

Legislative Analysis



CERTIFICATION AND SITING OF ENERGY FACILITIES WITH CAPACITY OF 50 TO 100 MEGAWATTS

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House Bill 5122 as introduced
Sponsor: Rep. Phil Skaggs

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5123 as introduced
Sponsor: Rep. Ranjeev Puri

Committee: Energy, Communications, and Technology
Revised 10-17-23

SUMMARY:

House Bill 5122 would amend the Clean and Renewable Energy and Energy Waste Reduction Act to create a certification process, through the Michigan Public Service Commission (MPSC), of solar energy facilities and energy storage facilities with a capacity of at least 50 but less than 100 megawatts.¹ The process would preempt local zoning or regulation of such facilities. House Bill 5123 would amend the Michigan Zoning Enabling Act to provide that zoning ordinances are subject to the provisions of House Bill 5122.

House Bill 5122 would add Part 8 (Solar and Storage Certification) to the Clean and Renewable Energy and Energy Waste Reduction Act. The proposed new part would apply to *solar energy facilities* with a *nameplate capacity* of at least 50 megawatts but less than 100 megawatts and to *energy storage facilities* with a nameplate capacity of at least 50 megawatts but less than 100 megawatts and an energy discharge capability of 200 megawatt hours or more. These would be referred to collectively as energy facilities in the bill. Energy facilities could be located on more than one parcel of property, including noncontiguous parcels.

Solar energy facility would mean a system that captures and converts solar energy into electricity for sale or for use in any location other than the facility property and would include at least all of the following:

- Photovoltaic solar panels.
- Solar inverters.
- Solar monitoring stations.
- *Energy storage facilities*.
- Access roads.
- Distribution, collection, and feeder lines.
- Wires and cables.
- Conduit.
- Footings.
- Foundations.
- Towers.

¹ House Bills 5122 and 5120 have identical provisions, except that HB 5122 would apply to the facilities with the capacities described above and HB 5120 would apply to wind energy facilities, solar energy facilities, and energy storage facilities with a capacity of 100 megawatts or more.

- Poles.
- Crossarms.
- Guy lines and anchors.
- Substations.
- Interconnection or switching facilities.
- Circuit breakers and transformers.
- Overhead and underground control.
- Communications and radio relay systems and telecommunications equipment.
- Utility lines and installations.
- Generation tie lines.
- Substations.
- Accessory equipment and structures.

Nameplate capacity would mean the designed full-load sustained generating output of an energy facility, determined by reference to the sustained output of an energy facility even if its components are located on different parcels.

Energy storage facility would mean a system that absorbs, stores, and discharges electricity.

Certificates

The bill would allow an **electric provider** or **independent power producer** to obtain a certificate from the MPSC, as described below, before beginning **construction** of an energy facility.

Electric provider means any of the following:

- Any person or entity that is regulated by the MPSC for the purpose of selling electricity to retail customers in Michigan.
- A municipally owned electric utility in Michigan.
- A cooperative electric utility in Michigan.
- An alternative electric supplier licensed under section 10a of 1939 PA 3.²

Independent power producer would mean a **person** that is not an electric utility but that owns or operates facilities to generate electric power for sale to electric providers, the state, or local units of government.

Person would mean any of the following:

- An individual.
- A governmental entity authorized by the state.
- A political subdivision of the state.
- A business.
- A proprietorship.
- A firm.
- A partnership.
- A limited partnership.
- A limited liability partnership.

² <http://legislature.mi.gov/doc.aspx?mcl-460-10a>

- A co-partnership.
- A joint venture.
- A syndicate.
- A business trust.
- A labor organization.
- A company.
- A corporation.
- An association.
- A subchapter S corporation.
- A limited liability company.
- A committee.
- A receiver.
- An estate.
- A trust.
- Any other legal entity or combination or group of persons acting jointly as a unit.

Construction would mean any substantial action taken that constitutes the placement, erection, expansion, or **repowering** of an energy facility.

Repowering would mean replacement of all or substantially all of an energy facility for the purpose of extending its life. It would not include repairs related to ongoing operations that do not increase the capacity or energy output of the facility.

