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,

v

MICHIGAN PUBLIC SERVICE COMMISSION and MICHIGAN ELECTRIC TRANSMISSION COMPANY, LCC,

Appellees.

Supreme Court Case No. 150695

Court of Appeals Case No. 317893

MPSC Case No. U-17041

AMICI CURIAE BRIEF OF MICHIGAN TOWNSHIPS ASSOCIATION, MICHIGAN MUNICIPAL LEAGUE, AND PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN IN SUPPORT OF APPELLANT CHARTER TOWNSHIP OF OSHTEMO

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STATEMENT OF JURISDICTION

On November 18, 2014, the Court of Appeals issued a per curiam opinion in this case.[1] On December 23, 2015, this Honorable Court issued an Order granting leave to appeal.[2] In its Order this Honorable Court directed that "[t]he parties shall include among the issues to be briefed whether the Electric Transmission Line Certificate Act, 1999 PA 30, effective May 17, 1995, is consistent with the first sentence of Const 1963, art 7, §29." This amici brief is submitted by Amici Curiae Michigan Townships Association, Michigan Municipal League, and Public Corporation Law Section of the State Bar of Michigan pursuant to MCR 7.312(H).

[1] *In re Application of Michigan Electric Transmission Co. for Transmission Line, 309* Mich App 1; 867 NW2d 911 (2015) (Court of Appeals Opinion).
[2] *In re Application of Michigan Electric Transmission Co. for Transmission Line*, 498 Mich 955; 872 NW2d 490 (2015).

STATEMENT OF QUESTION PRESENTED

WHETHER THE ELECTRIC TRANSMISSION LINE CERTIFICATION ACT, 1995 PUBLIC ACT 30, IS UNCONSTITUTIONAL IN CONSIDERATION OF A LOCAL MUNICIPALITY'S CONSTITUTIONAL AUTHORITY OVER ITS PUBLIC RIGHTS OF WAY AND PUBLIC PLACES AS PROVIDED FOR IN ARTICLE VII, SECTION 29 OF THE MICHIGAN CONSTITUTION OF 1963.

The Michigan Court of Appeals answered:	"No".
Appellees METC and MPSC answered:	"No".
Appellant Township answered:	"Yes".
Amici Curiae answer:	"Yes".

STATEMENT OF FACTS

Amici Curiae concur with and hereby incorporate by reference the Charter Township of Oshtemo's Statement of Facts set forth in the Township's Brief on Appeal.

STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Townships Association is a Michigan nonprofit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The Michigan Townships Association, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the Michigan Townships Association has participated on an amicus curiae basis in numerous state and federal cases presenting issues of statewide significance to Michigan townships.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief amicus curiae is authorized by the Legal Defense Fund's Board of Directors.[3]

[3] The Board of Directors' membership includes: The President and Executive Director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Clyde J. Robinson, City Attorney, Kalamazoo; John C. Schrier, City Attorney, Muskegon; Lori Grigg Bluhm, City Attorney, Troy; Catherine M. Mish, City Attorney, Grand Rapids; Eric D. Williams, City Attorney, Big Rapids; James O. Branson, III, City Attorney, Midland; James J. Murray, City Attorney, Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee; Thomas R. Schultz, City Attorney, Farmington and Novi; Lauren Trible-Laucht, City Attorney, Traverse City; and William C. Mathewson, General Counsel, Michigan Municipal League.

The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Public Corporation Law Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Public Corporation Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous amicus curiae briefs in state and federal courts.

The Public Corporation Law Section Council, the decision-making body of the Section, is currently comprised of 20 members, with one current vacancy on the 21 member Council. The filing of this Amici Curiae Brief was authorized at the February 12, 2016, meeting of the Council. 15 members of the Council were present at the meeting, and the motion passed on a vote of 15-0. The position expressed in this Amici Curiae Brief is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan.

Proper resolution of this case is of major importance to municipalities across the State, their citizens and constitutional jurisprudence. The importance of this case cannot be understated as it involves core legal principles regarding interpretation and application of the Michigan Constitution. Specifically, the authority granted by the electorate to local municipalities requiring a public utility to get consent of the local municipality for use of the public rights of way therein, and the separate general right (not just regarding utilities) reserved to local municipalities of

reasonable control of such public rights of way.[4] This authority is expressed in Article VII, Section 29 of the Michigan Constitution of 1963 which provides that:

> "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". [5] (Emphasis added).

In opposition to this constitutional authority granted to local municipalities regarding public rights of way stands the Michigan Public Service Commission's (MPSC) statutorily-derived ability to issue a "certificate of public convenience and necessity" pursuant to 1995 PA 30[6] allowing for the location of an applicant's electric transmission line in the public rights of way. Quite simply PA 30 does contain any process which requires a public utility to first seek consent from a local municipality's legislative board or commission before receiving this preemptive permission from the MPSC and thereby functions to disenfranchise a local municipality from its constitutional authority. This cannot happen, as Article VII, Section 29 is a constitutional limitation, placed by the electorate, on the otherwise plenary authority of the State.[7] Article VII, Section 29 was clearly put into place to limit the State's otherwise unbridled ability to allow public utilities to use the public rights of way without local consent, franchise, or control. It protects local government from the heavy hand of an administrative body and transfers to local municipalities

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[4] Rights of way refers to highways, streets, alleys or other public places.
[5] Also referred herein as Article VII, Section 29.
[6] The Electric Line Certification Act, 1995 PA 30 (PA 30 or Public Act 30).
[7] In *Attorney General ex rel, O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW2d 550 (1936) this Honorable Court stated that:

> "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 of the United States. The Constitution of the State is not a grant of power. It is a limitation upon authority." (Emphasis added)

certain protected authority that cannot simply be abrogated by statute. The language clearly allows a municipality the ability to apply local concerns when considering whether to grant consent to a public utilities use of the public rights of way. No State statute can be enacted that is in conflict or inconsistent with Article VII, Section 29.[8] If the Legislature can simply remove or bypass the consent requirement at will, then the limiting language in the Constitution is rendered nugatory. It would serve no purpose.

