COMMENTS RECEIVED ON STAFF DRAFT STRAW PROPOSALS

On April 5, 2024, MPSC Staff presented initial draft straw proposals.

See: Comment Request

(1) Pre-application process flowchart

(2) Public notice and community participation

(3) CREO guidance

(4) One-time grants to local units

(5) Application fees

This document contains the comments received through 4/26/24 in response to the staff draft straw proposals above and linked in the **Comment Request**. The comments received will be considered and will inform changes to the proposals prior to submission in Case No. U-21547 on June 21, 2024.

COMMENTS OF THE MICHIGAN ENERGY INNOVATION BUSINESS COUNCIL

AND ADVANCED ENERGY UNITED

April 19, 2024

Introduction and General Comments

The Michigan Energy Innovation Business Council ("Michigan EIBC") and Advanced Energy United ("United," collectively "Michigan EIBC/United") appreciate the opportunity to provide comments on the Michigan Public Service Commission ("Commission" or "MPSC") Staff's ("Staff") initial partial draft ("Draft") to implement the provisions of Public Act 233 ("PA 233"). Michigan EIBC/United represent a large number of utility-scale solar, wind, and storage developers working on projects in Michigan and were deeply involved in the development and passage of PA 233.

PA 233 creates an alternative zoning approval path

PA 233 represents a transfer, under certain circumstances, of authority for zoning approval from a local unit of government to the state. This is made clear by the clear legislative intent expressed in the construction of both PA 233, and its tie-bar to PA 234, which amended the Zoning Enabling Act, Public Act 110 of 2006 (the "ZEA"). There are many facets to 233 that make it clear that the commission's new authorities are an exercise of zoning authority specifically. A few are listed below:

- PA 233 itself refers specifically to units of government "exercising zoning jurisdiction". See Section 222(2). It is only those units that can request the state issue a certificate, which signals that the state's certificate process is understood to be zoning process.
- The law was tie-barred to PA 233, the Zoning Enabling Act, further suggesting this was an amendment to zoning power.
- The description of an ordinance that deprives the Commission of jurisdiction is a long list of items that are part of a zoning ordinances almost exclusively (e.g. setbacks, height restrictions).

- The issuance of siting permission under the Zoning Enabling Act from a local government will also (with limited exceptions) deprive the Commission of jurisdiction.

PA 233 was intended to provide a new path for zoning approval, rather than a different approval process outside of the zoning context. It is therefore required that it be read in the context of Michigan's established zoning law and interpreted to harmonize with the ZEA. Doing so is also consistent with the principle of statutory construction known as "*in pari materia"* which, as the Supreme Court has observed, requires that "statutes that relate to the same subject or share a common purpose should, if possible, be read together to create a harmonious body of law." See *People v Mazur*, 497 Mich 302, 313 (2015). Since the process created by PA 233 is fundamentally a zoning approval, it makes sense that the "affected local units" that PA 233 references are those with zoning jurisdiction – especially because the law specifically references local units that "exercise zoning jurisdiction." The ZEA itself makes plain in two places that local units cannot have overlapping zoning jurisdiction. See MCL 125.3209 and MCL 125.3102(x). This fundamental principle of zoning should be understood to be effective in the PA 233 context as well.

The grounding of the Commission's powers in PA 233 as fundamentally zoning powers is consequential. The foundation is unlike the Commission's other siting authorities, in which the Commission is granting authority to take property if it grants permission. Here, there is no power of eminent domain, and the Commission risks committing an illegal taking if it denies permission or imposes improper conditions on the owners that wish to use their own property.[1] Michigan law gives guidance as to matters that can be incorporated in a zoning decision, and those decisions

[1] *Electro-Tech, Inc v HF Campbell Co*., 433 Mich 57, 68–69; 445 NW2d 61 (1989). ("A taking may occur where a governmental entity exercises its power of eminent domain through formal condemnation proceedings, see, e.g., *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (Fifth Amendment taking), or where a governmental entity exercises its police power through regulation which restricts the use of property, see *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) (this claim may be framed as a Fifth Amendment taking or as a Fourteenth Amendment "due process" type taking). It is well established that land use regulation does not effect a taking if it "substantially *69 advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land."[13] *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Regulation that "goes too far ... will be recognized as a taking." *Pennsylvania Coal, supra,* 260 U.S. at p. 415, 43 S.Ct. at 160.)

should be instructive about the appropriate reach. For instance, there are matters that zoning ordinances are not permitted to restrict, like pesticide or fertilizer use.[2]

In contrast to the risks of imposing too many restrictions, the risk of a taking of the property of non-participating landowners by imposing insufficient restrictions is remote. *Muscarello v Winnebago Cnty. Bd*, 702 F3d 909, 914–15 (CA 7, 2012). As courts have recognized, even if a wind farm were to be permitted that created a nuisance, the neighbor would have the opportunity to bring such a claim under the common law of nuisance. *Id.* at 914-915 ("The fact that the County Board has zoned agricultural property to allow wind farms would complicate her effort to establish that it was a nuisance, but not defeat it. The operation of the wind farm might turn out to cause a kind or amount of damage that the Board had not foreseen, and in that event the ordinance would not bar the suit."). Similarly, the Commission is not the only possible route for relief for neighbors who believe a developer is not following the terms of the zoning permit or certificate; landowners who are specifically damaged by that departure would typically be able to bring an action to abate a public nuisance. E.g. *Sakorafos v Charter Twp of Lyon*, No. 362192, 2023 WL 8101316, at *4 (Mich Ct App, November 21, 2023); *Muscarello v Winnebago Cnty. Bd*, 702 F3d 909, 914–15 (CA 7, 2012).

Put another way, even if the Commission were to permit something in a siting certificate that did end up causing a neighbor specific damage, that neighbor could obtain relief if the neighbor could show a nuisance resulted. E.g. *Rockenbach v Apostle*, 330 Mich 338, 344; 47 NW2d 636 (1951) ("a nuisance will not be upheld solely on the ground that it has been permitted by municipal ordinance."). Therefore, the Commission should err on the side of allowing property owners to go forward, and resist calls to restrict matters that are beyond the proper scope of zoning power.

[2] War-Ag Farms, LLC v Franklin Tp, unpublished opinion of the Court of Appeals, issued October 7, 2008 (Docket No. 270242), 2008 WL 4604392, p *5 (finding NREPA forbids zoning regulations from addressing applications of pesticide and fertilizers, because NREPA controls).

PA 233 was never meant to expand the number of local units with approval authority

PA 233 was passed to expedite local siting approvals by divesting local units of government of their zoning authority over renewable energy projects unless their zoning ordinances met certain requirements. It was not intended to multiply the number of local units of government who would have a say in siting decisions and the Commission's implementation should be true to this intent. Under the ZEA, as noted above, counties and townships cannot exercise zoning jurisdiction concurrently over the same territory. Where both a county and a township have enacted zoning ordinances, the county's ordinance necessarily yields to the township's ordinance and the county has no formal zoning authority in the township. MCL 125.3209. Similarly here, those local units of government with an interest in how the siting decision comes out (*i.e.*, the affected local units) are those who possess local zoning jurisdiction that has been replaced by the MPSC certification process under PA 233. It is therefore more consistent with the existing structures of Michigan law to understand PA 233 to intend "affected local unit" to mean a local unit of government that has zoning jurisdiction and not any others. To read the phrase more broadly would give local units that have no say in local siting under the ZEA a voice and role in the siting process established under PA 233, thus expanding the number of parties involved in a local approval process. This would not expedite the siting approval process (as intended by the Legislature) and would, in fact, have the opposite effect.

PA 233 is different from the Commission's transmission and pipeline siting authority

It is also important to understand how the new siting authority for the MPSC under PA 233 is different from that granted by Public Act 30 of 1995 ("PA 30") related to transmission siting and Public Acts 9 and 16 of 1929 ("PA 9" and "PA 16") related to pipeline siting. Specifically, both the siting of new transmission lines and pipelines under PA 30 and PAs 9 & 16, respectively, allow for the use of eminent domain if a certificate is granted by the Commission. In contrast, a permit granted under PA 233 explicitly does not allow for the use of eminent domain. As such, granting of a permit under PA 30 or PAs 9 & 16 may allow for the lawful condemnation of privately-owned land, whereas, by contrast, only willing landowners wishing to host wind, solar, or storage projects will be participating in a project under PA 233.[3] A denial of a permit under PA 233 then, conversely

[3] This is, of course, just another way that PA 233 is seen to be operating in the context of zoning law, rather than under eminent domain or some other process.

to PA 30 and PAs 9 &16, impacts private property rights by denying a landowner the ability to participate in a project using their own land as they wish. It is critical to understand this difference, and it should underpin any attempted comparison between PA 233 and PA 30/PAs 9/16, such as proposals to provide notice to other landowners, as further discussed below.

Detailed Comments

Pre-application flow chart

Michigan EIBC/United appreciate the proposal to clarify in the Draft that a public meeting can be scheduled before November 29, 2024 and that a meeting with the chief elected official can occur before November 29, 2024. However, the flow chart indicates that these events can only occur prior to November 29, 2024 at the discretion of the local official. It would be helpful to remove the discretionary caveat or clarify what this discretion means and how it can be exercised. Furthermore, the flow chart indicates that a public meeting can be scheduled, but not take place before November 29, 2024. It would be beneficial to confirm that is the Staff's intent.

Michigan EIBC/United also believe that it is important to include the provision that if a local elected official does not respond within 30 days of the meeting with the local official, the developer can proceed as if there is not a CREO. This provision balances the need to ensure that a locality with a CREO can preserve its permitting authority with the need to ensure that a project is not delayed unnecessarily and unreasonably. However, there is no guidance indicating that the local official must respond within a specific number of days once a developer offers to meet. It would be helpful to provide a required response period; otherwise, this could be a way to indefinitely delay the meeting that determines whether there is a CREO or not.

The Draft indicates, prior to the contested case step, that "The developer must supply notice of the opportunity to comment on the application." It would be beneficial for the Staff to clarify whether this means simply the opportunity to comment on the application in the contested case docket (*i.e.*, as an open public comment) or whether the developer is required to create another comment process. If the latter, Staff should clarify what it intends this process to entail and whether this needs to take place prior to the initiation of the contested case proceeding, thereby extending the pre-application process.

Public notice and local community participation

- ***The Staff recommends that the statutory definition of affected local unit, "*** a unit of local government in which all or part of a proposed energy facility will be located," ***be read to include all counties, cities, townships and villages in which all or a part of the proposed facility will be located.***

Michigan EIBC/United strongly disagree with this proposal from Staff. Michigan EIBC/United submitted comments to Staff on this issue on March 29th and reiterate those comments here, which read in part:

> To determine the definition of "affected local unit of government," it is important to consider the broader context of the ZEA. PA 233 amends Public Act 295 of 2008, but was enacted along with Public Act 234 ("PA 234"), which amends the ZEA by incorporating PA 233's requirements. In fact, the original bills which became PA 233 and PA 234 (i.e., House Bills 5120 and 5121) were tie-barred. Those bills were tie-barred because HB 5120 (and thereby PA 233) was intended to affect the state's zoning laws. PA 234 ensures that PA 233 is effective by incorporating the changes in PA 233 into the ZEA. Thus, it is clear that PA 233 was intended by the Legislature to function within the context of the ZEA. It is only reasonable, therefore, to read and interpret its provisions in the zoning context and in the context of the legal determinations that have been made around the ZEA – in other words to harmonize the requirements in PA 233 with the ZEA.
>
> Just as PA 233 speaks broadly about a "local unit of government" and an "affected local unit," the ZEA speaks broadly in its definitions of a Local Unit of Government and of a Legislative Body. The ZEA uses those terms to refer only to those LUGs or Legislative Bodies that have zoning authority over a project. Under the ZEA, there is no confusion in the zoning context as to which LUGs are implicated. A fundamental principle of zoning, so fundamental that it is stated twice in the ZEA, is that when a township has zoning authority, it divests a county of any zoning authority over the area of the township. *See MCL 125.3102(x) and MCL 125.3209*.
>
> Likewise, in the context of the tie barred PA 233, the "affected local unit" therefore must be understood to mean the LUG with zoning authority over the project – otherwise it would not be an "affected" LUG in a zoning context. Understanding the term in this way clears up any confusion and Michigan EIBC/United urge the Commission to interpret the statute in alignment with this understanding.