Public meeting

An electric provider or independent power producer proposing to obtain a certificate would have to hold a public meeting in each **affected local unit** (a county, township, city, or village where all or part of a proposed energy facility will be located). However, a public meeting held in a township would be considered to be held in each village located in that township.

At least 60 days before the meeting, the electric provider or independent power producer would have to offer in writing to meet with the chief elected official of each affected local unit, or their designee, to discuss the site plan for the facility. (Site plans are described below.)

At least 30 days before the meeting, the electric provider or independent power producer would have to notify the clerk of the affected local unit where the meeting will be held of the time, date, location, and purpose of the meeting and provide either a copy of the site plan or an internet address where the site plan is available.

At least 14 days before the meeting, the electric provider or independent power producer would have to publish notice of the meeting in a newspaper of general circulation in the affected local unit or in a digital alternative that is comparable to such a newspaper. The notice would have to include either a copy of the site plan or an internet address where the site plan is available.

The MPSC would have to further prescribe the format and content of the notice.

Site plan

In addition to meeting application filing requirements established by the MPSC by rule or order, a site plan would have to include all of the following:

- The location of the energy facility.
- A description of the energy facility.
- A description of the anticipated effects of the energy facility on the environment, natural resources, and solid waste disposal capacity. This description could include records of consultation with relevant state, tribal, and federal agencies.
- Additional information that directly relates to the site plan as required by the MPSC by rule or order.

Whenever an electric provider or independent power producer submits a site plan to the MPSC as required by the bill, it also would have to submit a copy of the site plan to the clerk of each affected local unit, for informational purposes.

Application for a certificate

An application for a certificate would have to contain all of the following:

- The applicant's name, address, and phone number.
- The planned construction start date.
- The construction's expected duration.
- A description of the energy facility, including a site plan.
- A description of the facility's expected use.
- A description of the facility's expected public benefits.
- A description of the facility's expected direct impacts on the environment and natural resources.
- A description of how the applicant intends to address and mitigate the above impacts.
- Information on the facility's effects on public health and safety.
- A description of the portion of the community where the energy facility will be located.
- A statement (and evidence) that the facility will not start commercial operation until it is in compliance with applicable environmental laws.
- A summary of the community outreach and education efforts undertaken by the electric provider or independent power producer. This would include a description of the public meetings and meetings with elected officials described above.
- Evidence of consultation (before submission of the application) with the Department of Environment, Great Lakes, and Energy and other relevant state and federal agencies, including the Department of Natural Resources and the Department of Agriculture and Rural Development.
- Information about the interconnection queue for the applicable regional transmission organization.
- If the proposed site is undeveloped, a description of feasible alternative developed locations, including vacant industrial property and brownfields, and an explanation of why they were not chosen.
- If the facility is reasonably expected to have an impact on any of the following, a plan to minimize and mitigate that impact:
 - Television signals.
 - Microwave signals.
 - Agricultural global position systems.

- Military defense radar. Information in the plan concerning military defense radar would be exempt from disclosure under the Freedom of Information Act (FOIA) and could not be disclosed by the MPSC or the electric provider or independent power producer except under court order.
- Radio reception.
- Weather and Doppler radio.
- If the facility is expected to have an impact on drainage systems, a plan to minimize, mitigate, and repair that impact at the expense of the provider or producer.
- If the facility is or includes an energy storage facility, an emergency response plan.
- A decommissioning plan that includes financial assurance in the form of a bond, a parent company guarantee, or an irrevocable letter of credit, in an amount at least equal to the estimated cost of decommissioning the facility, after deducting salvage value, as calculated by a third party with expertise in decommissioning hired by the applicant. The financial assurance could be posted in increments as follows:
 - At least 25% by the start of full commercial operation.
 - At least 50% by the start of the fifth year of commercial operation.
 - 100% by the start of the tenth year of commercial operation.
- Other information reasonably required by the MPSC.

The MPSC would have to determine an application's completeness within 60 days after receiving it. For an incomplete application, the MPSC would have to advise the applicant in writing of the information needed to make it complete. An application would be considered to be complete if the MPSC fails to timely notify the applicant that it is incomplete.

By 30 days after the MPSC determines that an application is complete, the applicant would have to publish, and send to the clerk of each affected local unit, notice of an opportunity to comment on the application. Publication would have to be in a newspaper of general circulation in each affected local unit or a comparable digital alternative. The notice would have to be written in plain, nontechnical, and easily understood terms, with a specified style of title.