The Order granting leave in this case requests that the parties brief whether PA 30 is consistent with the first sentence of Article VII, Section 29. Without being presumptuous this question seems to recognize the distinct authority of a local municipality to withhold or grant consent for a public utility's use of the public rights of way separate from the municipality's general right of reasonable control contained in the second sentence[9]. This makes complete sense as it would violate the rules of construction to argue that the language and sentence structure used in the Constitution was unintended. The separate sentences clearly mark that the distinction was intentional. The first sentence covers public utility use of the rights of way and franchising if the utility transacts a local business therein. The language suggests that these rights cannot be abrogated by any law, especially when compared to the second sentence. The second sentence reserves to a local municipality general reasonable control (not limited to utilities) of its rights of way except as otherwise provided in the Constitution. The second sentence provides a more limited authorization to local municipalities (i.e. limited by other provisions in the Constitution). This subtlety escapes the Appellee's analysis.

The MPSC's statutory authority in PA 30 is clearly inconsistent with Oshtemo Township's

[8] *People v Meconi*, 277 Mich App 651, 658-659; 746 NW2d 881 (2008).

[9] In *City of Lansing v State of Michigan*, 480 Mich 1104; 745 NW2d 109 (2008), Justice Markman (dissenting) observed a possible distinction between the first and second sentences of Article VII, Section 29.

constitutional right to require consent. Consent is only limited by the fact that it cannot be denied arbitrarily and unreasonably. This is different than being subject to other laws.

If for some reason PA 30 is not an unconstitutional infringement on a local municipality's constitutional consent authority under Article VII, Section 29, then the question will remain as to whether the grant of authority to the MPSC in PA 30 is an unlawful delegation of authority pursuant to the test as set forth in the *Department of Natural Resources v Seaman*, 396 Mich 299 (1976). When preempting constitutional authority, the administrative review process would have to be extremely defined to avoid an unlawful delegation of legislative authority. The subject matter would dictate very specific standards for abrogating the Township's consent and reasonable regulations. The standards that would allow the MPSC to determine when to bypass a local municipality's constitutional right of way consent and reasonable regulation are nowhere near sufficiently defined in PA 30 to withstand this challenge.

After review of these issues, it will be apparent to this Honorable Court that the MPSC's statutory authority pursuant to Public Act 30 is unconstitutionally inconsistent with the consent authority of Article VII, Section 29 or, in the alternative, it provides the MPSC with an unlawful delegation of legislative authority. The local safeguards that would be constitutionally necessary with regard to public utility use of the public rights of way are not present in PA 30.

ARGUMENT

1. THE ELECTRIC TRANSMISSION LINE CERTIFICATION ACT, 1995 PUBLIC ACT 30, IS UNCONSTITUTIONAL IN CONSIDERATION OF A LOCAL MUNICIPALITY'S CONSTITUTIONAL AUTHORITY OVER ITS PUBLIC RIGHTS OF WAY AND PUBLIC PLACES AS PROVIDED FOR IN ARTICLE VII, SECTION 29 OF THE MICHIGAN CONSTITUTION OF 1963.

A. INTRODUCTION[10]

This case focuses on Appellee MPSC's grant of a Certificate of Public Convenience and Necessity (CPCN) to Appellee METC to locate an electric transmission line in Oshtemo Township without the Township Board's consent and in contravention of the Township's local ordinance and regulations. Oshtemo Township's duly adopted ordinance required that between 1,500 and 2,000 feet of the total length of METC's proposed electric transmission line be buried underground (within a public right-of-way or within 250 feet of a public right-of-way).[11] Notably, the area for the proposed underground burying of the electric transmission line was in the Township's unincorporated village area, which is developed with commercial and residential uses of a greater density and intensity than elsewhere in the Township. The Township's public utility rights of way regulations were based upon the consent authority and reasonable control granted to the Township pursuant to Article VII, Section 29 of the Michigan Constitution of 1963. Notwithstanding the Township's reasonable regulations, METC never requested that the Township Board consent to its transmission lines in the public rights of way as required under Article VII, Section 29. In abrogation of this Constitutional authority in granting the CPCN the MPSC said in part:

> "Finally, the Commission agrees with the Staff and METC that under the plain language of Sections 3 and 10 of Act 30, the Commission's grant of the CPCN preempts Oshtemo's ordinance. . . . The Commission therefore rejects the

[10] See also introductory comments contained in the Statement of Interest of Amici Curiae, supra.
[11] Oshtemo Township Utility Control Ordinance. Appellant's Appendix p 103a.

> recommendation in the PFD that the CPCN be conditioned on METC's compliance with the ordinance, and the alternative recommendation that the record be opened." (Emphasis added)[12]

The Court of Appeals thereafter perplexingly held that:

> "Contrary to arguments made by Oshtemo Township and amici Michigan Townships Association, et al, the PSC did not hold that Act 30 preempted all local regulation by the Township and did not eliminate the authority granted to Oshtemo Township by Const 1963, art 7, Section 29 to control its roads and rights-of-way."[13]

The Court of Appeals erred in making this statement. The MPSC did in fact determine that Oshtemo Township's ordinance conflicted with the CPCN and was therefore preempted. The MPSC decision did abrogate the Township's Article VII, Section 29 authority. The CPCN was issued under statutory authority granted to the MPSC pursuant to PA 30. While it is true that the grant of a CPCN does not, in and of itself, create a conflict between all local regulation, in this case, PA 30 was certainly used to preempt Oshtemo Township's Constitutional authority to require the METC to first obtain consent from the Township and then comply with its reasonable undergrounding regulations. It is specious to try to argue that PA 30 does not purport to grant statutory authority to the MPSC that allows the MPSC to preempt a local municipality's exercise of it Article VII, Section 29 authority. Under PA 30, the MPSC can rule that a utility line can go into any local rights of way without the municipality's consent and without compliance with reasonable rights of way regulations of the municipality. Local municipal concerns and rights protected by Article VII, Section 29 are unconstitutionally usurped.