Michigan EIBC/United argue that in addition to the context provided by the ZEA, PA 233 itself in Section 223 clearly indicates that **"affected local unit" means the LUG with zoning authority over the project** and not, as Staff proposes, "all counties, cities, townships and villages in which all or a part of the proposed facility will be located." Specifically, Section 223 states that "For the

purposes of this subsection, a public meeting held in a township is considered to be held in each village located within the township." This portion of statute clearly indicates that the drafters *did not* propose, as the Draft suggests, that an applicant should hold public meetings in each city and township as well as the affected county and villages. In fact, the opposite is true – the statute in Section 233 clearly states that a public meeting in a township and a public meeting in a village in that township is not required. This also implies, in addition to the need to harmonize this statute with the ZEA, that the drafters did not intend for "affected local unit" to include all levels of local government in a specific geographic area.

- ***The Staff recommends that the notice of the public meeting should be sent by U.S. mail to postal addressees within 1 mile of proposed solar or proposed energy storage projects, and within 5 miles of a proposed wind energy project.***

At the outset, it is not clear to Michigan EIBC/United that PA 233 gives the Commission discretion to broaden the notice requirement contained in the Act, which is limited to publication "in a newspaper of general circulation in the affected local unit or in a comparable digital alternative." Section 223(1) of PA 233. Although Section 223(1) gives the Commission authority to "further prescribe the *format* and *content* of the notice" (emphasis added), it does not authorize the Commission to prescribe the *manner*[4] in which notice should be given or to impose *additional* requirements regarding where or to whom that notice must be published or sent.

Nonetheless, Michigan EIBC/United do not oppose, as a matter of policy, Staff's proposal that notice of the public meeting be specifically provided to certain local residents. That said, the distances proposed in the Draft are far outside the norm for existing ordinances, the ZEA, requirements set for transmission siting in PA 30 and pipeline siting in PAs 9 and 16, as well as precedent established in other states.

[4] Cf. Mich Admin R 792.10417(c) ("The commission or its secretary may prescribe the form and *manner* of notice to be given."). Although the Commission may arguably impose particular notice requirements for the contested case once an application is filed under PA 233 in keeping with its rules of procedure and general due process considerations, the same is not true, and the same due process considerations are not present, with respect to the public meetings required by Section 223 of PA 233.

As discussed above in our General Comments, the most relevant model here is the zoning approval needed for a special land use, which the PA 233 process is broadly intended to replace at the state level. In keeping with the requirements of the ZEA, existing local zoning ordinances in Michigan typically require notice be provided to owners of property and residents living within 300 feet of a proposed wind, solar, or storage project. See MCL 125.3103(2). This level of direct mail notice is the maximum that Michigan EIBC/United consider reasonable under PA 233.

Even if the Commission were to move outside of the zoning context and look to its transmission or pipeline siting authority, the proposed distances in the Draft are not consistent. As detailed above, critical to this comparison is the fact that PA 233 involves *only* willing landowners who will be hosting projects, whereas PA 30 and PAs 9 & 16 involve (potentially) the use of eminent domain to include land from unwilling landowners. This is particularly relevant because the notice requirements of PAs 9 and 16 are notably less onerous than Staff's proposed requirements for renewable siting. In a very similar manner to PA 233, PA 30 requires a public meeting to be held in each municipality through which a transmission line would pass and indicates that a public meeting held in a township "satisfies the requirement that a public meeting be held in each affected village located within the township."[5] No specific notice requirements for public meetings are directly stated in PA 30, however, and no public meetings are required by either PA 9 or PA 16.

In Case No. U-17041, which granted an application for a certificate under PA 30, the Commission found that notice of public meetings was sufficient though it was limited to (1) publication in a local newspaper and (2) in the case of one of the two townships traversed by the proposed transmission line, letters to landowners whose property the transmission line route would intersect.[6] The Commission had previously interpreted the public meeting requirement in Section 6 of Act 30 as "informational in nature and . . . intended to promote an understanding on the part

[5] MCL 460.566.

[6] See *In the matter of the application of MICHIGAN ELECTRIC TRANSMISSION COMPANY, LLC for a certificate of public convenience and necessity for the construction of a transmission line in Almena Township, Van Buren County, and Oshtemo Township, Kalamazoo County, Michigan*, order of the Public Service Commission, entered July 29, 2013 (Case No. U-17041), p. 21; see also Exhibits A-16 and A-17 from Case No. U-17041, Filing No. U-17041-0118.

of governmental officials, affected landowners, and the general public of the applicant's 'desire to build the major transmission line and to explore the routes to be considered.'"[7]

There is no indication in PA 233 that the public meetings required there need be anything other than or accomplish anything in addition to what is intended to be accomplished through the public meetings required under PA 30. Given that a certificate issued by the Commission under PA 233 gives an applicant *fewer* rights to interfere with the rights of property owners than a certificate issued under PA 30, in that the holder of a PA 30 certificate may exercise condemnation authority but the holder of a PA 233 certificate may not, it is simply not justifiable even as a policy matter to impose higher notice requirements under PA 233 than under PA 30 for public meetings preceding the filing of an application.

Finally, Staff's proposed notice requirements are also outside the norm for other Midwest states with statewide zoning authority.

- In Minnesota, according to the Minnesota Wind Notification Guidelines, notice of an application must be provided "to the county board, each city council, and each township board in each county where the LWECS [read as "large wind project"] is proposed to be located."[8] Notice also has to be published in a newspaper in each county and the Public Utilities Commission must provide "public notice to those persons known to the PUC to be interested in the proposed LWECS project, including governmental officials in each county in which the LWECS is proposed to be located."[9]
- In Ohio, public notice of a public information meeting must be published in a locally circulated newspaper and, at least 21 days before that public meeting, "the applicant must send a letter to each affected property owner and tenant. This letter must describe the certification process, information on how to participate in the proceeding and how to request notification of the OPSB's public hearing."[10]

---

[7] *In the matter of the application of International Transmission Company, d/b/a ITC Transmission, for a certificate of public convenience and necessity for construction of a transmission line other than a major transmission line, running through Genoa, Hartland, Oceola, Milford, and Brighton Township*, order of the Public Service Commission, entered May 31, 2007 (Case No. U-14861), at 22.
[8] Minnesota Administrative Rules. 7854.0600 Application Acceptance. https://www.revisor.mn.gov/rules/7854.0600/.
[9] Minnesota Administrative Rules. 7854.0900 Public Participation. https://www.revisor.mn.gov/rules/7854.0900/.
[10] Ohio Power Siting Board. Standard Application Process. https://opsb.ohio.gov/processes/standard-process.

For all of these reasons, Michigan EIBC/United propose that any requirement to provide notice to area residents be limited to those within 300 feet of a proposed solar, wind, or energy storage facility. Requiring notice beyond that range is overly burdensome and inconsistent with what is deemed reasonable in other analogous contexts.

- ***The Staff recommends that when each chief local official notifies the applicant that it has a CREO, the MPSC does not have jurisdiction pursuant to PA 233 for facilities located in that local unit's area. The facilities may come before the MPSC due to a lack of a CREO in any one affected local unit with zoning jurisdiction, or by request of one affected local unit with zoning jurisdiction.***

It is inconsistent to interpret "affected local unit" in the context of the public meeting/notice requirements to include every level of government (irrespective of zoning authority) and in the context of a CREO to interpret "affected local unit" as being the LUG with zoning authority. Instead, as detailed above, the only logical and consistent interpretation of PA 233 is to interpret "affected local unit" throughout the statute to be the LUG with zoning authority. Staff cannot simply change statutory interpretations at will in different sections of PA 233.

Michigan EIBC/United are also concerned that the Draft indicates that a project which crosses into multiple jurisdictions "may" come before the MPSC if one of those affected LUGs does not have a CREO or requests that the project go to the MPSC. This potentially gives one LUG which is unwilling to work with a developer on a project the ability to deny a neighboring township the ability to work collaboratively with the developer. Instead, the MPSC should approach this issue in the same manner as it is under the ZEA whereby approval for a project can only come from the entity with jurisdiction for zoning authority. For example, consider a 50 MW solar project across two townships (A and B) where Township A has established a CREO and Township B has not. If 60% of the project footprint is in Township A, then that township would undertake the zoning reviewing process and, if appropriate, grant a permit for 60% of the project. The remaining 40% of the project located in Township B would then be subject to an application and approval process at the Commission. Such a process would respect the jurisdictional boundaries of the ZEA and ensure that willing townships are still able to approve projects under their local process.

- ***The Staff recommends that the developer may proceed as if there is not a CREO in the event that the local official has failed to respond to the offer to meet after thirty days have passed.***

Michigan EIBC/United support this proposal from Staff. It is important, given the clear notice requirements, that a local elected official is not able to block the application of a project simply by not responding to a request for a meeting. Moreover, allowing a local official to do this would undermine the whole purpose of PA 233, which is to prevent a LUG from blocking the siting of a renewable energy project that complies with the requirements of PA 233.

- ***The Staff recommends that the following evidence be submitted with the application:***

  . . .

  - ***A list of all addressees that were mailed the notice of the public meeting and the notice of the case filed at the Commission.***

  - ***A list of those that attended the public meeting from those opting to sign in to the meeting along with a count of the total attendance.***

  - ***Minutes or a transcript from the public meeting.***

  . . .

Michigan EIBC/United are concerned that a list of all addressees that were mailed notice of the public meeting and a list of all of those that attended the public meeting should, as a matter of rule and not on a case-by-case basis, be kept confidential and not subject to FOIA. This type of private information should not be shared in the public case docket.

Michigan EIBC/United are also concerned that sufficient minutes or transcripts from public meetings may not be available in all communities. Many local governments do not keep or publish detailed meeting minutes.

CREO guidance

- ***The MPSC should consider the requirements of MCL 460.1223(3) met as long as the entire footprint of the proposed project is covered by one or more effective ordinances meeting the requirements of MCL 460.1221(f) or is un-zoned, regardless of whether local units of government without zoning jurisdiction have an ordinance addressing siting.***

As detailed above, a consistent definition of "affected local unit" as the LUG with zoning authority renders this issue moot. In addition, a local government without zoning jurisdiction could not legally have a zoning-type ordinance addressing siting. Such ordinances are not permissible under Michigan law outside the context of the ZEA. Michigan's Supreme Court has ruled that ordinances addressing uses of land must be passed under the zoning authority to be valid. See *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310; 471 NW2d 321 (1991).

In addition, Michigan EIBC/United request that the MPSC provide further guidance on what additional requirements may or may not be included in a zoning ordinance that is deemed a CREO. Specifically, there are issues such as vegetative screening on which PA 233 is silent. It would be helpful to developers and local communities alike to understand whether issues not considered in PA 233 may be included in a CREO and, if so, what the limitations are on such provisions before they become unenforceable as violating that Act.

- ***Given concerns raised regarding jurisdictional issues between various local units of government, including townships' authority to enact a zoning ordinance, the Staff recommends that the MPSC should not require a binding zoning ordinance in an affected local unit without zoning jurisdiction for the purposes of PA 233 compliance.***

Michigan EIBC/United agree with this proposal in the Draft, but also emphasize that to do otherwise would be a clear violation of the ZEA. This decision by Staff to align interpretation of PA 233 with the existing ZEA renders other interpretations of "affected local unit" as applied elsewhere in the Staff's Draft arbitrary and inconsistent.

- ***To be considered a CREO, the MPSC should not require the ordinance to include technology types that are not included in the proposed project. For instance, a CREO for solar technology is all that would be needed to consider a solar project. A hybrid solar plus storage project would need to meet the requirements outlined in one or more CREOs for solar and storage technologies. Local units should not be prohibited from including more than one technology in the same CREO, should it choose.***

Michigan EIBC/United agree with this proposal in the Draft and argue that it is the only logical manner in which to interpret the requirement for a CREO.