The MPSC would have to further prescribe the format and contents of the notice.

The MPSC would have to conduct a proceeding on the application as a contested case under the Administrative Procedures Act. An affected local unit, participating property owner, or nonparticipating property owner could intervene by right.

The MPSC could assess reasonable fees to cover its administrative costs in processing an application, including costs of consultants to assist the MPSC in evaluating issues raised by the application.

The MPSC would have to grant the application and issue a certificate or deny the application not later than one year after a complete application is filed.

Evaluating an application

In evaluating an application, the MPSC would have to consider the impact of the proposed facility on local land use, including the percentage of land in the local unit dedicated to energy generation. The MPSC could condition approval on additional reasonable action related to the facility impacts, including the following:

- Establishing vegetative ground cover and maintaining it for the life of the facility.

- Meeting or exceeding specified pollinator standards for the life of the facility.
- Providing for community improvements in the affected local unit.

The MPSC would have to grant the application and issue a certificate if it determines all of the following:

- The public benefits of the proposed energy facility justify its construction.
- The applicant has considered and addressed impacts to the environment and natural resources, including sensitive habitats and waterways, wildlife corridors, wetlands and floodplains, parks, historic and cultural sites, and threatened or endangered species.
- The applicant has met the community-based organization conditions described below.
- The applicant has certified that workers employed for construction of the facility will be paid at least the prevailing wage in the affected local unit.
- The applicant has certified that it will enter into and adhere to an agreement with one or more labor organizations in regard to the construction of the energy facility.
- The proposed energy facility does not present an unreasonable threat to public health or safety.

An energy facility would be considered to meet the health and safety requirement described above if it will meet the following applicable standards:

- For a solar energy facility, all of the following:
 - The following setback requirements:
 - With regard to *occupied community buildings* and dwellings on *nonparticipating properties*, 150 feet from the nearest point on the outside wall of the structure.
 - With regard to a public road right-of-way, 50 feet measured from the nearest edge of the right-of-way.
 - With regard to nonparticipating properties, 50 feet measured from the nearest shared property line.
 - The solar energy facility is completely enclosed with fencing in compliance with the National Electric Code as in effect when the bill is enacted or any applicable successor standard approved by the MPSC.
 - Solar panel components do not exceed a maximum height of 25 feet above ground when the arrays are at full tilt.
 - The solar energy facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling would have to use the A-weighted scale as designed by the American National Standards Institute.
- For an energy storage facility, both of the following:
 - The facility complies NFPA 855 “Standard for the Installation of Stationary Energy Storage Systems” as in effect when the bill is enacted or any applicable successor standard adopted by the MPSC.
 - The facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling on an adjacent nonparticipating property. Decibel modeling would have to use the A-weighted scale designed by the American National Standards Institute.

Occupied community building would mean any of the following:

- A school.
- A place of worship.
- A day care facility.
- A public library.
- A community center.
- A similar building the applicant knows is regularly used as a community gathering place.

Nonparticipating property would mean property adjacent to a solar energy facility that is not a ***participating property***.

Participating property would mean real property that is either owned by an applicant or the subject of an agreement under which an applicant compensates a landowner related to an energy facility, regardless of whether any part of the facility is constructed on the property.

The certificate would have to identify the location of the energy facility and its nameplate capacity.

If construction of an energy facility is not started within five years after a certificate is issued, the certificate would be invalid, but the electric provider or independent power producer could seek a new certificate for the facility. The MPSC could extend this timeline at the request of the applicant without requiring a new contested case proceeding.

If the MPSC has issued a certificate for an energy facility, the electric provider or independent power producer could make minor changes (as defined by the MPSC) to the site plan if the changes are within the footprint of the previously approved site plan.

Community-based organization agreements

An applicant for a certificate would have to enter into at least one agreement with—or benefitting—at least one ***community-based organization***. Such an agreement would be legally binding and enforceable if construction of the energy facility commences. The MPSC would have to enforce this requirement, but the actual agreements would be enforceable in a court of competent jurisdiction.