[12] MPSC Opinion, p 26 (Emphasis added). We reference the term preemption as this is the direct term used by the MPSC. Further , Section 10 of Public Act 30 being MCL 460.570 indicates in part that: "(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 of construction of a transmission line for which the Commission has issued a certificate". Also Section 3 of Public Act 30 being MCL 460.563 indicates in part that: "(2) This act shall control in any conflict between this act and any other law of this state."

[13] Court of Appeals Opinion, p 18.

Amici Curiae contend that the Court of Appeals' decision was error as a matter of law. In fact, this case is the textbook example of why the people of the State of Michigan consciously gave the constitutional authority to local municipalities to consent and reasonable control of their public rights of way. Namely, the constitutional directive was approved so as to insure that a township (or other local municipality) would have a voice in how utilities and other activities occurred within their public rights of way and would not be held hostage by either a deep pocket power company's plans or the heavy-handed application of statute by an administrative agency such as the MPSC. This constitutionally-derived consent authority and reasonable control must prevail over any conflict with the provisions of PA 30. Who else but the local municipality will look out for the wellbeing of a community and its citizens. Certainly not the robber barons. It is noteworthy to point out the fearmongering and hyperbole coming from the MPSC as evidenced by statements in its Brief on Appeal.[14]

In upholding the MPSC decision, the Michigan Court of Appeals determined that "[t]he arguments 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."[15] In making this determination, the Court of Appeals at best gave judicial gloss to both the intent and application of Article VII, Section 29 to the issue at hand and did not address the questions raised. Appellees and the Court of Appeals fail to engage in proper logical analysis which requires a determination of the intent of Article VII, Section 29. As we will see in the following analysis, the correct beginning point is the understanding and recognition that the Michigan Constitution operates as a limitation on the state's plenary authority. Article VII, Section 29 carries forward

[14] "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". MPSC Brief on Appeal, p 1.

[15] Court of Appeals Opinion at 19.

this limitation on the state's plenary authority and specifically grants to municipalities certain authority over their public rights of way. To allow the state to legislatively control a constitutional limitation on its own authority placed by the people of the state renders this limitation a nullity. What purpose does a constitutional limitation serve if the legislature can completely abrogate its terms? Such interpretation cannot stand.

As a limitation upon the state's authority and as a grant to the township, it is important to review the actual language contained in Article VII, Section 29 as there appear to be two distinct sentences. The first sentence covers public utility consent and franchising and is unqualified.[16] The second sentence covers more general reasonable control of local rights of way (not limited to just public utilities).[17] In this case, the Court of Appeals and Appellees failed to address the limitation on plenary authority of the State of Michigan and further to engage in any meaningful review of the actual language contained in Article VII, Section 29. It is pure sophistry to analyze the MPSC's ability and authority to foreclose the Township's exercise of its constitutional authority over the public rights of way without meaningful review of the intent and language of Article VII, Section 29. To this point, both the MPSC and the Court of Appeals determined that because the MPSC granted a CPCN, the Township's ordinance regulating utilities in its rights of way and adjoining areas was in conflict and was therefore preempted. PA 30 is clearly inconsistent with the first sentence of Article VII, Section 29, as no local consent was required of Oshtemo Township.

Even if this Honorable Court would determine that PA 30 is not an unconstitutional infringement on the consent requirement of Article VII, Section 29, then PA 30 would still

[16] The only limitation on this authority is that it may not be arbitrary and unreasonable. See *City of South Haven v South Haven Charter Township*, 204 Mich App 49; 514 NW2d 178 (1994).
[17] The second sentence of Article VII, Section 29 distinctly provides a separate limitation "Except as otherwise provided in this constitution".

constitute an unlawful delegation of authority to the MPSC in consideration of the Township's reasonable regulations. Since PA 30 operated to disenfranchise the Township from its constitutional rights of way authority under Article VII, Section 29 the *Seaman*, s*upra*, test would require a level of standards to control the actions of the MPSC that is not present.

The following will further explore these arguments and clearly demonstrate the unconstitutionality of PA 30 and the erroneous decisions of the MPSC and the Court of Appeals.

B. **STANDARD OF REVIEW**

The issues addressed herein involve questions of constitutional and statutory interpretation, which are reviewed *de novo*. *In Re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). See also *Midland Cogeneration Venture Limited Partnership v Naftly*, 489 Mich 83; 803 NW2d 674 (2011). Commenting upon the limitations on the authority of administrative agencies, this Court has noted ". . . that the extent of the authority of public agencies is measured by the statute from which they derived their authority and not by their own acts and assumption of authority." *Ram Broadcasting of Michigan, Inc. v Michigan Public Service Commission*, 113 Mich App 79, 90; 317 NW2d 295 (1982). See also *Mason County Civic Research Council v Mason County*, 343 Mich 313; 72 NW2d 292 (1955).

