

Interstate Informed Citizens Coalition, Inc.

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December 4, 2017

Ms. Sally Talberg
Mr. Norman Saari
Ms. Rachael Eubanks
Ms. Amy Rittenhouse

Michigan Public Service Commission
PO Box 30221
Lansing, MI 48909

Dear Commissioners:

Please accept this correspondence on behalf of the *Interstate Informed Citizen's Coalition, Inc.* (IICC), a bipartisan non-profit corporation located in Blissfield, MI that represents people living inside Michigan's existing and proposed wind energy developments. We are writing on the behalf of Michigan ratepayer Ms. Traci Martin, 5790 Jefferson Rd., North Branch, MI, a resident of Lapeer County.

As you may be aware, industrial wind energy development and the associated land use issues are very contentious in Michigan townships. Every major Michigan wind district has experienced profound social disruption and political turmoil. Rather than recite the many objections rural Michigan residents have to pervasive utility scale wind development, this letter will speak to just one objection: the false and fraudulent statements made by wind energy company agents to township and county officials regarding the long-defunct "State Siting Guidelines" and alleged "exclusionary zoning." As will be explained below, these inaccurate and unethical statements are designed to convince local policy makers that they must amend their local wind facility zoning regulations in a manner that comports with the wind company's economic plans. And while this tactic is widely employed by the wind industry, the recent conduct of DTE Energy in Lapeer County has been especially egregious.

DTE Energy CEO Gerry Anderson recently announced plans to construct 4,000-6,000 MW of new wind generation in the State of Michigan over the next decade. This will require 2,000-3,000 new wind turbines. At an average rate of two turbines per square mile, it is simple to see that somewhere between 1,000 and 1,500 square miles of ground will be required to reach this goal. That is 30 to 50 new townships.

As you may be aware, Michigan's best wind region is located in the Thumb and includes Huron, Tuscola and Sanilac Counties. But recent political events¹ in that region have effectively closed

¹ <http://www.michigansthumb.com/news/article/Campaign-finance-records-illustrate-a-David-and-11200512.php>

the door to future industrial wind energy development there. As a result, wind profiteers have shifted their focus to much poorer wind regions such as Branch, Midland, Gratiot, Bay and Lapeer Counties.

DTE Energy is attempting to construct a project that would cover parts or all of Burnside, North Branch and Burlington Townships in Lapeer County. Local residents and township officials have responded to this proposal by using their rights under the *Michigan Zoning Enabling Act* to regulate wind as they see necessary to protect the health, safety and welfare of their residents.

One of *DTE's* responses has been to accuse these jurisdictions of attempting to adopt “exclusionary zoning”, an illegal zoning strategy.

Under the *Michigan Zoning Enabling Act*, all lawful uses of land must be permitted but only if there is a demonstrated need for that use and the use is appropriate for the location. But even when there is a demonstrated need for a given land use, township and county governments are free to regulate those land uses to protect health, safety and welfare of their residents, even if those regulations create an insuperable economic burden to that use. And *DTE Energy's* agents know this.

Recently, in a highly publicized² case, *DTE Energy's* business colleague *NextEra Energy Resources* brought suit against Almer Township in Tuscola County in Federal court. One of the many claims made by *NextEra* in that suit was that Almer Township's interpretation of their existing wind zoning ordinance noise standards would result in illegal “exclusionary zoning”. *NextEra* claimed that using an acoustical measurement known as “Lmax” or “not to exceed,” rather than allowing *NextEra* to comply with a much more permissive hourly average of wind turbine noise, would require an “exclusionary” turbine-to-property line setback distances of approximately 2,775', a distance difficult to comply with in Michigan townships which have roads spaced on one mile squares. Federal Judge Thomas Ludington did not agree.

He first pointed out that since Almer Township already had access to electricity, there was no demonstrated need in Almer for new generation:

*" [NextEra's] final argument regarding § 1522(C)(14) is that the Township Board's interpretation would result in exclusionary zoning, which is prohibited by Michigan law. Specifically, [NextEra] argues that "[u]sing an Lmax metric would make development of commercial wind energy in the Township impossible because a single wind turbine could not be sited within at least a half-mile of a nonparticipating line." This conclusory argument has no merit. Under Michigan, "a zoning ordinance may not totally exclude a land use where (1) there is a demonstrated need for that land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful." Even assuming that the Township Board's interpretation of the ordinance completely excludes wind energy development in the Township, [NextEra] cannot prevail."*³

