

Executive Secretary
Michigan Public Service Commission
P.O. Box 30221
Lansing, Michigan 48909

Via E-Dockets

July 15, 2024

RE: Comments on Draft Application Instructions and Procedures for Renewable Energy and Energy Storage Facility Siting Pursuant to PA 233 of 2023 (Case No. U-21547)

Dear Executive Secretary:

As legal scholars and practitioners who specialize in land use law, energy law, and environmental law, we write to submit comments on the “Draft Application Instructions and Procedures for Renewable Energy and Energy Storage Facility Siting Pursuant to PA 233 of 2023” published on June 21, 2024 (the “Draft Application Instructions”).

In these comments, we urge the Michigan Public Service Commission (the “Commission”) to provide greater clarity on what constitutes a “compatible renewable energy ordinance” (“CREO”) within the meaning of Public Act 233 of 2023 (“PA 233”). The question of what constitutes a CREO is critically important, because it will determine in large part whether the Commission has jurisdiction over an application.

In particular, we suggest that the Commission amend the Draft Application Instructions to make clear that an affected local unit of government does not have a CREO if it: (A) prohibits utility-scale wind, solar, or energy storage projects from agricultural or industrial zoning districts; (B) prohibits utility-scale wind, solar, or energy storage projects from land enrolled in the farmland and open space preservation program pursuant to PA 116; or (C) prohibits utility-scale wind, solar, or energy storage projects beyond a specified distance from existing transmission lines.

I. PA 233 Does Not Offer Sufficient Clarity on What Constitutes a CREO

The statutory text of PA 233 leaves many questions unanswered about what constitutes a CREO. For background, PA 233 defines a CREO as follows:

“Compatible renewable energy ordinance” [or CREO] means an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8). A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction.

See PA 233 sec. 221(f). This definition makes clear that any local unit of government with a moratorium in place does not have a CREO. Any other type of restriction, however, must be evaluated in comparison to the provisions set out in section 226(8).

Importantly, section 226(8) explicitly addresses only a limited subset of the many types of restrictions that a local government could adopt to block renewable energy or energy storage projects. In particular, Section 226(8) establishes clear limits on setback requirements, noise limits, height limits, shadow flicker restrictions, fencing requirements, and a few other types of restrictions, and it is relatively easy to determine whether a local provision that relates to any of these specific types of restrictions can be included as part of a CREO. By contrast, however, section 226(8) does not explicitly address many other types of restrictions, including, for example, provisions that: (A) restrict development in agricultural or industrial zoning districts; (B) restrict the use of land enrolled in the PA 116 program; or (C) limit development to within a specified distance of existing transmission lines. There is substantially less clarity about how these other types of restrictions factor into determining whether a local ordinance can be considered a CREO.

On the one hand, it is intuitive that many of the types of restrictions that are not explicitly addressed in section 226(8) can be considered “more restrictive than the provisions included in section 226(8).” For example, as discussed in section II.A below, a provision banning solar development from agricultural zoning districts could have the effect of prohibiting solar from the vast majority of the available land in a township or county, which would be substantially more restrictive than, for example, the fencing requirements specified in section 226(8). On the other hand, the statute offers very little guidance as to the precise circumstances under which such a restriction could enable the Commission to obtain jurisdiction over an application.

II. The Draft Application Instructions Should Be Amended to Provide More Clarity on What Constitutes a CREO

In an order dated February 8, 2024, the Commission directed its staff (“Staff”) to “engage with experts, local units of government, project developers, and other interested persons . . . to consider issues related to . . . guidance for use in the development of compatible renewable energy ordinances,” among other topics. *See* Order, Michigan Public Service Commission, Docket No. [U-21547-0001](#) (Feb. 8, 2024) at 2. In that same order, the Commission further directed its Staff to “file recommendations on . . . guidance relating to compatible renewable energy ordinances, and any other issues in this docket by June 21, 2024.” *Id.*

In our view, the Draft Application Instructions published on June 21, 2024 do not provide adequate guidance as to what constitutes a CREO. Without such guidance, developers, landowners, and local governments will face substantial uncertainty about when an application can be submitted to the Commission.

Local governments in Michigan have already adopted many restrictions that are not explicitly addressed by section 226(8) of the statute, such as bans on solar in agricultural zoning districts. For example, as of December 31, 2023, at least seven townships in Michigan had prohibited or severely restricted utility-scale solar development from agricultural zoning districts.¹ More recently, on June 27, 2024, the Planning Commission in Deerfield Township voted to

¹ Matthew Eisenson et al., *Opposition to Renewable Energy Facilities in the United States: June 2024 Edition*, Sabin Center for Climate Change Law, June 2024, https://scholarship.law.columbia.edu/sabin_climate_change/226.

recommend adopting new restrictions on renewable energy development, including: (i) limiting utility-scale wind and solar projects to within 1,250 feet of one existing transmission line; and (ii) prohibiting utility-scale solar projects from any properties enrolled in the PA 116 program.²

The Commission should make clear now, by amending the Draft Application Instructions, that a local unit of government with these restrictions in place is not considered to have a CREO. Specifically, the Commission should amend the Draft Application Instructions to make clear that an affected local unit of government does not have a CREO if it: (A) prohibits utility-scale wind, solar, or energy storage projects from agricultural or industrial zoning districts; (B) prohibits utility-scale wind, solar, or energy storage projects from land enrolled in the farmland and open space preservation program pursuant to PA 116; or (C) prohibits utility-scale wind, solar, or energy storage projects beyond a specified distance from existing transmission lines.