C. **RULES OF INTERPRETATION**

When reviewing a constitutional provision, the primary objective is to realize the intent of the people and in doing so, to apply the plain meaning of the language used unless they are technical legal terms.[18] Generally, the rules of statutory construction will also apply to the constitution.[19]

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[18] *Toll Northville Ltd v Township of Northville*, 480 Mich 6, 15 fn2; 743 NW 2d 902 (2008).
[19] *Counsel 23 Am. Federation of State, County and Municipal Emp., AFL-CIO v Civil Service Commission for Wayne County*, 32 Mich App 243, 247-248; 188 NW2d 206 (1971).

The issues before this Honorable Court also turn in part on statutory interpretation. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature."[20] "The first step in that determination is to review the language of the statute itself."[21] "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed and judicial construction is neither required nor permissible."[22] 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."[23] Courts "interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole."[24] "[I]n seeking meaning, words and clauses will not be divorced from those which precede and those which follow."[25] "Statutory interpretation requires courts to consider the *placement* of the critical language in the statutory scheme."[26] "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning".[27]

This Honorable Court has articulated a relevant contextual principle as follows:

> "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed.), p. 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting." *Brown v Genesee Co. Bd. of Comm'rs*

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[20] *In re: MCI Telecommunications*, 460 Mich 396, at 411; 596 NW2d 164 (1999).
[21] *In re: MCI Telecommunications, supra*, 411.
[22] *In re: MCI Telecommunications, supra*, 411.
[23] *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) citing *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich. 142, 146; 644 NW2d 715 (2002).
[24] *Johnson, supra*, 177 citing *People v. Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).
[25] *Sanchick v. State Bd. of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955).
[26] *Johnson, supra*, 177 citing *United States Fidelity & Guaranty Co. v. Mich. Catastrophic Claims Ass'n* (On Rehearing), 484 Mich 1, 12; 795 NW2d 101 (2009).
[27] *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69, 77, 780 NW2d 753 (2010), citing MCL 8.3a;

(After Remand), 464 Mich 430, 437, 628 NW2d 471 (2001), quoting *Tyler v Livonia Schs*, 459 Mich 382, 390-391, 590 NW2d 560 (1999)[28].

In addressing the threshold question of ambiguity, this Honorable Court has held that:

> "A term is ambiguous 'when it is *equally* susceptible to more than a single meaning,' *Lansing Mayor v Pub. Service Comm.*, 470 Mich 154, 166, 680 NW2d 840 (2004), not when reasonable minds can disagree regarding its meaning."[29] Further, "ambiguity is a finding of last resort".[30]

Keeping the above rules of interpretation in mind, the following analysis of the relevant constitutional and statutory language will show that the language is not ambiguous and, that it actually provides plain direction that Article VII, Section 29 was intended by the electorate to limit the authority of the state with regard to utility use of public rights of way by giving the unqualified power of required consent to the local municipalities in addition to the separate general power of reasonable control of their rights of way.

Analysis will highlight the erroneous interpretations used in the MPSC and the Court of Appeals Opinion.

D. CONSTITUTIONAL AND STATUTORY APPLICATION

Oshtemo Township has challenged the constitutionality of the Electric Transmission Line Certification Act, 1995 PA 30, as interpreted by the MPSC and the Court of Appeals. Amici curiae concurs and will attempt to further edify this Honorable Court regarding the unconstitutional nature of Public Act 30 to the extent that the MPSC claims broad preemptive authority over a local municipality's ability to regulate its rights of way pursuant to Article VII, Section 29. As previously indicated, the Court of Appeals Opinion did not provide meaningful analysis at the right starting point to determine the intent of Article VII, Section 29 or engage in analysis of the

[28] *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 317-318; 645 NW2d 34 (2002).
[29] *Toll Northville Ltd., v Township of Northville*, 480 Mich 6, 15 fn 2; 743 NW2d 902 (2008).
[30] *Lansing Mayor*, supra at 165, citing *Klapp v Limited Insurance*, 468 Mich 459, 474; 663 NW2d 447 (2003).

language used therein in order to determine the extent of the powers granted to local municipalities regarding their public rights of way.

In addressing this issue of whether Public Act 30 is in accord with Article VII, Section 29, it is important to first address the overriding framework setting forth the function of the Michigan Constitution. This framework will also help distinguish the opinions in *City of Lansing v State of Michigan*, 480 Mich 1104; 745 NW2d 109 (2008) and *City of Taylor v Detroit Edison Company*, 475 Mich 109; 715 NW21d 28 (2006)[31].

In *Romano v Auditor General*, 323 Mich 533, 536-537; 35 NW2d 701 (1949) the Michigan Supreme Court stated that:

> "The function of a state constitution is not to legislate in detail, but to generally set limits upon the otherwise plenary powers of the legislature." (Emphasis added)

This function differs from the United States Constitution as distinguished by the Michigan Supreme Court in *In re Request for Advisory Opinion Enrolled Senate Bill 558 (being 1976 PA 240)*, 400 Mich 175, 400 Mich 311, 317-318; 254 NW2d 544 (1977), when the court indicated that:

> "The Michigan Constitution is not a grant of power to the Legislature as is the United States Constitution, but rather, is a limitation on a general legislative power." *In Re: Brewster Street Housing Site*, 291 Mich 313, 289 NW2d 493 (1939).

[31] *The City of Lansing* and *City of Taylor* cases both involved much more narrow issues of state control with regard to consideration of Article VII, Section 29. *City of Lansing* wrestled with the issue of local consent for a utility line but was only doing so in the limited context of a qualified utility construction longitudinally within a limited access highway, not other rights of way. *City of Taylor* wrestled with the limited issue of reasonable local regulation of an existing line in the context of who pays for it to go underground when locally required. In the case at bar, however, the MPSC's authority is too broad in its ability to limit a local municipality's consent and regulatory authority with regard to any and all public rights of way. Further, consideration was not given in these cases to the independent nature of the first sentence of Article VII, Section 29 with regard to consent and franchise.