² <http://www.nationalreview.com/article/447244/wind-turbine-company-sues-small-towns-get-tax-credits>

³ <http://iiccusa.org/michigan/almer-township-ruling/>

Secondly, Judge Ludington addressed the claim that a *de facto* acoustic setback distance of 2,775' would be illegal exclusionary zoning:

“... [NextEra] asserts that application of an Lmax standard would prevent the company from siting a turbine within 2,775 feet from a nonparticipating property line. Thus, [NextEra] would be forced to reach agreements with a significantly larger number of property owners in order to build the turbines as currently planned. But it seems plausible that [NextEra] might be able to enter into more land use contracts with property owners and/or site a fewer number of turbines in Almer Township. Both of those alternatives would undoubtedly impact the profitability of the project, but [NextEra] has not demonstrated that it is entitled to deferential or economically favorable conditions.”⁴

Why is this information being brought to your attention?

The case law is clear. Using Judge Ludington's ruling as a guide in the matter of Lapeer County, we know that Lapeer County has electricity and therefore there is no demonstrated need for new generation in Lapeer. Thus it is essentially impossible to make a claim of exclusionary zoning against proposed generation projects. And Judge Ludington's ruling makes it clear that uneconomical turbine-to-property line setbacks are also not exclusionary.

But this has not prevented DTE's agents from making that fraudulent claim to Lapeer County townships and to the local press and that is the heart of our complaint.

DTE in the Press and in Print

The *Lapeer County Press* recently reported⁵ the following statements by DTE Regional Manager Carla Gribbs to Burnside Township:

*“The planning commission recommendation that you'll be considering tonight ... does not consider the **exclusionary nature** of the zoning ordinance,” Gribbs told the board.*

The *Press* also quoted DTE Communication Manager Brian Corbett:

*“Corbett further noted “there are zoning guidelines that were established by the State of Michigan as far back as 2008⁶ to help local governments develop zoning regulations for wind energy that protect public health, safety and welfare without being overly restrictive or **exclusionary**.””⁷*

⁴ <http://iiccusa.org/michigan/almer-township-ruling/>

⁵ http://thecountypress.mihomepaper.com/news/2017-11-29/Front_Page/Burnside_officials_tweak_wind_ordinance.html

⁶ As this Commission is well aware, 2008 *State of Michigan Wind Energy Siting Guidelines* have been long since rejected by the State. It was determined that they were never subjected to any sort of legislative or administrative process. More importantly, DTE Energy is well aware of this fact. Yet they continue to attempt to confuse and intimidate Michigan municipalities by referring to these long defunct guidelines.

⁷ http://thecountypress.mihomepaper.com/news/2017-11-15/Front_Page/DTE_to_offer_wind_park_tours.html

DTE Program Manager Michael Sage also sent a stern letter to Burnside Township with this statement:

8. The required 1640' setback from non-participating property lines and public rights-of-way is three to four times the height of a typical turbine. What's the basis for these requirements?
 - a. At best, these provisions may allow one turbine per section, which is an insufficient density for utility-grid generation that imposes unwarranted increases infrastructure costs, and more will result in entire sections being excluded from utility grid generation, thereby excluding utility-grid electrical generation entirely from the township.
 - b. The exclusionary effect of the setback requirements is reinforced by the addition of a 1640' setback from the overly broad category of inhabited structures.

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Summary and Call to Action

As these clear public statements demonstrate, we believe *DTE Energy*, a regulated utility under the purview of the MPSC, has established a deliberate pattern of deception by making fraudulent claims of exclusionary zoning in their recent dealings with township governments in Lapeer County and by continuing to rely upon the now-abandoned *2008 State Wind Energy Siting Guidelines*.

Further, since these claims are being made by multiple *DTE* employees, these statements show an internal systemic intent on the part of *DTE Energy* to manipulate township officials into believing that they do not possess the legal right to regulate wind development in the manner they see fit unless those regulations satisfy *DTE's* economic model. Judge Ludington's ruling makes it clear that those claims are baseless under the law.

The IICC, on the behalf Ms. Traci Martin and the citizens of Lapeer County, respectfully requests that the MPSC order *DTE Energy* and its agents to **cease and desist from making fraudulent claims of "exclusionary zoning"** anywhere in the State of Michigan.

Sincerely,

⁸ <http://iiccusa.org/michigan/dte-comments-re-burnside-twp/>



Kevon Martis, Executive Director



Joshua Nolan, Esq., Co-director and Legal Counsel

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cc: Carla Gribbs, DTE Energy

cc: Michael Sage, DTE Energy

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