- ***The Staff recommends that the MPSC should consider the local unit to no longer have a CREO only until the local unit has modified its ordinance to be compliant with the statute. Likewise, when a local unit lifts a moratorium and approves an ordinance in compliance with the statute, it should be considered that the local unit has a CREO until such time found otherwise***.

Michigan EIBC/United appreciate this clarification from Staff. However, we recommend that Staff add more details to this proposal. For example, if the MPSC approves a project in a township (and, therefore, the township does not have a CREO), and another developer approaches the township's chief elected official about a new project, is the township provided a certain amount of time to update its ordinance? Alternatively, can the second developer simply assert that the township does not have a CREO (given the recent decision regarding permitting in that township at the MPSC) and proceed to an application to the MPSC until the MPSC is provided notice that the township has revised its ordinance? Michigan EIBC/United propose that the latter should be Staff's recommendation.

One-time grants

- ***The Staff recommends that the statutory definition of affected local unit, "*** a unit of local government in which all or part of a proposed energy facility will be located," ***be read to include all counties, cities, townships and villages in which all or a part of the proposed facility will be located.***

Michigan EIBC/United strongly disagree with this proposal from Staff. As detailed above, it would be an inconsistent reading of the statute to interpret the meaning of "affected local unit" differently throughout PA 233. This would open the Commission to challenges that its application of the

requirements is arbitrary and capricious rather than being grounded in the statutory language. As we noted above, there is good reason for the Commission to determine that such requirements should be read narrowly within the zoning context, but there is no basis for applying that understanding arbitrarily to some parts of the Act and not to others. There is no evidence that the Legislature meant there to be different meanings of this term and, in contrast to this proposal, the strongest evidence (i.e., the tie-bar to the ZEA) is that the Legislature meant "affected local unit" to mean the LUG with zoning authority.

- ***The Staff recommends the following calculation methodology for the 1-time grants:***
    - ***Grant $5000 to each affected local unit, regardless of which local units may have zoning jurisdiction, contemporaneous with submitting an application pursuant to PA 233.***

As detailed above, Michigan EIBC/United strongly believe that such initial grants of $5,000 should only be made to affected local units with zoning authority. In addition to the fact that this is a misreading of the statute, this proposal would make less funding available to actual affected LUGs with zoning authority. The LUG with zoning authority is the LUG who, absent the passage of PA 233, would be required to review a siting application and to determine its compliance with a local ordinance. Broadening that prerogative and responsibility to additional LUGs in the MPSC certification process is inconsistent with the purpose of the Act to make the siting process more efficient.

    - ***Within 7 days following the pre-hearing, the remaining funds ($150,000 minus the total of the $5000 grants already made) would be granted to all affected local units that have intervened in the case as follows:***
        - ***An additional $5000 to any intervening affected Counties which would cap intervening Counties at $10,000 to preserve the bulk of the funds for the localities where the facility would be located regardless of whether the locality or the County has zoning jurisdiction; as well as setting aside $5000 for Counties that have not intervened to maintain the availability of those funds in the event that a late intervention is approved; and***

Given the definition of "affected local unit," Michigan EIBC/United argue that such additional grants to any intervening Counties should only be made to an affected County with zoning authority. A County intervening without zoning authority is not an affected local unit and, as such, should not be provided with a grant to intervene.

- ***The remaining portion of the $150,000 should be divided by the nameplate MW of the project to calculate $/MW. The $/MW would be allocated to the affected local units other than Counties that have intervened based on the MW located within each local unit's area subject to the $75,000 cap per local unit.***

Again, this funding should be provided only to local units of government that are both affected by the project footprint and that have zoning authority.

- ***Staff recommends that affected local units should each file an exhibit in the case record prior to the close of the record containing the balance of unspent funds in the local intervenor compensation fund, outstanding unpaid invoices, and an estimate for funds to be used for briefing and exceptions. Remaining funds not utilized for intervention in the case will be refunded to the developer within 90 days of the close of the record. Any initial $5000 one-time grants made to local units contemporaneous with the application that have not been granted intervention status shall also be refunded to the developer following the close of the record.***

Michigan EIBC/United appreciates this proposal to ensure that the funds provided to affected local governments are used only for the purposes of intervention. We recommend that the proposed exhibit should also contain complete information on the expenses and documentation of paid invoices for the funds already spent. To do otherwise would provide incomplete information on the record and would require a less than full accounting of the use of the funds provided. Staff may also consider that this information, as a matter of course or upon request, could be filed as a confidential exhibit.

Application fee schedule

The Draft proposes that Staff may consider capping the total cost of the application fees to $250,000. Michigan EIBC/United encourage Staff to consider capping the total cost of the application fees to $150,000. As Staff noted in the March 19 public meeting, current Ohio Administrative Code 4906-3-12 requires an upfront payment of $10,000 at the time the case is opened followed by fees incurred, and billed, at cost not to exceed $150,000. This code has been undergoing revisions for quite some time and proposed changes are still in front of the Ohio Joint Committee on Agency Rule Review (JCARR). Michigan EIBC/United believe that it is both

reasonable to set an application fee cap and to align that fee cap with those set in other neighboring states such as Ohio.

P.O. Box 1322
Fowlerville, MI 48836

Tim Lundgren
Direct: 616 / 915-3726
tlundgren@potomaclaw.com

Justin Ooms
Direct: 708 / 743-7173
jooms@potomaclaw.com

COMMENTS OF ENERGY MICHIGAN, INC.
on
STAFF DRAFT STRAW PROPOSALS
for
IMPLMENTING PUBLIC ACT 233 OF 2023

April 24, 2024

I. Introduction

On April 5, 2024 the Staff ("Staff") of the Michigan Public Service Commission ("MPSC" or "Commission") issued a "Request for Informal Comments" on five draft straw proposals covering the following topics: (a) Pre-application process flowchart, (b) Public notice and community participation, (c) CREO guidance (d) One-time grants to local units, and (e) Application fees.

Energy Michigan, Inc. ("Energy Michigan") is a trade association that has represented independent power producers and suppliers, as well as customers interested in self-supply and competitive supply, for 40 years in Michigan. We have been involved in countless Commission proceedings, workgroups, and stakeholder collaboratives and welcome the opportunity to provide our comments regarding the Staff's draft straw proposals.

Aside from generally voicing its support for the comments submitted by the Michigan Energy Innovation Business Council and Advanced Energy United, Energy Michigan focuses its comments to the question of the appropriate scope of the term "affected local unit of government" and provides reasons why, from practical as well as from a legal perspective, the Staff's draft straw proposal to interpret the term "affected unit of government" as including all levels of local

government does not comport with the purpose of Public Act 233.[1] We believe that this issue cuts across several of the topics on which the Staff has requested comment.

II. The Term "Affected Local Unit" Should be Consistently Defined as the Local Unit of Government with Zoning Jurisdiction Over a Project.

In its straw proposals, the Staff suggest that the statutory term "affected local unit" be given two different meanings as part of the Commission's implementation of Public Act 233. Specifically, on page 3 of the draft proposal, in the first bullet under Section 223(1), the Staff state: "The Staff recommends that the statutory definition of affected local unit . . . be read to include all counties, cities, townships and villages in which all or a part of the proposed facility will be located." On page 4, however, in the first bullet under Section 223(3), the Staff suggest the following: "The Staff recommends that when each chief local official notifies the applicant that it has a CREO, the MPSC does not have jurisdiction pursuant to PA 233 for facilities located in that local unit's area. The facilities may come before the MPSC due to a lack of a CREO in any one affected local unit *with zoning jurisdiction*" (emphasis added).

In the former case (on page 3), the Staff are interpreting the term "affected local unit" to include all nested units of government. In the latter case (on page 4), the Staff are limiting the same term to those local units of government with zoning jurisdiction. This means that the lack of a CREO in any other local unit (e.g., a county where the township exercises zoning jurisdiction or a township where a county exercises zoning jurisdiction) will not trigger MPSC jurisdiction. Stated differently, the presence of a CREO in all nested local units would not be required for the local unit with zoning jurisdiction to assert jurisdiction over siting.

Energy Michigan agrees with the Staff's recommendation that a local unit that would not have previously had any say over whether a renewable energy or storage facility may be sited in a particular location (*e.g.*, a county where a township exercises zoning jurisdiction) should not have the ability to either divest a willing township of its erstwhile authority to permit the project on the one hand (by refusing to adopt a CREO) or to add another layer to the local permitting process on the other hand (by purporting to adopt a CREO). It would not be reasonable to interpret a statute whose purpose was to ease siting difficulties and reduce siting complexity[2] in a way that ultimately ends up *increasing* complexity by effectively multiplying the number of cooks permitted to be in the kitchen. Interpreting "affected local unit" as a local unit *with zoning jurisdiction*, as Staff recommend with respect to Section 223(3), avoids this and Energy Michigan agrees is the correct approach.

There are good reasons to support the Staff's definition here of the term "affected local unit" as the local unit *with zoning jurisdiction* over a proposed project. Among these are the fact that zoning preemption is clearly the primary issue in view throughout PA 233, seeing as how the only type of ordinance *specifically enumerated* as preempted in Section 231 is a zoning ordinance,[3]

---

[1] The comments expressed in this filing represent the position of Energy Michigan as an organization but may not represent the views of any particular member of Energy Michigan.

[2] See "Brief Rationale" in Senate Fiscal Agency's Bill Analysis of PA 233 as reported from committee, https://legislature.mi.gov/documents/2023-2024/billanalysis/Senate/pdf/2023-SFA-5120-F.pdf.

[3] To be sure, Section 231(3) makes clear that a zoning ordinance is not the only type of ordinance or local regulation that *may* be preempted.

and enacting section 2 explicitly tie-bared PA 233 to House Bill 5121 (*i.e.*, PA 234, which made the Michigan Zoning Enabling Act, 2006 PA 110 (the "MZEA"), subject to PA 233). Section 223(3)(c)(iii), furthermore, only makes sense if "affected local unit" is defined as limited to the local unit with zoning jurisdiction. Under the MZEA, in a situation where both a county and a township have a zoning ordinance, the township's zoning ordinance controls. MCL 125.3209. If "affected local unit" is interpreted to include the county in this scenario, MPSC jurisdiction could be triggered under Section 223(3)(c)(iii) by an amendment of the *county's* zoning ordinance, even though that ordinance would have no legal relevance under the MZEA to a project seeking siting approval in the township. This would be an absurd result and one which, it appears, the Staff has decided to make an exception to their otherwise broad definition of "affected local unit" to avoid.

While we agree with the Staff's recommendation to interpret "affected local unit" in the context of Section 223(3) as limited to local units with zoning jurisdiction under the MZEA, we find no defensible basis on which to define the same term differently elsewhere in PA 233, i.e., as including all nested levels of government, for other purposes under the same statute. The MPSC does not have legal authority to interpret an identical term two different ways within the same statute. The Michigan courts have held, "[i]dentical terms in different provisions of the same act should be construed identically." *Cadle Co v Kentwood*, 285 Mich.App. 240, 249 (2009) (citing *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 426 n. 16, 565 N.W.2d 844 (1997)). The meaning of "affected local unit" must therefore be the same throughout PA 233.

Furthermore, while the interpretations of an expert agency, such as the MPSC, are given some deference by Michigan courts, such deference is based on certain requirements. Thus, while falling short of federal-style *Chevron* deference, the Michigan courts have articulated a "respectful consideration" standard to be applied to administrative constructions of statutes that an agency administers: "Agency interpretations of the statutes they are charged with implementing are generally given 'respectful consideration' so long as they are consistent with the plain language of the statute." *Vectren Infrastructure Servs. Corp v Dept of Treasury*, 512 Mich 594, 613–14; 999 NW2d 748 (2023) (citing *In re Complaint of Rovas Against SBC Mich*, 482 Mich. 90, 93, 754 N.W.2d 259 (2008)), emphasis added. Given the explicit legislative intent of the statute to reduce siting complexity, and it being tie-barred to another Bill that explicitly invokes the MZEA, it is reasonable for the MPSC to interpret the Act's definitions in the context of the MZEA and its limitations on the jurisdiction of local units. However, the MPSC's interpretation arguably loses its "respectful consideration" when the same term, "affected local unit" is interpreted inconsistently in different parts of the statute and departs from its rootedness in the MZEA.