In further addressing the legislative authority of this State, the Michigan Supreme Court in *Attorney General ex rel. O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW2d 550 (1936) stated that:

> "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 of the United States. The Constitution of the State is not a grant of power. It is a limitation upon authority." (Emphasis added)

It follows that "[a] fundamental and indisputable tenet of law is that a constitutional mandate cannot be restricted or limited by the whims of a legislative body through enactment of a statute." *American Federation of State, County and Municipal Employees, Council 25 v Wayne County*, 292 Mich App 68, 93; 11 NW2d 4 (2011).

It is axiomatic that in the event of a conflict the requirements of the Constitution prevail over a statute:

> [I]t is "a fundamental axiom of American law, rooted in our history as a people and requiring no citations to authority, that the requirements of the Constitution prevail over a statute in the event of a conflict." See also *Marbury v Madison*, 5 US (1 Cranch) 137, 177, 2 Ed 60 (1803) ("an act of the legislature, repugnant to the constitution, is void").[32]

This overriding framework has strong bearing on the case at bar as we are looking at a statute, Public Act 30, that is being broadly interpreted by the MPSC and the Court of Appeals in a way that ignores the constitutional limitations on the legislature's plenary authority with regard to a local municipality's regulation of its rights of way in matters of local concern. The Court of Appeals Opinion skips this consideration and fails to address its impact. So too do the Appellees fail to give this framework any meaningful analysis.

As we look at Article VII, Section 29, it must be understood that while it establishes a grant of authority to local municipalities for, among other things, utility use of its rights of way,

[32] *People v Meconi, supra* 658-659.

it is in fact a directive from the people of the State of Michigan limiting the State's plenary authority to otherwise legislate in this area. The consent provision of Article VII, Section 29 is clearly intended to protect municipalities and their citizens from the deep pockets of the utility providers and the heavy hand of state agencies. The predecessor to Article VII, Section 29 first appeared in Article VIII, Section 28, of the Michigan Constitution of 1908.[33] Prior to this constitutionally delegated local authority, the state had given statewide franchises to use the public rights of way (i.e., Michigan Bell) regardless of local concerns. These abuses necessitated local consent and reasonable general control being placed back in the hands of local government through Article VII, Section 29 and its predecessor. If the state legislature can merely pass laws to preempt this constitutional limitation, then the constitutional limitation would be rendered meaningless and without purpose. By its very nature it is a limitation on the state legislature's authority. Therefore, there is a delicate balance where the legislature must recognize some limitations with regard to public right of way regulations reserved to local municipal control. What we should find is legislation that is in harmony with Article VII, Section 29 instead of Public Act 30 where local constitutional rights of way authority is broadly usurped by the MPSC's stated preemption and where the limitations on the State are ignored by the Court of Appeals. Consider for example that the Metropolitan Extension Telecommunications Rights Of Way Oversight Act, 2002 P.A. 48, (MCL 484.3101 et seq) created a statewide system regarding public rights of way access for

[33] Article VIII, Section 28, of the Michigan Constitution of 1908 provided that: "No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefore from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and township." Even this predecessor constitutional provision had two separate and distinct sentences.

telecommunication providers while preserving local municipal consent and certain regulatory authority. MCL 484.3115 provides in relevant part that:

> "(1) Except as otherwise provided in this section, a municipality shall, upon application, grant to providers a permit for access to and the ongoing use of all public rights-of-way located within its municipal boundaries. A municipality shall act reasonably and promptly on all applications filed for a permit involving an easement or pubic place.
> (2) This section shall not limit a municipality's right to review and approve a provider's access to and ongoing use of a public right-of-way or limit the municipality's authority to ensure and protect the health, safety, and welfare of the public.
> (3) A municipality shall approve or deny access under this section within 45 days from the date a provider files an application for a permit for access to a public right-of-way. A provider's right to access and use of a public right-of-way shall not be unreasonably denied by a municipality. A municipality may require as a condition of the permit that a bond be posted by the provider, which shall not exceed the reasonable cost to ensure that the public right-of-way is returned to its original condition during and after the provider's access and use."

This provides a good example of how important utility infrastructure legislation can be compliant with Article VII, Section 29.

It is also instructive to look at the Uniform Video Services Local Franchise Act, 2006 PA 480, (MCL 484.3301 et seq). This Act provides for local franchise approval with regard to cable television providers' use of the public rights of way, while establishing statewide uniform regulation. MCL 484.3303 provides in relevant part that:

> "(1) Before offering video services within the boundaries of a local unit of government, the video provider shall enter into or possess a franchise agreement with the local unit of government as required by this act."

Again, even in light of the extensive use of the public rights of way by cable television providers, the legislature has found a way to recognize a municipality's franchise right in an attempt not to violate Article VII, Section 29.

As will be further explored, the Township's constitutional consent authority over a public utility's use of its rights of way is absolute.

Before delving into a deeper analysis of Article VII, Section 29, another Michigan constitutional provision should be highlighted. Article VII, Section 34 of the Michigan Constitution of 1963[34] which provides that:

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

This provision of the Michigan Constitution should not just be given lip service or marginalized as it is an integral part of any determination regarding a local municipality's constitutional authority regarding its public rights of way. There is a mandate that liberal construction in their favor be provided as a framework for analysis. *Natural Aggregates Corp. v Brighton Township*, 213 Mich App 287, 295; 539 NW2d 761 (1995) appeal denied 452 Mich 880; 522 NW2d 178 (1996). It certainly appears from the Court of Appeals and the MPSC's interpretation of Public Act 30 and the arguments by the Appellees, that Article VII, Section 29 is being narrowly construed as opposed to liberally construed in favor of counties, townships, cities and villages. This narrow construction is in direct violation of the restriction placed upon the State by Article VII, Section 34. Additionally, constitutional powers granted to townships include those fairly implied and not prohibited by the Constitution. A township must have the authority to implement its constitutional authority in Article VII, Section 29.