A. Local Provisions Banning Development in Agricultural or Industrial Zoning Districts Are More Restrictive than the Provisions Set Out in Section 226(8)

The Commission should clarify in the Draft Application Instructions that a local restriction prohibiting utility-scale renewable energy or energy storage facilities in agricultural or industrial zoning districts is more restrictive than the provisions set out in section 226(8) and therefore cannot be included in a CREO.

This clarification is particularly important with respect to local restrictions on solar development in agricultural zoning districts, as there is strong evidence that such restrictions may constitute a de facto ban. For example, in LaSalle Township (Monroe County), a local ordinance adopted in 2022 restricts utility-scale solar to the township's industrial districts, which are virtually nonexistent.³ By some estimates, LaSalle Township's industrial districts comprise 89 acres out of approximately 17,000 acres in the township; agricultural zoning districts, by comparison, comprise approximately 14,000 acres.⁴ Moreover, half of the land within the 89 acres zoned for industrial purposes is already developed.⁵ This leaves barely 50 acres available for utility-scale solar development, which would not support more than 10 megawatts of generation capacity.⁶

Importantly, for projects subject to review by the Commission, PA 233 already addresses farmland preservation as part of the approval process. For example, section 226(7)(f) requires the Commission to determine that any "proposed energy facility will not unreasonably diminish farmland, including, but not limited to, prime farmland and, to the extent that evidence of such farmland is available in the evidentiary record, farmland dedicated to the cultivation of specialty crops." Thus, a township or county need not adopt a blanket ban on solar development in agricultural zoning districts to ensure that farmland is adequately preserved.

² Draft Deerfield Township Ordinance Nos. 20-24-1, 20-24-2, and 20-24-3, last revised June 27, 2024.

³ LaSalle Township, Mich., Zoning Ordinance § 5.59(c)(2) (as amended May 1, 2023), <https://lasalletwpmi.com/wp-content/uploads/2023/09/LaSalle-ZO-20230515.pdf>.

⁴ Letter from Nicholas Schroeck to La Salle Township Board dated August 11, 2022.

⁵ *Id.*

⁶ Solar Energy Industries Association, Land Use & Solar Development, <https://www.seia.org/initiatives/land-use-solar-development> (last visited July 8, 2024).

B. Local Provisions Banning Renewable Energy or Energy Storage on PA 116 Land Are More Restrictive than the Provisions Set Out in Section 226(8)

The Commission should further clarify that a local provision banning projects on PA 116 land is more restrictive than the provisions set out in Section 226(8), particularly in the context of solar development. The state legislature recently codified an existing state policy of allowing utility-scale solar to be sited on land enrolled in the PA 116 program, provided that the project incorporates sufficient pollinator habitat and conservation cover, along with other requirements.⁷ The state policy is well founded: a solar project that complies with the statutory criteria will support native plants and wildlife while preserving the soil for future use as farmland.⁸ More importantly, a blanket ban on solar facilities on PA 116 land would be more restrictive than many of the other types of restrictions outlined in section 226(8) of the PA 233, such as noise limits, height limits, or fencing requirements.

C. Local Provisions Restricting Renewable Energy and Energy Storage Projects to Areas Within the Immediate Vicinity of Existing Transmission Lines Are More Restrictive than the Provisions Set Out in Section 226(8)

Finally, the Commission should clarify that local provisions restricting renewables to within a narrow radius of existing transmission lines are more restrictive than the provisions set out in section 226(8) of the statute and cannot be included as part of a CREO. While the areas closest to an existing transmission line may be the most practical to develop under certain circumstances, development may be impractical or impossible in other instances, such as if the land in those areas is already developed. Moreover, these types of limits can be easily manipulated to ban development altogether. For example, if a township board hostile to wind energy learns of a wind farm that is being planned 1,400 feet away from existing transmission lines, the township board could effectively block the project by adopting a provision that allows wind turbines to be installed only within 1,300 feet of existing transmission lines. The Draft Application Instructions should make clear that this type of provision, which has the potential to block renewable energy and energy storage, cannot be included as part of a CREO.

III. Conclusion

For the reasons described in this letter, the Commission should amend the Draft Application Instructions to further clarify the circumstances under which a local unit of government cannot be considered to have a CREO.

Sincerely,

⁷ Mich. S.B. 277 (2023) § 36104e(2)(f), <https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-SB-0277>; Michigan Department of Agriculture and Rural Development, Policy for Allowing Commercial Solar Panel Development on PA 116 Lands, Nov. 14, 2022, <https://www.michigan.gov/mdard/-/media/Project/Websites/mdard/documents/environment/farmland/MDARD-Policy-on-Solar-Panel-and-PA116-Land-rev20230328.pdf>.

⁸ See, e.g., Parikhit Sinha et al., *Best Practices in Responsible Land Use for Improving Biodiversity at a Utility-Scale Solar Facility*, 2 CASE STUDIES IN THE ENV'T 1, 1-2 (2018), <https://doi.org/10.1525/cse.2018.001123>.



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