Considering the multitude of reasons, legal and practical, provided by commentors such as Michigan EIBC/Advanced Energy United and Energy Michigan why interpreting "affected local unit" as limited to those local units of government with zoning jurisdiction over a particular project is the only interpretation that makes sense within the statute as a whole and is consistent with the legislative intent to reduce siting complexity, Energy Michigan respectfully submits that Staff should abandon support for the arbitrary and capricious use of multiple definitions for the term "affected local unit" in PA 233 that is proposed in the draft straw proposal.

4/24/2024

Cathy Cole and Julie Baldwin,
Energy and Strategic Operations
Michigan Public Service Commission (MPSC) Staff
7109 West Saginaw Highway
Lansing, MI 48917

DTE's response to MPSC Staff's Initial Straw Proposal

I. We are hoping that MPSC Staff can clarify what happens if a developer and local unit of government disagree as to whether the LUG has a CREO. In the event that a local official says there is a CREO, but the developer disagrees, does the issue go to the MPSC for a decision? if so, when? Is the existence of a moratorium the only per se CREO-disqualifying provision where it is clear that there is no CREO and the developer can apply for a certificate with MPSC?

II. We are also hoping that MPSC Staff can clarify the definition of "affected local unit of government". We would recommend that MPSC Staff consider reading the statutory definition in PA 233 in the context of the Zoning Enabling Act, and that "affected local units" would therefore be limited to those local units with zoning jurisdiction. We believe such a definition is logical and consistent with the intent of the statute. This would help streamline the process and allow developers to focus their engagement efforts on local units that are most affected by the state siting process.

III. DTE has some questions about how unzoned townships are addressed in the straw proposal. In unzoned townships, there technically is no local unit of government with zoning jurisdiction. How does the process proceed when at least part of a project footprint is located in an unzoned township? We don't think it makes sense to ask an unzoned township to develop a CREO because they don't have a zoning ordinance that would allow for such development. But, we are unclear as to whether that means that a project with an unzoned township would always be subject to state siting. Similar questions arise about how unzoned townships should be treated with respect to notice, public meetings, and one-time grants.

IV. Finally, DTE thinks it would be helpful for MPSC Staff to clarify what happens when a developer has a project in more than one zoning jurisdiction (ie. 120MW project in two townships), and one jurisdiction has a workable ordinance and the other does not. In that situation, what happens if the developer is able to obtain a special land use permit in the jurisdiction with the workable ordinance, but the other jurisdiction refuses to adopt a workable ordinance or CREO. Does the developer have to apply with MPSC for a state siting certificate for the entire project, even though the project is already partially permitted at the local level? As a company that values working with local governments whenever possible, we are concerned about the implications of taking siting control out of the hands of a community that has not only indicated that it will work with the developer but has proven it by granting a special land use permit.

Sincerley,

Matt Wagner
DTE, Manager - Renewable Energy Development

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMSSION

In the matter, on the Commission's own motion, to implement the provisions of Public Act 233 of 2023 Case Number U-21547
_____/

COMMENTS OF THE GREAT LAKES RENEWABLE ENERGY ASSOCIATION

Introduction

The Staff of the Michigan Public Service Commission has asked stakeholders to offer informal comments in response to an initial draft on a series of Straw Proposals regarding the implementation of Public Act 233 and Public Act 234. The Great Lakes Renewable Energy Association (GLREA) appreciates the opportunity to provide comments to the Michigan Public Service Commission (MPSC) Staff's initial partial draft. The Great Lakes Renewable Energy Association is a membership-based organization consisting of individuals and businesses that install solar energy systems to commercial businesses and residential homeowners, as well as a utility-scale solar developer working on energy projects in Michigan. GLREA is very supportive of transitioning Michigan's electrical generation from fossil fuels to renewable energy and believes that large scale solar and wind projects are critical for meeting the new 50% Renewable Portfolio Standard by 2030.

Comments

Pre-Application Flow Chart

Great Lakes Renewable Energy Association (GLREA) appreciates the work that the MPSC Staff did to create this Flow Chart which involves a great number of steps.

At the risk of making the Flow Chart more complicated but with the intended goal of providing clarity to all parties including the public, it might be appropriate to add to this Chart that only Solar Projects 50 megawatts or larger, Energy Storage Projects 50 megawatts or larger and Wind Projects 100 megawatts or larger, are eligible to seek the necessary approval from the MI Public Service Commission. In other words, make it clear that the first fork in the Chart is the size of the Project and if the size of the Project

falls below the statutory sizes, then the developer must go through the local unit of government decision making process.

The Flow Chart and statute indicates that upon filing an application, "The developer must supply notice of the opportunity to comment on the application in a form or manner prescribed by the Commission." GLREA is assuming that this notice provision is similar to when a regulated utility is filing for a rate case, that notice is provided so that interested parties can comment on the application within the normal case process and not in an entirely separate commenting process (outside of the MPSC case process). If our understanding is wrong and the Staff proposal is to create a secondary means of providing comment, then GLREA would oppose that as being redundant, costly and complicating an already complex process.

Public Notice and Local Community Participation

- ***Staff recommends that the statutory definition of affected local unit,"*** a unit of local government in which all or part of a proposed energy facility will be located,*"* ***be read to include all counties, cities, townships and villages in which all or a part of the proposed facility will be located.***

Great Lakes Renewable Energy Association strongly disagrees with this proposal from Staff. Public Act 233 establishes an alternative process, under certain circumstances, for zoning approval to be transferred from a local unit of government to the state. This is made clear by the clear legislative intent expressed in the language of PA 233, and its tie-bar to PA 234, which amended the Zoning Enabling Act, Public Act 110 of 2006 (the "ZEA"). The fact that the Legislature tie-barred the passage of PA 233 to PA 234, is a clear indication of legislative intent that PA 233 was establishing an alternative process for making zoning decisions.

In addition, Public Act 233 itself refers specifically to units of government "exercising zoning jurisdiction," as the only local unit government that can request the state issue a certificate, which indicates the legislative intent that the state's certificate process is understood to be the zoning process. See Section 222(2).

Public Act 233 was therefore intended to provide a new path for zoning approval, rather than establish a different approval process outside of the zoning context. Public Act 233 must be interpreted and implemented to harmonize with the Zoning Enabling Act. The Michigan Supreme Court established as a matter of law that statutory construction requires that "statutes that relate to the same subject or share a common purpose should, if possible, be read together to create a harmonious body of law." See *People v*

Mazur, 497 Mich. 302, 313 (2015). Since the process created by Public Act 233 is fundamentally a zoning approval, it makes sense that the "affected local units" that PA 233 references are those with zoning jurisdiction, especially since the law specifically references local units that "exercise zoning jurisdiction."

Public Act 233 was enacted to expedite local siting approvals of renewable energy projects by providing an alternative zoning approval process to the state, unless local units of government established zoning ordinances that met certain requirements established by the state. It was not intended to multiply the number of local units of government who would have a say in siting decisions and the Commission's implementation should be true to the Legislative intent.

Under the Zoning Enabling Act counties and townships cannot exercise zoning jurisdiction concurrently over the same territory. Where both a county and a township have enacted zoning ordinances, the county's ordinance necessarily yields to the township's ordinance and the county has no formal zoning authority in the township. MCL 125.3209. Therefore, those local units of government with an interest in how the siting decision is decided, are those who possess local zoning jurisdiction that has been replaced by the Michigan Public Service Commission process under PA 233, and thus must be viewed as the "affected local units." It is more consistent to understand Public Act 233 to intend "affected local unit" to mean a local unit of government that has zoning jurisdiction and not any others. To interpret the phrase more broadly would give local units that have no say in local siting under the Zoning Enabling Act a role in the siting process established under PA 233, thus expanding the number of parties involved in a local approval process, contrary to the Legislative intent of wanting to expedite the siting approval process in order to site more renewable energy projects to reduce fossil fuel electrification generation in this state.

Moreover, just as Public Act 233 addresses a "local unit of government" and a "affected local unit," the Zoning Enabling Act also addresses the definition of a local unit of government and of a legislative body. The ZEA uses those terms to refer only to those local units of government or legislative bodies that have zoning authority over a project. Under the Zoning Enabling Act, it is clearly understood in the zoning context as to which local units of government are involved. A basic principle of zoning, is that when a township has zoning authority, it divests a county of any zoning authority over the area of the township. *See MCL 125.3102(x) and MCL 125.3209*.

Thus, in the context of the tie barred Public Act 233, the "affected local unit" should understood to mean the local unit of government with zoning authority over the project, otherwise it would operate contrary to an "affected" local unit of government in a zoning context as contained within Public Act 234.

Finally, GLREA contends that ***"affected local unit***" in Section 223 of Public Act 233, means the local unit of government with zoning authority over the project and not, as Staff proposes, "all counties, cities, townships and villages in which all or a part of the proposed facility will be located," based on other language in that section regarding holding public hearings. Section 223 specifically states that "For the purposes of this subsection, a public meeting held in a township is considered to be held in each village located within the township." This section of the statute clearly indicates that the legislative drafters did not propose, as the Staff Draft suggests, that an applicant should hold public meetings in each city and township as well as the affected county and villages. In fact, the opposite is true, the statute in Section 233 states that a public meeting in a township and a public meeting in a village, in that township is not required. GLREA therefore believes that in addition to the need to harmonize Public Act 233 with Public Act 234 the Zoning Enabling Act, that the Legislature did not intend for "affected local unit" to include all levels of local government in a specific geographic area but just the unit of government with zoning authority.

- ***Staff recommends that the notice of the public meeting should be sent by U.S. mail to postal addressees within 1 mile of proposed solar or proposed energy storage projects, and within 5 miles of a proposed wind energy project.***

GLREA doesn't understand the basis from which the MPSC Staff came up with these provisions. Public Act 233 doesn't provide the Commission discretion to broaden the notice requirement contained in the Act, which is limited to publication "in a newspaper of general circulation in the affected local unit or in a comparable digital alternative." Section 223(1) of PA 233. Although Section 223(1) gives the Commission authority to "further prescribe the format and content of the notice", it does not authorize the Commission to specifically prescribe that notice by mail be required to addresses within one-mile for a propose solar or proposed energy storage project and five miles for a proposed wind energy project Unless the MPSC Staff can site other authority from which it can justify sending notice by mail for these distances, these proposed requirements are arbitrary and unreasonable.

But GLREA does understand the intent behind the Staff's proposal. We would suggest that Staff look at other comparable situations and see what criteria is used for contacting local residents by mail.

Referring back to the Zoning Enabling Act, existing local zoning ordinances in Michigan typically require notice be provided to owners of property and residents living within 300 feet of a proposed wind, solar, or storage project. See MCL 125.3103(2). This requirement might be inadequate for purposes of large solar, energy storage or wind projects but it does provide guidance of sorts. GLREA would suggest that further research be done to find a more comparable set of criteria that meets a standard of reasonableness, keeping in mind the Legislative intent of establishing a new siting process that can make siting decisions in a forthright timely manner. Imposing a notice by mail for the distances that MPSC staff have suggested is burdensome and inconsistent with Legislative intent.

- ***The Staff recommends that when each chief local official notifies the applicant that it has a CREO, the MPSC does not have jurisdiction pursuant to PA 233 for facilities located in that local unit's area. The facilities may come before the MPSC due to a lack of a CREO in any one affected local unit with zoning jurisdiction, or by request of one affected local unit with zoning jurisdiction.***

It is inconsistent to interpret "affected local unit" in the context of the public meeting/notice requirements to include every level of government (irrespective of zoning authority) and in the context of a CREO to interpret "affected local unit" as being the local unit of government with zoning authority. Instead, as previously stated, the only consistent reading of Public Act 233 is to interpret "affected local unit" throughout the statute to be the local unit of government with zoning authority. Staff cannot simply change statutory interpretations at will in different sections of PA 233.