Upon further analysis of Article VII, Section 29 and the action taken by the MPSC pursuant to Public Act 30, it is impossible to reconcile the action which was taken in light of the framework for analysis as presented above. A statutory system such as Public Act 30, that is being used to broadly preempt local public rights of way utility regulations and local control of any and all rights of ways, is most certainly unlawful legislation.

[34] Also referred to herein as Article VII, Section 34.

As noted above, Article VII, Section 29 of the Michigan Constitution of 1963 provides that:

> "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)

This constitutional provision can be broken into three distinct parts and two distinct sentences. First, a public utility is required to get the consent of the county, township, city or village to acquire the right to use its public rights-of-ways or other public places. Second, the utility is required to acquire a franchise from the township, city or village in order to transact a local business therein. Third, reasonable control (not limited to public utilities) is reserved to counties, township, cities and villages with regard to its public rights-of-way and public places.[35]

This constitutional authority must be liberally construed in favor of the local municipality and certainly it serves as a limitation on the State's legislative authority. Without a doubt, Public Act 30 legislation cannot broadly usurp or altogether nullify this authority. Support for this premise can be found in the *City of Lansing* case. However, this case did not go far enough in its analysis to come to the proper conclusion that local consent is a separate absolute right.

In *City of Lansing*, Wolverine Pipeline sought to use the city streets for construction of a pipeline longitudinally without the city's consent. The city argued that "municipalities have the absolute right to refuse to consent to the use of their streets by utilities,"[36] according to Article VII, Section 29 and further, that to the extent MCL 247.183(2) deprives municipalities of this right, it

[35] *City of Lansing, supra*, 431 and footnote 3 therein regarding these distinct parts.
[36] *City of Lansing, supra*, 429.

is unconstitutional.[37] Having previously noted that "[l]ocal governments generally derive their authority from the Legislature," the Court clarified that although the grant of authority under Article VII, Section 29 appears absolute, it is not.[38] The Court found that cities have authority to adopt resolutions and ordinances under Article VII, Section 22 subject to the constitution and laws and as such, the Court of Appeals found that . . . "the Legislature has the authority to limit the manner and circumstances under which a city may grant or withhold consent under Section 29."[39]

The Court of Appeals held:

> "Because MCL 247.183(2) merely limits 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 is 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. Therefore, MCL 247.183 as amended by 2005 PA 103, is not unconstitutional."[40] (Emphasis added)

In *City of Lansing*, footnote 5 is instructive and indicates that

> "We note that MCL 247.183(2), as amended by 205 PA 103, applies only to a subset of utilities that seek to use a specific type of public property. Hence, this case does not involve an attempt to deprive cities of all authority to grant or withhold consent to utilities to use the cities' highways, streets, alleys, or other public places. See *McGraw*, *supra* at 238-239, 150 NW 836 (holding that a statute that purported to 'take away from the cities all control of their highways with reference to the use thereof by motor vehicles' was unconstitutional under the predecessor of the third clause of §29)."[41]

Contrary to Public Act 30, MCL 247.183(2) was limited in covering a narrow class of public property, being limited-access highways. Public Act 30, on the other hand, has no such limitation and can completely deprive Article VII, Section 29 local authority regarding all classes of public rights-of-way. This clearly is unconstitutional.

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[37] MCL 247.183(2) removes the need for qualified utilities to obtain local consent to construct longitudinally in limited access highways.
[38] *City of Lansing, supra* at 430, 432.
[39] *City of Lansing, supra* at 433.
[40] *City of Lansing, supra,* 433, 434.
[41] *City of Lansing, supra*, 434.

Additionally, it is important to this case that while leave to appeal was denied in *City of Lansing v State of Michigan*, 480 Mich 1104; 745 NW2d 109 (2008), Justice Markman observed a possible distinction between the first and second sentences of Article VII, Section 29. He wrote that "[r]ead together, the difference between these grants of authority arguably gives rise to an inference that a city's right to withhold consent to a utility project cannot be defeated by other constitutional provisions in the same fashion as a city's right of 'reasonable control'." *Id.* at 1105. Justice Markman stated "the Court of Appeals relied on Const 1963, art. 7, §22, which states that a city may enact resolutions and ordinances 'subject to the constitution and law." *Id.* He wrote that "this begs the question of to *which* parts of the constitution and *which* laws are the city's actions properly subject. At least arguably, the specific grant of constitutional authority to cities to refuse consent to utility projects must control over the more general authority granted to the Legislature in art. 7, §22." *Id.*

Justice Markman's questions are enlightening and logical and should be analyzed. In review of the two different sentences in Article VII, Section 29, it is apparent from the language that they are, in fact, separate and distinct. The first sentence of Article VII, Section 29 addresses public utilities' right to use a local municipality's public rights of way or to transact a business therein. In the first sentence, a public utility must get the consent of the local municipality and if it is going to transact a local business therein, it must get a franchise. This requirement of consent is absolute and allows the legislature no room to impede this authority granted by the electorate. As noted, the grant to the local municipalities of this authority operates as a limitation on the state's plenary legislative authority. Although the legislature may not impair the right of consent, a public utility still has recourse if consent is denied. The Court of Appeals case of the *City of South Haven v South Haven Charter Township*, 204 Mich App 49; 514 NW2d 178 (1994) is instructive with regard to a township's authority pursuant to Article VII, Section 29 to withhold its consent

regarding a public utility's use of the public rights of way. In *City of South Haven*, the City sought by mandamus to compel the Township to consent regarding the City's proposed extension of a water pipeline in a public right of way running through the Township. In *City of South Haven*, the court importantly held that:

> "It is clear that the trial court could not issue a writ of mandamus compelling the township to consent to the city's request for permission to extend its water pipeline along Blue Star Memorial Highway. The reason for this is that the granting or denying of consent by the township is discretionary, and a court cannot by mandamus compel a discretionary act. *Delly v. Bureau of State Lottery*, 183 Mich App 258, 261, 454 NW2d 141 (1990). In this matter the granting or withholding of consent by the township is a discretionary legislative function, and the township has the right to grant or withhold consent under Const. 1963, Art.a 7, §29, provided the township's decision is not arbitrary and unreasonable." *Union Township v City of Mt. Pleasant*, 381 Mich 82, 90, 158 NW2d 905 (1968).

The *City of South Haven* case is important to the case at bar as it recognizes a township's constitutional consent authority and at the same time recognizes that such authority is not without limitation, as such decision may not be arbitrary and unreasonable. Whether a township's decision is arbitrary and unreasonable, however, is not an invitation for the legislature to infringe on the right granted to the township but, rather, is a question that should be determined by a court of law. The language in the first sentence of Article VII, Section 29 clearly prevents a state agency from stepping in and overriding a local municipality's consent authority.

In contrast to the first sentence of Article VII, Section 29, it is clear that the electorate put a specific limitation on a local municipality's reasonable control of its public rights of way with the qualifying language at the beginning of the second sentence stating that "Except as otherwise provided in this constitution". This second sentence does not specifically address public utilities but would instead generally govern regulations by local municipalities for use of their public rights of way. It provides a more general grant of authority and is therefore subject to greater limitations. The first sentence is already limited to just public utilities

When applying the general rules of construction to Article VII, Section 29, it is clear that each subject expresses a separate idea. The first sentence, being more specific than the second sentence, governs utility local consent and franchising absolutely and separately. In applying the doctrine of *noscitur a sociis*, the exception phrase at the beginning of the second sentence is given meaning by the context of the two sentences. The second sentence is a broad general grant of reasonable control which, therefore, requires this exception to prevent local municipalities from unbridled general right of way authority. Such a limitation is not necessary with the first sentence because the subject matter of the first sentence is much more defined and restricted (ie., just covers public utilities). The language is clear and unambiguous. Certainly if this limitation in the second sentence was intended to apply to the first sentence regarding public utility use of the rights of way, the language could have clearly provided so. Moreover a specific provision controls over a general provision in the constitution.[42]

It should be noted that even with regard to the exception to local authority in the second sentence of Article VII, Section 29, the Court of Appeals' reliance on Article VII, Section 22 of the Michigan Constitution of 1963 is misplaced, as it addresses cities and villages and is inapplicable to townships.[43]

Additionally, if this Honorable Court will not hold the purported preemption created by Public Act 30 as unconstitutional, then the MPSC's authority under MCL 460.570(1) still represents an unlawful delegation of legislative authority.

If, for argument purposes, the Legislature could broadly preempt a local municipality's Article VII, Section 29 regulatory authority, then Public Act 30 remains an unlawful delegation of

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[42] A general provision controls where a specific provision does not apply. See *National Pride at Work, Inc. v Governor of Michigan*, 274 Mich App 174, 153; 732 NW2d 139 (2007) citing *Advisory Opinion on Constitutionality of 1978*, Pa. 426, 403 Mich 631, 639-640; 272 NW2d 495 (1978).

[43] Court of Appeals Opinion, p 15-16.

authority. In light of the previously expressed constitutional framework, it is our contention that the authority granted to the MPSC, under Public Act 30, to preempt Oshtemo Township's ordinance and regulations, lacks sufficient standards to guide the MPSC in ruling on these requirements and in fact serves as an unlawful delegation of power from the legislature. Through PA 30, the legislature has given the MPSC the unbridled power to determine when local rights of way regulations are to be nullified. The standards contained in Public Act 30 for the MPSC's granting of certificates for location and construction of transmission lines do not meet the legal standards for a lawful the delegation of authority in this regard.

The Michigan Supreme Court case of *Department of Natural Resources v Seaman*, 396 Mich 299; 240 NW2d 206 (1976) is the leading case in Michigan regarding the delegation of authority. In *Seaman*, the Court announced a three part test to analyze whether there was an unlawful delegation of authority. The Court found no hard and fast rule for determining whether a challenged statute had adequate standards and instead provided this test. It stated the three part test as follows:

"First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. *Argo Oil Corp v Atwood*, 274 Mich 47, 53; 264 NW2d 285 (1935)." *Seaman, supra*, at 309.

"Second, the standard should be as reasonably precise as the subject matter requires or permits. *Osius v St. Clair Shores*, 344 Mich 693, 698; 75 NW2d 25, 27; 58 A.L.R. 2d 1079 (1956)." [Footnote reference omitted] *Id*.

"The preciseness of the standard will vary with the complexity and/or the degree to which [the] subject regulated will require constantly changing regulation. [Footnote reference omitted] The 'various' and 'varying' detail associated with managing the natural resources has led to recognition by the courts that it is impractical for the Legislature to provide specific regulations

and that this function must be performed by the designated administrative officials." [citations omitted]. *Id*.

"Third, if possible the statute must be construed in such a way as to 'render it valid, not invalid', as conferring 'administrative, not legislative' power, and as vesting 'discretionary, not arbitrary, authority'. *Argo Oil Corp v Atwood, supra*, 53. [footnotes omitted]." *Id*.

