Blue & Gray bar image for title text Legal Action Against MPSC Order Regarding PA 233

**This Communication Is Subject to Attorney-Client Privilege**

Dear Municipal Officials:

As you may know, the Michigan Public Service Commission (“MPSC”) recently issued an Order adopting application instructions and procedures that electric providers must follow when seeking the MPSC’s approval for siting utility-scale renewable energy projects under Public Act 233 of 2023 (“PA 233”).

The 168-page Order covers a wide array of topics. Most notably, the MSPC is attempting to do something the Legislature promised not to do by adopting a very narrow definition of compatible renewable energy ordinance (“CREO”) and in our opinion, attempting to further limit local input:

[T]he Commission finds that a CREO under Act 233 means an ordinance that provides for the development of energy facilities within a local unit of government, the requirements of which are no more restrictive than the provisions included in Section 226(8). The Commission further specifies that a CREO may only contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and may not contain additional requirements more restrictive than those specifically identified in that section. [MPSC Order p. 18]

We strongly disagree with the MPSC’s interpretation of CREO. PA 233 defines CREO as “an  
ordinance that provides for the development of energy facilities within a local unit of government, the  
requirements of which are no more restrictive than the provisions included in Section 226(8).” PA 233 §  
221(f). Section 226(8) provides the maximum restrictions local governments can place on setbacks,  
fencing, height, noise, lighting, and other regulations typical of zoning. Neither Section 226(8) nor any  
other section of PA 233 prohibits municipalities from imposing additional zoning regulations on utility scale  
renewable energy projects.

The MPSC also redefined “affected local unit” in its Order. PA 233 defines an affected local unit  
as “a unit of local government in which all or part of a proposed energy facility will be located.” PA 233  
§ 221(a). Contrary to the statute, the MPSC is now attempting to limit affected local units to only those  
municipalities that exercise zoning jurisdiction. MPSC Order p. 10.

Not only is the MPSC wrong on the law, but it is also grossly overstepping its authority as an  
administrative agency. PA 233 does grant the MPSC several powers related to administering the Act, such  
as establishing application filing requirements, PA 233 § 224(1); however, PA 233 is clear that in  
administering the Act the MPSC “has only those powers and duties granted” by PA 233. PA 233 § 230(1).  
Furthermore, PA 233 controls in any conflict between it and other state laws. PA 233 § 230(3).

For these reasons, we recommend that our clients across the state contest the Order and initiate an  
appeal/litigation against the MPSC for acting outside the scope of its limited authority on PA 233.  
Interested parties have until November 8, 2024, to file an appeal in the Court of Appeals. Filing a joint  
appeal on behalf of our many clients that are negatively impacted by the Order will both bolster your  
position and substantially defray costs for each client individually.

If you would like to be involved in this fight, please contact us as soon as possible.

Best Regards,

A close-up of a signature

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**Michael D. Homier, Chair of Foster Swift’s Administrative & Municipal Practice Group**