Great Lakes Renewable Energy Association is also concerned with the Staff Draft, that a project which crosses into multiple jurisdictions "may" come before the MPSC if one of those affected local units of government does not have a CREO or requests that the project go to the MPSC. This potentially gives one local unit of government which is unwilling to work with a developer on a project the ability to deny a neighboring township the ability to work with the developer. Instead, as stated previously, the MPSC should approach this issue in the same manner as it is under the Zoning Enabling Act, that approval for a project can only come from the entity with jurisdiction for zoning authority.

- ***The Staff recommends that the developer may proceed as if there is not a CREO in the event that the local official has failed to respond to the offer to meet after thirty days have passed.***

GLREA agrees with this proposal from Staff.

- ***The Staff recommends that the following evidence be submitted with the application:***

- ***A list of all addressees that were mailed the notice of the public meeting and the notice of the case filed at the Commission.***
- ***A list of those that attended the public meeting from those opting to sign in to the meeting along with a count of the total attendance***

Given the volatile nature of some of these siting debates at the local level, GLREA is concerned that a list of all addressees that were mailed notice of the public meeting and a list of all of those that attended the public meeting would expose homeowners and business to inappropriate mail or contact. This type of private information should not be shared in the public case docket.

CREO Guidance

- ***The MPSC should consider the requirements of MCL 460.1223(3) met as long as the entire footprint of the proposed project is covered by one or more effective ordinances meeting the requirements of MCL 460.1221(f) or is un-zoned, regardless of whether local units of government without zoning jurisdiction have an ordinance addressing siting.***

As previously stated, if the definition of "affected local unit" is the local unit of government with zoning authority, as GLREA has suggested, this would make this question irrelevant.

- ***Given concerns raised regarding jurisdictional issues between various local units of government, including townships' authority to enact a zoning ordinance, the Staff recommends that the MPSC should not require a binding zoning ordinance in an affected local unit without zoning jurisdiction for the purposes of PA 233 compliance.***

Great Lakes Renewable Energy Association agree with this provision in the Staff Draft. The decision by Staff here, to interpret PA 233 with the existing Zoning Enabling Act, makes other interpretations of "affected local unit" as used elsewhere in the Staff's Draft, arbitrary and inconsistent.

- ***To be considered a CREO, the MPSC should not require the ordinance to include technology types that are not included in the proposed project. For instance, a CREO for solar technology is all that would be needed to consider a solar project. A hybrid solar plus storage project would need to meet the requirements outlined in one or more CREOs for solar and storage technologies. Local units should not be prohibited from including more than one technology in the same CREO, should it choose.***

Great Lakes Renewable Energy Association agrees.

- ***The Staff recommends that the MPSC should consider the local unit to no longer have a CREO only until the local unit has modified its ordinance to be compliant with the statute. Likewise, when a local unit lifts a moratorium and approves an ordinance in compliance with the statute, it should be considered that the local unit has a CREO until such time found otherwise.***

Great Lakes Renewable Energy Association agrees.

One-Time Grants

- ***The Staff recommends that the statutory definition of "affected local unit,"*** a unit of local government in which all or part of a proposed energy facility will be located," ***be read to include all counties, cities, townships and villages in which all or a part of the proposed facility will be located.***

Great Lakes Renewable Energy Association strongly disagrees with this proposal from Staff. Our position on this issue has been previously stated.

- ***The Staff recommends the following calculation methodology for the 1-time grants:***
    - ***Grant $5000 to each affected local unit, regardless of which local units may have zoning jurisdiction, contemporaneous with submitting an application pursuant to PA 233.***

Great Lakes Renewable Energy Association believe that initial grants of $5,000 should only be made to affected local units of government with zoning authority. The local unit of government with zoning authority is the local unit of government who, prior to the passage of PA 233, would be required to review a siting application and to determine its compliance with a local ordinance. Expanding that role and responsibility to additional local units of governments in the MPSC certification process is inconsistent with the purpose and legislative intent of Public Act 233 to make the siting process more efficient. Moreover, Staff's proposal would make less funding available to actual affected local units of government with zoning authority.

    - ***Within 7 days following the pre-hearing, the remaining funds ($150,000 minus the total of the $5000 grants already made) would be granted to all affected local units that have intervened in the case as follows:***
        - ***An additional $5000 to any intervening affected Counties which would cap intervening Counties at $10,000 to preserve the bulk of the funds for the localities where the facility would be located regardless of whether the locality or the County has zoning jurisdiction; as well as setting aside $5000 for Counties that have not intervened to maintain the availability of those funds in the event that a late intervention is approved; and***

Given our position regarding the definition of "affected local unit," Great Lakes Renewable Energy Association contend that additional grants to any intervening Counties should only be made to an affected County with zoning authority. A county intervening without zoning authority is not an affected local unit and should not be provided with a grant to intervene. It will only add additional complexity to an already complex process.

        - ***The remaining portion of the $150,000 should be divided by the nameplate MW of the project to calculate $/MW. The $/MW would be allocated to the affected local units other than Counties that have intervened based on the MW located within each local unit's area subject to the $75,000 cap per local unit.***

Again, this funding should be provided only to local units of government that are both affected by the project footprint and have zoning authority.

- ***Staff recommends that affected local units should each file an exhibit in the case record prior to the close of the record containing the balance of unspent funds in the local intervenor compensation fund, outstanding unpaid invoices, and an estimate for funds to be used for briefing and exceptions. Remaining funds not utilized for intervention in the case will be refunded to the developer within 90 days of the close of the record. Any initial $5000 one-time grants made to local units contemporaneous with the application that have not been granted intervention status shall also be refunded to the developer following the close of the record.***

Great Lakes Renewable Energy Association agrees.

Application Fee Schedule

Great Lakes Renewable Energy Association understands that significant costs will be involved in evaluating projects brought forth to the Michigan Public Service Commission and thus there is a need to assess fees to recoup those costs for the MPSC. GLREA also understands the reasoning why the Staff Proposal is looking to the prescribed fees paid by a public utility as a comparable structure. But GLREA urges some caution in using the public utility fee structure because there are significant differences between regulated utilities and energy project developers. Regulated utilities are readily able to recoup those costs through rate increases but energy project developers don't have that built in mechanism to recoup costs. Yes, the energy project developers can build in these fees to the overall cost of the project. But if the fees are excessive then the overall cost of the project will increase which makes the price of power that these projects generate that much higher, which might make the project more difficult to pencil out. The goal of Public Act 233 and Public 234 is to develop an alternative certification process through the MI Public Service Commission that will provide calmer deliberation in the siting of new renewable energy projects. In order to meet the new 50% Renewable Portfolio Standard by 2030, we need to site a lot of new energy projects. We therefore need to be careful about not running up the costs of evaluating these energy project proposals in order to make them financially viable and hopefully be done in a way that the end user of the electric power, can save money over power that is currently generated by fossil fuels.

April 24, 2024

Respectfully submitted,

John Freeman (P43020)
Executive Director - GLREA
(313) 655-7945
Jfreeman13@comcast.net

MAC
MICHIGAN ASSOCIATION OF COUNTIES
110 W. Michigan Ave., Suite 200
Lansing, MI 48933
517-372-5374 Fax 517-482-4599
www.micounties.org
Stephan W. Currie, Executive Director

April 24, 2024

Michigan Public Service Commission
7109 W. Saginaw Hwy.
Lansing, MI 48917

Members and Staff of the Michigan Public Service Commission,

The Michigan Association of Counties (MAC) is grateful for the opportunity to comment on the straw proposal created by the commission (MPSC). Public Act 233 of 2023 has presented a unique challenge for local units of government by requiring them to adhere to state standards while also considering the implications that renewable energy facilities will have on their communities. As the MPSC staff makes recommendations for implementing the new law, it is imperative that local voices are not only protected but elevated to the forefront of these discussions.

The below excerpts and responses reflect the relevant areas of concern for MAC and its members:

The Staff recommends that the statutory definition of affected local unit, "a unit of local government in which all or part of a proposed energy facility will be located," be read to include all counties, cities, townships and villages in which all or a part of the proposed facility will be located.

> MAC concurs with the MPSC's definition of "affected local unit." Though many counties do not have zoning powers, all will be impacted by the presence of a renewable energy facility: county resources will be utilized, infrastructure will be altered, acres will be occupied, constituents will voice their concerns, master plans will be re-examined, etc. It is critical that all levels of government are recognized when administering PA 233.

The Staff recommends that public meetings should be held in each city and township where the proposed project is located and also serve to meet the requirement to hold a public meeting within the affected county as well as affected villages.

- ***Unless otherwise requested by the local official, the public meeting should be held outside of the traditional workday hours of 8 a.m. to 5 p.m.***
- ***The applicant shall provide a copy of the notice submitted to the clerk in each affected local unit to the MPSC Executive Secretary on the same date in which the local clerk was provided notice.***

The Staff recommends that the notice of the public meeting should be sent by U.S. mail to postal addressees within 1 mile of proposed solar or proposed energy storage projects, and within 5 miles of a proposed wind energy project.

- ***The notice shall include the date, time, and location of the public meeting; a description and location of the proposed project; and directions for submitting written comments for those unable to attend the public meeting.***

  MAC agrees public meetings held in "each city and township where the proposed project is located" is an appropriate means of communication, and that the proposed provisions for notifying the local unit and the public are adequate.

The Staff recommends that the titles of chief elected officials may vary between jurisdictions. Chief elected officials typically include mayors, village presidents, township supervisors, and board chairs.

The Staff recommends that the offer to meet with the chief elected official be delivered by email and by certified U.S. mail.

The Staff recommends that the offer in writing to meet with the chief elected official be submitted as evidence with an application filed pursuant to PA 233.

MAC proposes that the offer in writing to meet with the chief elected official be submitted to the entirety of the legislative body for each affected local unit of government. The law does not command the chief elected official to share the notice of meeting, or contents of the meeting, with the rest of the board, effectively limiting transparency. To ensure there is an open dialogue between an applicant and local unit, they should meet collectively.

The Staff recommends that when each chief local official notifies the applicant that it has a CREO, the MPSC does not have jurisdiction pursuant to PA 233 for facilities located in that local unit's area. The facilities may come before the MPSC due to a lack of a CREO in any one affected local unit with zoning jurisdiction, or by request of one affected local unit with zoning jurisdiction.

Should an applicant apply for siting approval at the MPSC even though a local unit of government notified it has a CREO, the local unit of government, or another intervenor, may file a motion to dismiss the case to be ruled upon by the administrative law judge. The judge's ruling could be appealed to the Commission.

The Staff recommends that the developer may proceed as if there is not a CREO in the event that the local official has failed to respond to the offer to meet after thirty days have passed.

The MPSC should consider the requirements of MCL 460.1223(3) met as long as the entire footprint of the proposed project is covered by one or more effective ordinances meeting the requirements of MCL 460.1221(f) or is un-zoned, regardless of whether local units of government without zoning jurisdiction have an ordinance addressing siting.

Given concerns raised regarding jurisdictional issues between various local units of government, including townships' authority to enact a zoning ordinance, the Staff recommends that the MPSC should not require a binding zoning ordinance in an affected local unit without zoning jurisdiction for the purposes of PA 233 compliance.

The definition of a CREO should be revisited for the purpose of clarity. If a CREO were to be defined explicitly as a zoning ordinance, it would allow the local unit in control of zoning to adopt a CREO and prevent redundancy or contradictions through any other police power or regulatory ordinances.

The Staff recommends that the MPSC should consider the local unit to no longer have a CREO only until the local unit has modified its ordinance to be compliant with the statute. Likewise, when a local unit lifts a moratorium and approves an ordinance in compliance with the statute, it should be considered that the local unit has a CREO until such time found otherwise.

MAC is supportive of allowing local units to adjust and adapt. Each election cycle can change the composition of a board, and perspectives may shift with time. Additionally, PA 233 takes effect in November, and we find ourselves in April without proper guidance from the state on how to administer the act; this does not grant local units much time to draft and adopt a CREO. Allowing a local unit to come into compliance at a later date grants boards flexibility.