Application of the *Seaman* test requires that we first take a closer look at the relevant statutory provisions. Public Act 30 provides the MPSC with authority to regulate the location and construction of certain electric transmission lines and provides that the MPSC's grant of an application for such a project through the issuance of a certificate takes precedence over local municipal regulations that prohibit or regulate the same. MCL 460.570(1). Public Act 30 provides for the contents of an application for a certificate and, in part, requires an applicant to indicate "[I]f a zoning ordinance prohibits or regulates location or development of any portion of a proposed route, a description of the location and manner in which the zoning ordinance prohibits or regulates the location or construction of the proposed route." MCL 460.567(2)(d). No other information regarding local public right of way regulations are required to be submitted (i.e., public utility ordinance). Public Act 30 is then silent with regard to how this zoning ordinance information is to be reviewed.

MCL 460.568(5) contains the commission's standards for granting an application and issuing a certificate in providing that:

> "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 alternate 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."

Finally, MCL 460.570(1) provides that:

> "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." (Emphasis added)

On what basis does the MPSC decide that a municipality's constitutionally-authorized right of way regulations under Article VII, Section 29 or zoning ordinance regulations will be preempted by the issuance of its certificate? How does the MPSC determine when the local regulations will be accepted, or are controlling or when the regulations will be in conflict in granting a certificate? The answers are unclear at best.

In application of the first part of the *Seaman* test, the act must be read as a whole in order to try to answer the above questions. The MPSC would argue that there are standards contained in MCL 460.568(5) as referenced above. However, these standards do not directly address any findings required by the MPSC with regard to any zoning ordinance regulations and, interestingly, would not apply to Article VII, Section 29 public utility rights of way regulations as these are not even part of the application process. This works to create an arbitrary authority with regard to the MPSC's ability to issue a certificate that takes precedence over conflicting local regulations pursuant to MCL 460.570(1). [44]

Even if it could be said that the standards contained in MCL 460.568(5) are applicable, it would not meet the second part of the *Seaman* test which requires the standards to be reasonably precise. The Court in *Seaman* indicated the precision of the standard will vary with the complexity and/or degree to which the subject regulated will require constant change in regulations. In this regard, utility right of way management is not a complex ever-changing subject. There would be

[44] MCL 460.570(1) should be read in conjunction with MCL 460.570(2). MCL 460.570(2) specifically states that "[a] zoning ordinance or limitation imposed after an electric utility, affiliated transmission company, or independent transmission company files for a certificate shall not limit or impair the transmission line's construction, operation or maintenance." Arguably, a zoning ordinance or other local limitation in effect when the certificate is applied for should be considered during the application process and must not be impaired by the Certificate.

no need to have a vague standard as to when a local regulation should be discarded by the MPSC. Certainly Article VII, Section 29 regulations should not be so easily discarded without a single precise standard for the MPSC to review. This allows the MPSC to have arbitrary and unlimited authority to determine the applicability of the constitutional authority granted to local municipalities pursuant to Article VII, Section 29. We would suggest that in light of the Township's constitutional authority under Article VII, Section 29 and the liberal construction of this authority that an extremely heavy burden would be placed squarely on the applicant or MPSC to determine that the local regulations are unreasonable.[45] However, this standard is not contained in Public Act 30. The MPSC does not even need to consider whether a local municipality has given its constitutional consent.

In the case at bar, the MPSC determined that Oshtemo Township's local regulations were preempted. But where are the reasonably precise rules and standards for making this determination, especially when the municipality is addressing matters of local concern? The Legislature should have at least imposed a reasonableness standard. Without such standards the delegation of authority to determine when these local regulations will be preempted is unlawful.

Under the third part of the *Seaman* test, Public Act 30 is to be given a presumption of constitutionality. This presumption, however, is overcome by the lack of adequate standards (see discussion of first two parts of the *Seaman* test) and the fact that the MPSC, through MCL 460.570(1), can engage in an arbitrary exercise of what amounts to legislative authority. The Legislature has essentially granted the MPSC legislative authority to consider without promulgated rules or reasonably precise standards the scope of the township's statutory and constitutional authority regarding reasonable control of its public rights-of-way. Unlike the Supreme Court case

[45] See for example, *Union Township v City of Mt. Pleasant*, 381 Mich 82, 89-90; 158 NW2d 905 (1968) re: reasonableness.

of *City of Taylor*, where the MPSC had promulgated rules governing underground relocation of wires, the authority provided in MCL 460.570(1) is not predicated on the MPSC's promulgation of relevant rules or the application of existing standards. As stated in the *City of Taylor*, *supra*, at 122:

> "We agree that the MPSC has absolutely no jurisdiction to consider the scope of plaintiff's constitutional authority under Article VII, Section 29."

This, however, is exactly what the MPSC is doing pursuant to MCL 460.570(1). The statute does unlawfully delegate to the MPSC the legislative authority to determine the scope of the Township's constitutional authority to consent or to place reasonable conditions on utility use of its rights of way, due to the absence of promulgated rules or adequate standards in this regard.

CONCLUSION

For the reasons set forth above, Amici Curiae respectfully requests this Honorable Court to hold Public Act 30 unconstitutional in consideration of local consent authority granted in Article VII, Section 29 or, as an unlawful delegation of authority lacking proper standards to determine when local rights of way regulations are preempted. In the alternative, Amici Curiae respectfully requests that this Honorable Court reverse the Court of Appeals and vacate the MPSC order which granted the subject certificate of public convenience and necessity and, should this matter be remanded, that this Court direct that the proceedings of the MPSC be consistent with implementation of Oshtemo Township's subject ordinance requirement mandating that a portion of the proposed electrical transmission line be underground.

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Respectfully submitted,

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