* case for the proposition that "the public service commission statute does 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'" (Oshtemo Township's Brief, pp 26-27, quoting *Detroit Edison*, 382 Mich at 683-384). This statement is clearly no longer good law as ETLCA confers exactly that jurisdiction on the Commission. MCL 460.561 *et seq.*

In sum, the Michigan Constitution gives Oshtemo Township the right to consent to utility activity within its borders – but the Township may not arbitrarily withhold or unreasonably condition that consent. *Union Twp v City of Mt Pleasant*,

381 Mich at 90 (1968). (Oshtemo Township brief pp 12,14, 28-29.) The Michigan Legislature, via the Certification Act, determined that municipal conditions on consent to transmission lines are unreasonable if they conflict with a certificate granted by the Commission, and required the Commission to consider any existing municipal conditions in making its certificate decision. MCL 460.570(1); MCL 460.567(2)(d). The Commission duly considered Oshtemo Township's undergrounding condition, found it was not reasonable, and granted a certificate providing for aboveground construction of the Line. (227a-228a; 7/29/13 Order p 26.) The Commission determined that the Township's undergrounding ordinance was in conflict with state law, i.e. the Certificate. (*Id.*) The Certification Act therefore did not deprive the Township of the ability to withhold consent – it merely limits that consent to reasonable consent.

III. The Township's ordinance goes beyond mere consent and is an exertion of the Township's right to reasonable control over its streets and public places.

Oshtemo Township's "Utility Control" ordinance is far more than a process for granting or withholding consent. The Utility Control ordinance also requires utilities like METC to bury their transmission lines, and provides a penalty (a fine) for failure to do so. This type of ordinance is not an exercise of a municipality's power to grant or withhold consent, but rather, is an exercise of its right to reasonable control over its streets and public places.

Oshtemo Township's "Utility Control" ordinance does far more than merely grant or withhold consent. Granting or withholding consent is distinctly different

than regulating something – as the Township does here. Consent means “Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. Agreement; approval; permission; the act of coming into harmony or accord.” *Black’s Law Dictionary* (9th ed). Regulating means “to fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction.” *Blacks Law Dictionary* (6th ed). Clearly, Oshtemo Township’s ordinance regulates as it fixes or controls the location and construction of transmission lines underground by rule.

Furthermore, the ordinance states its purpose is to regulate:

Purpose.

Sec. II. The purpose of this ordinance is to regulate the use of public streets, roads, alleys and right-of-ways by public and/or private utilities operating within the Township, for the location of lines, poles, mains, towers, buildings, structures and appurtenances in order to protect the public health, safety and general welfare. [104a; Oshtemo Township Utility Control Ord. No. 114, Sec. II.]

And true to its purpose, the ordinance regulates the location of lines:

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... [105a; Oshtemo Township Utility Control Ord. No. 114 Sec. IV(b).]

Furthermore, the ordinance imposes penalties for violation:

Penalties.

Violation of any of the provisions of this Ordinance or failure to comply with any of its requirements shall constitute a municipal civil infraction.

Upon determination of responsibility, the person, corporation, firm or other entity shall pay a fine according to the following schedule:

First offense \$ 75.00

Second offense within three years of first offense \$150.00

Third offense within three-year period \$325.00

Fourth and each subsequent offense within three-year period are each \$500.00

If a determination of responsibility is made by the Court, the Court may impose costs as provided for by law in addition to the fines called for above.

Each day during which a violation continues shall be deemed a separate offense. The imposition of a fine shall not exempt an offender from compliance with the provisions of this Ordinance. [107a; Oshemo Township Utility Control Ord. No. 114 Sec. VI.]

Clearly, the ordinance does far more than merely grant or withhold consent. As such, these portions of the ordinance are not protected by the consent clause of article 7, § 29. Rather, such regulatory provisions are protected by the last sentence of § 29, the reasonable-control provision.

In *City of Taylor*, this Court explained, “municipalities may “exercise ‘reasonable control’ to regulate matters of local concern, but only in a manner and to the degree that the regulation does not conflict with state law.” *City of Taylor*, 475 Mich at 117-118. For that reason, the Court found that the City of Taylor’s ordinance requiring the utility to bear the cost of relocating utility wires had to yield if it conflicted with the Commission’s rules on the subject. *Id.* at 120. Thus, where state law (here the certificate) and a local ordinance conflict, the ordinance must cede. *Id.* at 117-118. ETLCA merely parallels Michigan constitutional law. And as set out more fully above, there can be no question the certificate and the

ordinance conflict. The Commission was not in error in determining the certificate takes precedence over the ordinance.

CONCLUSION AND RELIEF REQUESTED

The Michigan Constitution protects the right of municipalities like Oshtemo to reasonably grant or withhold consent to utility activities within its borders and to reasonable control over its roads and public spaces. But the Constitution grants a township its authority under article 7, § 17, which is subject to law, and the Constitution does not grant a municipality an unchecked veto power over every necessary utility infrastructure project that happens to cross its borders. Such an interpretation must fail because it would render the second sentence of article 7, § 29 regarding reasonable control surplusage. As such, ETLCA provides the framework for deciding whether a municipality has unreasonably conditioned its consent. Furthermore, this Court need not reach this issue as Oshtemo did not merely grant or deny consent. Rather, Oshtemo revised a zoning ordinance, which falls into the reasonable-control clause of the Constitution not the consent clause, and the Zoning Enabling Act makes all zoning specifically subject to ETLCA.

The Public Service Commission respectfully requests that this Court affirm.

Respectfully submitted,

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150695/Brief on Appeal