The Staff recommends the following calculation methodology for the 1-time grants:

- ***Grant $5000 to each affected local unit, regardless of which local units may have zoning jurisdiction, contemporaneous with submitting an application pursuant to PA 233.***
- ***Within 7 days following the pre-hearing, the remaining funds ($150,000 minus the total of the $5000 grants already made) would be granted to all affected local units that have intervened in the case as follows:***
    - ***An additional $5000 to any intervening affected Counties which would cap intervening Counties at $10,000 to preserve the bulk of the funds for the localities where the facility would be located regardless of whether the locality or the County has zoning jurisdiction; as well as setting aside $5000 for Counties that have not intervened to maintain the availability of those funds in the event that a late intervention is approved; and***
    - ***The remaining portion of the $150,000 should be divided by the nameplate MW of the project to calculate $/MW. The $/MW would be allocated to the affected local units other than Counties that have intervened based on the MW located within each local unit's area subject to the $75,000 cap per local unit.***

Staff recommends that grants are intended to cover the cost of participation for local units of government. Individual landowners seeking to participate in proceedings will continue to follow established processes for intervention and public comment but are not eligible recipients for grant funding under Sec. 226. Local landowners may work with the affected local units at the discretion of the local units and may seek alternate funding from other sources.

Applicants and affected local units may consult with Staff on 1-time grant calculations ahead of filing the application at their discretion.

Staff recommends that affected local units for a particular facility be allowed to pool funds allocated for the purposes of participating in the MPSC siting case.

Staff recommends that affected local units should each file an exhibit in the case record prior to the close of the record containing the balance of unspent funds in the local intervenor compensation fund, outstanding unpaid invoices, and an estimate for funds to be used for briefing and exceptions. Remaining funds not utilized for intervention in the case will be refunded to the developer within 90 days of the close of the record. Any initial $5000 one-time grants made to local units contemporaneous with the application that have not been granted intervention status shall also be refunded to the developer following the close of the record.

> The proposed method of distribution for the intervenor grant funds is convoluted and inequitable among the various local units of government in covering the costs of legal counsel. To ensure clarity and consistency, MAC recommends the funds be distributed evenly across all affected local units of government. After all, the cost of retaining legal counsel will not be dependent on the size of the project or megawatts within a locality.
>
> Furthermore, the language in PA 233 explicitly refers to these funds as a "grant." Unexpended grant funds are not typically returned to the granting party. MAC proposes that any unexpended funds be deposited in the local unit's general fund.

On behalf of Michigan's 83 counties, we urge the commission to consider these points when crafting their final proposal.

Respectfully,

Madeline Fata

Madeline Fata
Governmental Affairs Associate

Comments Regarding MPSC Staff Proposal Implementing PA 233
Michigan Conservative Energy Forum
April 25, 2024

Background & Introductory Comments

The Michigan Conservative Energy Forum (MICEF) is uniquely positioned to provide insight to the Michigan Public Service Commission and its staff (Hereafter "Commission" and "Staff") as it develops rules and processes for implementing PA 233 of 2023. MICEF, through its Land & Liberty Coalition® program, is the only organization in the state with a program dedicated solely to assisting the siting of large-scale wind, solar and storage projects, which are the subject of PA 233. Our team has developed unique expertise in this arena by attending hundreds of planning commission, township board, and county board meetings regarding ordinances and permitting.[1]

In addition, we have assisted several local governing bodies by drafting zoning ordinances. MICEF and Land & Liberty have well-established relationships with utilities, renewable energy developers, dozens of local officials, and a statewide network of local landowners and farmers desiring to participate in renewable projects. We understand all the elements of the zoning and permitting process from essentially every perspective.

MICEF views PA 233 as creating a secondary route, through the Commission, for permitting renewable projects, either by the preference of the local unit of government (LUG) with zoning authority or as a fallback mechanism should the process between the LUG and developer reach an impasse. MICEF emphasizes the "secondary" nature of pursuing a certificate from the Commission as every stakeholder group, since the passage of PA 233, has indicated a desire to keep project approvals at the local level. As MICEF has done for more than a half-decade, a cooperative local process leads to the best outcome for all parties involved.

Fundamental Zoning Principles Should Guide MPSC Process

Along with appropriate interpretation of the statute, an important guidepost for the Commission's implementation of PA 233 is to synchronize, to the greatest extent possible, its policies and processes with those of the Zoning Enabling Act (ZEA). While the Commission has

[1] Our team includes a former county commissioner and two local planning commissioners. The principal author of these comments is currently the chair of a township planning commission and participated in drafting the township's solar ordinance.

valuable experience with siting pipelines and transmission lines under the authority of other statutes, PA 233 and its companion law in PA 234, are specifically tied to the principles of zoning and permitting in the ZEA. The Commission will best fulfill its duties under PA 233 by keeping the ZEA as its "north star."

Key principles in the zoning and ordinance-crafting process affecting renewable energy projects include: respecting zoning districts and land use policies, upholding rights of property owners, protecting the health, safety, and well-being of residents, and avoiding the de facto prohibition of a legal land use through restrictive policies (aka "exclusionary zoning"), which is prohibited under the ZEA. Because there is no enforcement mechanism in the ZEA regarding exclusionary zoning, the only recourse being litigation against a LUG, restrictive ordinances that block projects became the norm across much of the state. As Staff is aware, this illegal practice prompted the Legislature to enact PA 233.

Definition of "Affected Local Unit"

Staff recommends that the definition of an "affected local unit" of government include both the county in which a project is located and any city, village, or township in which it is located, regardless of which jurisdiction has actual zoning authority over the project location. This interpretation runs contrary to zoning authority governed by the ZEA. A narrow reading and interpretation of this definition, isolated from the larger context of the ZEA, creates unnecessary complications to implementing PA 233.

The ZEA is explicit in establishing that ***only one*** jurisdiction can have zoning and permitting authority over a parcel of land. Simply stated, residents and commercial parties are not required "to serve two masters" when it comes to zoning. While it is common for the physical footprint of a project to cross multiple jurisdictions, each parcel of land in the project is subject to a single zoning authority.

The interpretation that both a zoned township and the county must each have a compatible renewable energy ordinance (CREO) under PA 233 to satisfy some requirements of the law undermines this zoning principle and misinterprets the intent of the Legislature. The ZEA is explicit in stating that the "zoning jurisdiction of a county does not include the areas subject to a township zoning ordinance." [MCL 125.3102(x)]. The ZEA also has an exclusive section, MCL 125.3209, which states, "… a township that has enacted a zoning ordinance under this act is not subject to an ordinance, rule, or regulation adopted by a county under this act."

In effect, Staff's isolated interpretation of a definitional term, which resides in an entirely different chapter of Michigan law, would abrogate these two explicit ZEA provisions.

If the Legislature had intended that the county and a zoned jurisdiction were both required to have a CREO, then PA 233 would be a mandate that all 83 counties are required to create a CREO under PA 233 or the county would be potentially subjecting all smaller zoned jurisdictions to the Commission certification process. The Legislature clearly did not intend to mandate this involvement.

The appropriate understanding of the term "affected local unit" is each jurisdiction that has zoning authority over any parcel of land that is part of the project. An unzoned jurisdiction could not be considered "affected" because it does not have the governmental structures in place to enact a CREO. Likewise, a county is not "affected" if a project is entirely within one or more zoned jurisdictions.

Under its proposal for CREO Guidance (p.6), Staff notes in 1.b., "Given concerns raised regarding jurisdictional issues between various local units of government, … the MPSC should not require a binding ordinance in an affected local unit ***without zoning jurisdiction*** for the purposes of PA 233 compliance" (emphasis added). First, the "concerns raised regarding jurisdictional issues" are a function of the Staff's interpretation of an affected local unit. Adhering to the understanding of affected local units recommended by MICEF and others eliminates the concerns and the need for recommendation 1.b. altogether. Second, by recommending the Commission functionally absolve a local unit without zoning authority from having to develop a binding ordinance, it highlights the inappropriateness of including a unit without zoning authority as an affected local unit.

Including only those units with zoning authority in the definition of an affected local unit also reduces complexity in the allocation of funds for intervenors that will be discussed below.

Notice of Public Meetings

Staff proposes that notices for public meetings required under PA 233 be sent by U.S. mail to every postal address within 1 mile of a proposed solar or storage project and within 5 miles of a proposed wind project. Staff further proposes that the list of addresses mailed be made part of the case record, which subjects them to public exposure.

PA 233 expressly creates the requirement for notice on public meetings, namely, publishing notice in a newspaper of general circulation or a digital equivalent in the affected local unit. Staff cites no authority for these additional requirements imposed upon project developers. The Commission has authority to "further prescribe the format and content of the notice" itself, but it

does not have authority to impose additional requirements as to how the notice is to be provided. The proposal is effectively administrative legislation.

Staff further provides no rationale or explanation for the arbitrary distance standards of 1 mile and 5 miles. A principle of zoning is to protect the health, safety, and welfare of a community's inhabitants. One cannot point to a reasonable health, safety, or welfare impact that a zoning authority typically takes into consideration upon a resident living 1 mile from a solar farm or 5 miles from a wind turbine. The scope of these requirements is out of proportion to normal zoning practices and potentially burdensome as the number of affected inhabitants could number well into the thousands.

The requirement that the list of mailing addresses be part of the case record, and thus subject to public access, is without justification. There is no means of consent for a resident to be part of a public record. If some sort of mailing requirement remains, a receipt from the U.S. Postal Service indicating the number of pieces mailed should be sufficient proof that a project developer has complied with a mailing requirement, similar to other requirements for using certified mail. Given the points raised above, MICEF recommends that these mailing requirements be entirely removed.

CREO Guidance

In 1.c. of the CREO Guidance, Staff proposal states, "Local units should not be prohibited from including more than one technology in the same CREO, should it choose." This phrasing is without context as the Commission has no authority to "prohibit" any action by a local zoning authority. It appears to be a statement in the negative that the Commission will consider multiple ordinance provisions that meet the requirements of PA 233 to be acceptable CREOs regardless of whether they are in separate ordinances or combined into one ordinance. The sentence should either be rephrased in the affirmative or can be removed without any impact on the guidance.

In 1.d. Staff recommendation is almost tautological in stating the Commission should allow any provision as acceptable if it complies with the requirements of PA 233. The Commission is, in fact, obligated to accept within CREO provisions that are compatible with the statute. Is the point of this recommendation to restate the law or indicate the Commission should follow the law?

Proposal on One-time Grants

Per the discussion on what constitutes an affected local unit, the allocation of funds for intervenor compensation should be limited to only those jurisdictions with zoning authority in the footprint of the project. If any portion of the project is in an unzoned jurisdiction, the county, having zoning authority over the parcel(s), shall be the entity eligible for intervenor funding.

While this interpretation appears to disadvantage an unzoned jurisdiction, this circumstance is no different than many other zoning decisions that an unzoned jurisdiction abdicates to the county when it chooses not to self-zone.

There have been several instances when unzoned townships have opted to become a self-zoned jurisdiction once a project was proposed within their boundaries. Remaining unzoned, and thus not given intervening funding in a case before the Commission, is at the discretion of the local unit.

Reducing the number of affected units to only those with zoning jurisdiction over any parcel of land in the project will simplify the calculation and distribution of funds. Staff's recommendation to divide the funds proportionate to the amount of land within the project is a sensible approach.

Staff recommends that any funds not expended by local intervenor, minus unpaid invoices and an estimate for costs of briefing, etc. be returned to the developer within 90 days of the close of the record. MICEF sees this recommendation as premature on two counts. First, there is no necessity for financial matters to be rectified before the case comes to its conclusion, especially if there are future expenses that can reasonably be anticipated.

Second, the legislation explicitly identifies the right of parties to appeal a Commission order pertaining to a certificate to the Court of Appeals (Sec. 229). MICEF believes this potential further legal action would be a contiguous extension of the right to intervene granted to local units. Any remaining funds should remain available to the local unit should it wish to appeal the Commission's order in the case.