Community-based organization would mean any of the following:

- A workforce development and training organization.
- A labor union.
- A local governmental entity.
- A Michigan federally recognized tribe.
- An environmental advocacy organization.
- An organization that represents the interests of underserved communities.

An agreement would have to prioritize benefits to the community where the facility will be located. The topics and specific terms of an agreement could include any of the following:

- Workforce development, job quality, and job access provisions such as the following:
 - Terms of employment, such as wages, benefits, employment status, workplace health and safety, scheduling, and career opportunities.

- Recruitment, screening, and hiring strategies and practices; targeted hiring; investment in training and education; and worker input and representation in decisions affecting employment and training.
- Funding or providing specific environmental benefits.
- Funding or providing community amenities such as park and playground equipment, urban greening, enhanced safety crossings, road paving, and bike paths.
- Annual contributions to a grant-giving nonprofit or community-based organization.

Confidentiality

Except as otherwise described below, information obtained by the MPSC under the bill would be a public record under FOIA.

An applicant could designate information received from a third party and submitted to the MPSC for certification as only for the confidential use of the MPSC. If the scope of a request for public records under FOIA included information designated as confidential, the MPSC would have to notify the electric provider or independent power producer. If, within 10 days after the receipt of the notice, the electric provider or independent power producer demonstrates to MPSC that the information a trade secret or secret process or that disclosure of the information would jeopardize the competitive position of the electric provider, independent power producer, or person the information was obtained from, the MPSC would have to deny the information request. If the MPSC grants the request, it could not release the information until three days after notice is provided to the electric provider or independent power producer.

A person that uses information obtained by the MPSC under the proposed Part 8 to forecast electrical demand would have to structure the forecast so the person the information pertains to is not identified (unless that person waives confidentiality).

The MPSC would have to issue orders to protect any information in an application or other documents required for certification that it reasonably finds to be confidential. Information under a protective order would be exempt from disclosure under FOIA.

Local preemption

A local ordinance could not prohibit or regulate testing activities by an electric provider or independent power producer to determine the suitability of a site for an energy facility.

If a certificate for an energy facility is issued under the bill, a zoning ordinance or limitation imposed after the electric provider or independent power producer submitted the certificate application to the MPSC could not be construed to limit or impair the construction, operation, or maintenance of the energy facility. The certificate and the proposed Part 8 would preempt any local policy, practice, regulation, rule, or other ordinance that prohibits, regulates, or imposes additional or more restrictive dimensional and use limitations or requirements on the construction, operation, use, dimensions, replacement, or maintenance of an energy facility.

The bill states that, except as provided above, it would not exempt an electric provider or independent power producer to which a certificate is issued from obtaining any other permit, license, or permission to construct or operate an energy facility that is required by state law, a rule promulgated under state law, or a local ordinance.

Other provisions

In administering the proposed Part 8, the MPSC would have only those powers and duties granted under that part.

An MPSC order relating to a certificate or anything else provided for in the proposed Part 8 would be subject to review in the same manner as provided in section 6 of 1909 PA 300.³

The MPSC could consolidate proceedings under the proposed Part 8 with contract approval or other certificate-of-need cases relating to the same energy facility.

The proposed Part 8 would control in any conflict between it and any other law of Michigan, except for the Electric Transmission Line Certification Act, which would control in any conflict between it and Part 8.

The bill would take effect one year after the date it is enacted.

Proposed MCL 460.1221 et seq.

House Bill 5123 would amend the Michigan Zoning Enabling Act to provide that zoning ordinances are subject to Part 8 of the Clean and Renewable Energy and Energy Waste Reduction Act as proposed by House Bill 5122.

MCL 125.3205

Neither bill could take effect unless both bills were enacted.

FISCAL IMPACT:

The bills would likely have a neutral net fiscal impact on the Michigan Public Service Commission. The bills would result in increased costs for the MPSC for its responsibilities related to siting. The MPSC projects that it would require additional staff to comply with the provisions of the bills, though exact staffing needs are currently indeterminate. The bills would allow the MPSC to assess application fees to cover its costs.

The bills may also result in local governments receiving public benefits, though the magnitude of these benefits is not well defined and is currently indeterminate.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

³ <http://legislature.mi.gov/doc.aspx?mcl-462-26>