Further, should the developer appeal the order to the Court of Appeals, any funds not expended by local intervenors up to that point should be available to respond to the developer's appeal. If after the Commission's order neither party appeals to the Court of Appeals, then remaining intervenor funds should be returned to the developer. Staff's recommendation of 90 days is reasonable, including a recommendation that all expected or invoiced expenses be paid within the 90 days, so all remaining funds can be returned.

April 24, 2025

Subject: Comments of Ørsted on Staff Straw Proposal of Renewable Energy and Energy Storage Facility Siting

Ørsted appreciates the opportunity to provide comments on the straw proposal for the local siting regulations published by the Michigan Public Service Commission Staff. We applaud the MPSC and staff initiating a transparent, inclusive, and collaborative process for developing state siting regulations. The release of the straw proposal is another example of these principles in action. The execution of a state process that is clear, efficient, and transparent while respecting the vital role of local communities in siting and permitting of renewable energy projects is critical to satisfying the spirit of the law and the goals of the legislature and Governor to make deployment of renewable projects efficient while ensuring maximum benefit to the state and local communities.

Ørsted, a global clean energy leader, develops, constructs, and operates land-based and offshore wind farms, solar farms, energy storage facilities, hydrogen facilities, and bioenergy plants. In the United States, the company has approximately 700 employees and a portfolio of clean energy assets and partnerships that includes offshore wind energy, land-based wind energy, solar, battery storage and e-fuels. Ørsted has a total U.S. land-based operational capacity of 5 gigawatts across wind, solar, storage technologies and e-fuels.

Ørsted believes the straw proposal is a good initial step toward building out more robust recommendations from Staff on the implementation of a state permitting process for siting renewable energy. While we agree with the intent of certain sections and the effort put into this initial draft, Ørsted believes there are a number of areas that remain unclear or ambiguous. As a member of the Michigan Energy Innovation Business Council (MIEIBC), we support the comments submitted by the Council. In addition to the issues raised by MIEIBC, below are three areas that Ørsted believes warrant greater clarity and certainty to ensure the process achieves the goals and intent of PA 233.

I. **Siting Plan Modifications**: Ørsted recommends that the MPSC make clear that when modifications are made to a project after the initial public meeting and meeting with a public official, the project will not be forced to start the entire process again from the beginning. As with a regular zoning approval, the siting plan should not be considered final until the form that receives approval.

II. **Compatible Renewable Energy Ordinance (CREO)**: Ørsted encourages the MPSC to explicitly address questions raised in various stakeholder meetings about whether conditions that appear in a local ordinance but do not appear in PA 233 means the relevant local unit does not have a CREO.

III. **30-day window for offer to meet and window for meeting**: Ørsted recommends that the MPSC make clear when the 30-day window for a chief elected official to respond to an offer to meet begins and what method will be used to verify when the window opens. Additionally, Ørsted recommends that the MPSC require the chief local elected official, or their designee, to provide a written response to the offer to meet, preferably by email. Finally, Ørsted requests that the MPSC also set a time limit on the window within which a meeting must take place after a chief elected official responds.

I. Siting Plan Modifications

The straw proposal does not make clear that when modifications are made to a project site plan, the project will not be required to start the application process again from the beginning. Site plan modifications are a standard aspect of project development and are necessary to ensure that developers are being responsive to the input and feedback from the local community and the permitting authority. Additionally, site plan modifications are made as a result of more detailed surveying within a project's footprint, environmental permitting requirements, interconnection requirements, and continued coordination with participating landowners. While Section 222(3) of PA 233 addresses changes made to a site plan after the Commission issues a certificate for an energy facility, it does not directly address changes to a facility's site plan made after a developer begins the PA 233 process under Section 223 but prior to the issuance of a certificate. In certain sections of the PA 233 and in the straw proposal, it is either implied or made explicit that the MPSC can impose certain additional conditions as a prerequisite to a project gaining MPSC approval. Ørsted recommends that the MPSC make clear that site plan modifications made as a project moves through the permitting process will not trigger a reset of the entire process and force a project to begin again from the start. Ørsted also recommends that the MPSC make clear that the site plan proposed at the meeting with the chief elected official of the affected local unit is to be understood as preliminary and subject to modifications for the reasons listed above.

II. Compatible Renewable Energy Ordinance (CREO)

The straw proposal does not appear to address the concerns raised by stakeholders in the public meetings about whether requirements that are included in a local affected unit's zoning ordinance but not addressed in the statute would effectively make the local ordinance not a CREO.

For example, what if a local ordinance/identified CREO includes a condition for maximum lot coverage (e.g., that no more than 50% of any single parcel may be covered by solar)? A local unit informs the developer that it has a CREO. Maximum lot coverage is not addressed in PA 233, and therefore the developer interprets that condition as incompatible with the PA 233. The developer applies with the local unit and prepares the application to comply with all statutory requirements in PA 233 but not with the additional requirements set by the local ordinance that do not appear in the statute (in this case, the maximum lot coverage requirement). As a result, the application gets denied at the local level. Does the developer have grounds at this point to apply at the MPSC under Section 223(3)(c)(ii)? Under this scenario, does the local unit effectively not have a CREO going forward or until the local unit modifies its ordinance to limit its requirements to those reflected in the statute (specifically, Section 226(8))?

The risks to both the developer and the local unit of this uncertainty are numerous. There is legal risk if it is perceived that one or the other party did not follow appropriate procedure as laid out in PA 233. There is timing risk for the developer if they must go through both the local unit process and the MPSC process unnecessarily, which can delay project execution. This uncertainty also creates financial risk for both the developer and the local unit, as it costs human resources and money to build and submit an application as well as to evaluate and vote on an application.

III. 30-day window for offer to meet and window for meeting

It is unclear in the straw proposal when the clock begins on the 30-day period in which the chief elected official must respond to a developer's offer to meet. In the straw proposal, a developer must transmit the offer to meet both through email and certified mail. Does the 30-day period commence at receipt of the offer provided via certified mail? If so, how would that receipt be verified and conveyed to the developer that the 30-day window has commenced? Or would it be at time of receipt of the email offer? If so, should a read receipt or some other means of verification be required by the Commission? Ambiguity in when the 30-day window starts creates confusion both for the developer and chief elected official, which can lead to a compounding effect of misaligned timelines through the period leading up to potential application to the MPSC permitting process. It could also open the door to potential legal liability both for the developer and for the state if there is a question raised about whether the statutory or regulatory processes were appropriately followed. Ørsted recommends that the 30-day clock should begin at the time of verification of receipt by the chief elected official of the offer to meet sent by certified mail.

Additionally, the straw proposal does not specify a means by which the chief elected official must respond to the offer to meet within the 30-day period. Ørsted recommends that the MPSC require that the chief elected official provide a response to the developer's offer to meet via email. A copy of the sent email should be required to be included in the developer's application to the MPSC permitting process. If the chief elected official does not respond to the offer to meet within the 30-day period, the MPSC should clearly state that this step is waived.

Finally, the straw proposal leaves open the question of what should happen if a chief elected official responds to the offer to meet but states that they are not available for a meeting within a reasonable time. For instance, if a chief elected official responds by indicating that their availability is limited to a day six months into the future, it is not immediately obvious what recourse a developer might have under the statute, since the time period provided for the next step in the process, described under Section 223(3), is measured not with reference to the date on which the chief elected official responds but with reference to the date on which the meeting occurs. Ørsted therefore recommends that the MPSC require that any meeting between the developer and the chief elected official take place within 21 days of the date on which the chief elected official responds.

Thank you again for the opportunity to provide comments on the MPSC Staff straw proposal. Ørsted believes that clarity on the above issues will benefit all parties and result in a stronger and more effective state permitting process. We reiterate our appreciation to the MPSC Staff and the Commissioners for their diligent work in this process.

Philippe Pontbriand

Philippe Pontbriand

Senior Director, Development Central & East
Ørsted Power North America

From: Planning
To: Cole, Cathy (LARA)
Cc: Baldwin, Julie (LARA)
Subject: Renewable Energy Siting - April Comments request
Date: Wednesday, April 17, 2024 4:11:03 PM

Subject: Renewable energy siting

Informal Comments on staff straw proposals due April 24, 2024.

Observation: Page 3 (b), Publish notice:

- Act 233 states 14 days before meeting which is inconsistent with the MI Zoning Enabling Act Sec. 125.3103 stating 15 days.
- Comment: Page 4, staff recommendation, bottom paragraph, "...newspaper or online...". Published notice should be in both the newspaper and online since many locations throughout the State may not have dependable internet access, and many older citizens may not be adapted to technology.
- "...notices sent by mail within 1 mile...". Battery Storage Facility should be added to the 1-mile notice mailing.

Page 6(c), CREO Guidance:

- A CREO should be considered compatible with the ACT with additions of reasonable regulations that address the following subjects: A complaint procedure (e.g. high decibels, excessive glare & shadow flicker, drainage & temperature effects on sensitive habitats) should be addressed in the CREO as well as at the MPSC level.
- A CREO should be able to require "wildlife friendly fencing" as recommended by the USDA Natural Conservation Resource Service. Patterned solar panels or other method to minimize the risk of bird crash landings as recommended by the National Audubon Society.
- Pollinator and native grasses requirement on PA 116 lands should be required on all subject project property.
- EGLE should recommend to CREOs and MPSC, applicable setbacks to protect impacted riparian areas such as wetlands, floodplains, streams, and lakes.

Page 7(d) Grant Funding:

- Funding for on-going intervals of fire department training should be made available for battery storage facilities throughout project's life since these facilities may be more prone to safety issues (e.g. fire) as they age.

The MPSC staff have done a great job dealing with Act 233 text and working out the details. Thank you for your work.

I would also direct your attention to studies from Mary Reilly and Brad Neuman, MSU Extension Educators, and Sarah Mills, on the top-down approach and resistance from local citizens and property owners toward large renewable energy facilities. Below are a few concerns I've noted over the last few years:

- I don't disagree with thoughts on global warming. If we want to keep climate crisis from getting even worse than it is already, all countries will need to build a huge amount of clean energy infrastructure. But should that infrastructure be sited on the cheapest, easiest, wall street profitable, green space? Will the big Washington financial incentives for renewable energy slow the planet's warming? Short-sighted needs of today to address the impacts in the future may have unintended consequences.

It's also a question of values, if you've dedicated your life to protecting wildlife and habitat, you might object to hundreds of fenced acres disrupting their habitat and migration patterns even if that renewable energy could help delay an extinction crisis driven in part by climate change. If you're a fourth-generation farmer hoping your kids will follow in your footsteps, of course you might be troubled by neighboring growers selling out to solar companies, even if rising global temperatures are sapping the water supplies. And if you love landscapes, then you might feel a restful wheatfields, pastures, or woods are terrible spots for industrial energy infrastructure. You can put a solar farm in many different places. Bucolic rural landscapes occupy less and less places in southern Michigan. This might crystallize the difficulties we're going to face as a nation confronting the climate crisis."

- These companies (large wind & solar) come down and take over with strongarm tactics, as if we don't matter.
- Our land is not a commodity, it's our homes, we're suppose to protect it.
- Opportunity comes with responsibility toward nature.

Thank you for your time,

[redacted]

From: [redacted]
To: Cole, Cathy (LARA); Baldwin, Julie (LARA)
Subject: Siting Comments
Date: Tuesday, April 23, 2024 7:18:23 AM

Good Morning,

This is my first time involved in any state government process and I am impressed. This is a lot to sift through to get it right.

1) Still need clarification on 'affected' unit. To keep it in simplest terms.....If a township is self zoning, then the county should not have any "grant dollars". If the county is responsible for zoning, then both. For instance, our township is self zoning and the county has no jurisdiction on our zoning....our county should not be eligible for any grant dollars. Are there stipulations on what the grant money can be used for?

2) For projects that have gone through the township process prior to November 2024 and the project was denied, however it hasn't been given the opportunity to have an Appeal Hearing (which is the next step in the township process), can the company go directly to the MPSC process? This is real world situation of game playing at the township level. The project was denied in our township on October 3, 2023, approved minutes and resolution not prepared and processed until December 6, 2023. The company on December 22 requested an Appeal Hearing with the Zoning Board of Appeals. The township WILL NOT give them the Appeal Hearing because they are attempting to impose a moratorium. The company can not go through the legal system until they have exhausted the township appeal process. So now it has been 6 months from denial and the company is in a pickle. Just giving you a taste of real world strategies that are and will occur with townships and their attorney's.

3) On the notice of public meeting, I would recommend every property owner in a township should get notice as well as the township officials of any adjacent township.

4) Again, on a public meeting of the 'affected unit'.....are you advocating for one at the township level, and one at the county level? I would clarify it should only be required at the township level for self zoning jurisdictions. In addition, our public hearing was held in a neighboring township since our township hall only can accommodate 154 people. We wanted to make sure everyone who wanted to attend could because if 160 people came to our public hearing then we would have had to cancel since

the law dictates it would have to be rescheduled since it didn't accommodate everyone.

5) On page 7, middle of page, a 'pre-hearing' is mentioned around the 1 time grants. What is a pre-hearing? Is there any stipulation what the grant funds can be used for? It indicates 'the cost of participation for local units'. So this pot of money will be a source for fighting against the company?

Thanks for listening....Feel free to contact me if you need clarification of my comments...

From: Clerk
To: Cole, Cathy (LARA)
Subject: Siting Comments for wind/solar operations
Date: Tuesday, April 23, 2024 9:17:37 PM

Hello,

I would like to provide comments regarding the siting discussion for large scale wind and solar (PA233 resulting from HB5120). Our township sees many weaknesses in the legislation that provide risks to anyone in our township who may wish to enter into a contract with a developer of one of these facilities.

We see at least the following items missing that should be included in an ordinance to protect both the land owners that may house these facilities as well as other local residents who may be in the facility of any proposed development.

1. PA233 provides no requirement for liability insurance on the facility to protect the land owner. Who is liable when someone gets hurt on the property? A requirement for liability insurance needs to be added.
2. A fully funded surety bond needs to be required from the very beginning of the project, not after 10 years of operation.
3. Training should be required for the local EMS services so they are up to date on the latest methods of fire prevention and other safety requirements and responses related to the renewable energy operation.
4. Erosion control requirements need to be added otherwise there is risk to neighboring properties or possibly local waterways.
5. Well water monitoring needs to be required so that any potential contamination of drinking water is captured as soon as possible. Note that a day zero baseline is required for this to be effective.
6. A complaint resolution process needs to be included so local residents have a mechanism to communicate their concerns.

I thank you for your consideration.

[redacted]
Waterloo Township Clerk

From: [redacted]
To: Cole, Cathy (LARA)
Cc: Baldwin, Julie (LARA)
Subject: Siting Comments
Date: Wednesday, April 24, 2024 3:30:22 PM

TO: Michigan Public Service Commission

Dear Commissioners:

I have read through the staff recommendations for rulemaking in response to some of the more egregious regulatory errors and conflicts created by the poorly worded Public Act 233 of 2023. I have two comments in response that I would invite you to consider, of which the second is the most important:

- **Thoughtful, logical solutions** - The MPSC staff recommendations related to public notice, zoning authority and compatible renewable energy ordinance (CREO) requirements, and distribution of the one-time "grants" to affected local governments are well-considered, thoughtful, and logical solutions.

- **Completely unlawful legislating by unelected bureaucrats** - Public Act 233 does anticipate the need for some rulemaking for implementation of the Act by the MPSC, including the need for establishment of application forms and a fee structure. However, nothing in this Act or any other part of the relevant state Acts governing this process gives MPSC staff to propose or the MPSC itself the authority to adopt rules that co-opt the legislative process. The proposed "fixes" go well beyond rulemaking for implementation and tread deeply into the legislative territory of the Michigan House and Senate. The following proposed rules governing are logical fixes for a deeply flawed state Act, but they CANNOT and SHOULD NOT be enacted by rulemaking. These fixes MUST be enacted through the legislative process:

    - Section 223(1) gives the MPSC authority to determine the "format and content" of the required public notices of a local meeting about a proposed project. **Neither authority over "format" nor "content" gives the MPSC authority to require notices to be sent to everyone within one mile or five miles of a project area, no matter how good an idea that might be.** A local government that retains some authority through a CREO could not require notices to be sent to anywhere near that distance. This is one of the many reasons why Act 233 needs legislative fixes, not a bureaucratic rulemaking over-reach.

    - **Nothing in the language of Act 233 gives the MPSC or its staff any authority to rewrite the law related to compatible renewable energy ordinances (CREO).** What is proposed, while again a very good idea, goes well beyond implementation rulemaking to effectuate a complete rewrite of the CREO requirements. Like it or not, this is another area where Act 233 needs a legislative

fix. The MPSC has no authority to override the adopted law, regardless of how flawed it may be.

- **Nothing in the language of Act 233 related to these one-time "grants" to affected local governments gives the MPSC or its staff the authority to rewrite the distribution provisions, no matter how much more logical the proposed rules may be.** The Act is clear and unambiguous in stating exactly how much funding is required from the developer and how the funds are to be distributed and used by the local governments. The rule proposes to completely revise the state Act and to redistribute the funds under an alternative formula that, while logical and reasonable, is completely at odds with and incompatible with Act 233 requirements. Here again, the MPSC has no authority to override the adopted law, regardless of how flawed it may be.

My recommendation is to request that the state Act be revisited by the state legislature through a set of legislative fixes needed to fix the serious flaws in this hastily adopted law.

Regards,

[redacted]
Whitmore Lake, MI 48189
[redacted]

From: [redacted]
To: Baldwin, Julie (LARA); Cole, Cathy (LARA)
Cc: [redacted]
Subject: Siting Comments
Date: Tuesday, April 23, 2024 9:52:33 AM

Hello,

I have 17 years of experience reviewing renewable energy applications for many of Michigan's rural communities, serving township and county planning commissions as a consulting Community Planner, starting in 2006 with John Deere Energy's application to Oliver Township for the Harvest Wind project, to assisting the Isabella County Community Development Department as recent as 2023 to close out DTE's Isabella Wind projects for commercial operation.

During those years, I learned there is one key approach that Michigan's communities can employ that I believe is the most important step in helping them serve the public interest, and that is to provide as much transparency as possible to renewable energy applications to the public sooner rather than later.

In consideration of that mindset, I offer MPSC staff the following five comments in response to the "b. Public notice and community participation" item listed on the Request for Informal Comments/Draft Straw Proposal document:

1. The period of 14 days for publishing the public meeting notice seems too short. Consider extending it to at least 21 days (3 weeks).

2. The period of 30 days for the developer/applicant/electric provider to notify the Clerk seems too short. Consider extending it to at least 42 days (6 weeks).

3. The period of 60 days for the developer/applicant/electric provider to contact the Chief Elected Official seems too short. Consider extending it to at least 84 days (12 weeks).

4. Siting a renewable energy facility entails broad impacts to the community, thus, the required site plan that must be submitted alongside the public notice should not be just a mere site plan, e.g. a single 24" x 36" sheet, but the submittal should be detailed and include any studies, at a minimum, relating to sound, shadow, and impacts to wildlife. (If PA 233 of 2023 lacks a definition for "site plan," then it is recommended that MSPC staff adopt an internal guiding definition of a "site plan" to be broader in scope to ensure that developers/applicants/electric providers submit more publicly available information upfront for their proposed project.)

5. There should also be a noticing requirement for all late/extra/supplemental application materials that are submitted throughout the permitting process, including up to and until the start of construction. Applications for renewable energy facilities are complex, and, inevitably, applications submitted for the purposes of the initial public meeting should be expected to contain missing and/or incomplete information (also: inaccurate and/or obfuscated data). In my experience, when these initial applications submitted by developers/applicants/electric providers are in this state, I have attributed the oversights to the crunch of meeting deadlines, or other unpredictable factors. Usually, the developer/applicant/electric provider asks for forgiveness on these occasions, which is a fair request, however, to fully serve and uphold the public interest and to provide as much transparency as possible requires vigilance and patience by all involved to support the process. In short, I am suggesting that the process is just as important as the end result itself, and any gaps that are inadvertently created during the process has the potential to subvert efforts to uphold the public interest and transparency. Thus, having a process in place to ensure the public is notified when application materials submitted late can only serve to minimize, and perhaps, eliminate those gaps.

Sincerely,

[redacted]
Saginaw

---------- Forwarded message ---------
From: [redacted]
Date: Mon, Apr 22, 2024 at 2:21 PM
Subject: Call to Action – Public Comment for PA 233 Renewable Energy and Energy Storage Facility Siting

To view this bulletin in a web browser, click here.

MAP

Call to Action – Public Comment for PA 233 Renewable Energy and Energy Storage Facility Siting

On November 28, 2023, Governor Gretchen Whitmer signed House Bill 5120 PA 233, Renewable Energy and Energy Storage Facility Siting. (PA 233 of 2023)

The Michigan Association of Planning (MAP) closely followed the Michigan legislature as the bill was being drafted and enacted, and we continue to monitor the Michigan Public Service Commission (MPSC) as it conducts public meetings, and seeks to engage with experts, local units of government, project developers, and other interested person to consider comments and to secure public input.

The purpose of this legislative alert is to urge you to provide comment to the MPSC on PA 233. MAP will remain involved to influence policy around siting of renewables, and we encourage you to

weigh in on MPSC staff's draft on how it plans to implement parts of the law. These are things planners should care about, and our voices matter.

Background

MAP has been thinking about how renewables are sited for well over a year. In January 2023, hearing rumors that developers were considering introducing legislation to preempt zoning for the largest projects, a subgroup of the MAP law committee began to consider an option that would balance state and local priorities. They landed on an approach that was modelled on mobile home park siting, and which would allow for more renewables without imposing an undue burden on some communities. Our approach asked that ALL communities--urban and rural-- do their fair share to address the climate crisis.

Unfortunately, we were unable to gain a foothold to influence the lawmakers that were spearheading what would ultimately become PA 233. Once the law was signed, the subcommittee gave the new law a careful read to better understand how it might work, contributing to FAQs and co-sponsoring a webinar organized by MSUE to help lay out knowns and unknowns.

Recent Advances

More recently, at the request of some members of the legislature, the MAP team drafted some simple legislative fixes that wouldn't change the meaning of the law, but would clear up confusion to allow it to be more easily implemented. To be clear, our legislative fixes are NOT the approach we would have advanced, but rather provide clarity to a statute that is flawed.

We want the Voice of Planning to be at the table as PA 233 is implemented. And we want to signal to lawmakers that we stand ready to provide technical expertise to advance more substantial changes that would better elevate planning principles should there be interest.

The MPSC staff 's released an initial draft of their recommendations, and are seeking comment by April 24th (though they are open to receiving feedback beyond that date). The MAP Renewable Energy Subcommittee is currently drafting a response and plan to share this with MAP members and our municipal partners by April 23rd.

Into Action

We encourage you to become familiar with the recommendations and draft your own response. Of particular relevance to planners and local elected and appointed officials may be the suggestion to the MPSC for:

- Providing public notice when a project for state-approval is proposed (page 3)
- The extent to which the applicant should respond to public comment in their application submittal (page 5)
- What might constitute a "compatible renewable energy ordinance" (page 6, 1d)
- Distribution of funds for local governments to intervene in the state process (pages 9-10)

To learn more about MPSC staffs' rationale for their recommendations, you may wish to refer to the recording of the meeting; discussion starts at 1:17:00.

Overall, the MAP Renewable Energy Subcommittee believes that most of these recommendations are in support of maximizing community engagement and voice for all affected local units of government and setting a high bar for developers that opt to go through the state-level process: effectively, the best that can be expected given the law. As a result, there is a strong sense that industry may suggest weakening some of these recommendations.

We encourage planners to weigh in now, as the window for comment is short, deadline is Wednesday April 24, 2024.

Sincerely,

[redacted]

1919 West Stadium Boulevard, Suite 4
Ann Arbor, MI 48103
Tel: 734.913.2000 | Fax: 734.913.2061 | Email: info@planningmi.org