

November 22, 2002

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Re: FPL Energy North Dakota Wind Projects – Request for Siting Jurisdiction
Determination, Case No. PU-2806-02-606

Gentlemen:

On October 29, 2002, the Commission received your response to the Commission's request for information concerning FPL Energy's (FPLE's) wind projects in North Dakota. FPLE advised the Commission that it did not believe that the projects fall under the Commission's jurisdiction pursuant to the North Dakota Energy Conversion and Transmission Facility Siting Act, North Dakota Century Code Chapter 49-22 ("Siting Act"). Because neither project would be designed for nor capable of generating fifty (50) MW or more of electricity and each project would be a separate and distinct facility from the other.

We have reviewed the information provided by FPLE, and determine that these two FPLE projects should not establish precedent for any future wind generation projects. We believe that the Commission, the Legislature and the industry need to work together to determine what, if any, changes need to be made to the laws and rules relating to the siting of wind generation projects. Siting jurisdiction for all future projects will be evaluated on a case-by-case basis.

The information provided by FPLE adequately supports FPLE's position that these are separate and distinct projects. Neither project will be designed for nor capable of generating fifty (50) MW or more of electricity, and therefore, neither project is subject to the Siting Act.

We recommend that FPLE contact the designated state agencies and officers entitled to notice under the North Dakota Siting Act. The list is found in N.D. Admin. Code § 69-06-01-05.

Attached is a copy of the Staff Opinion Regarding Siting of FPL Energy Wind Projects.

If you have any questions, please call.

Anthony T. Clark
Commissioner

Susan E. Wefald
President

Leo M. Reinbold
Commissioner

MEMORANDUM

TO: Commissioners Wefald, Reinbold and Clark

FROM: Bill Binek and Pat Fahn

DATE: November 19, 2002

RE: Staff Opinion Regarding Siting of FPL Energy Wind Projects

On October 29, 2002, the Commission received a letter from FPL Energy North Dakota Wind, LLC requesting a review by the Commission to determine whether the projects described are under the Commission's jurisdiction pursuant to the North Dakota Energy Conversion and transmission Facility Siting Act (Siting Act), N.D.C.C. Chapter 49-22.

On October 9, 2002, Staff provided the Commission with a memorandum concerning the siting of wind generation facilities. Staff explained that N.D.C.C. § 49-22-07 prohibits a utility from beginning construction of an energy conversion facility without first obtaining a certificate of site compatibility from the Commission. "Energy conversion facility", as defined in N.D.C.C. § 49-22-03(5), includes any plant, addition, or combination of part and addition, designed for or capable of generation of fifty thousand kilowatts of more of electricity. The term "utility," as defined in N.D.C.C. § 49-22-03(13) means any person engaged in or controlling the generation of electric energy.

Staff pointed out that it is clear under the law that siting would be required for construction of a 50 megawatt or larger wind generation facility, wind farm or wind project. Staff also believes that siting would be required for any construction of a phased wind generation project if the total project was designed to be 50 megawatts or larger.

Staff also pointed out that a more difficult situation under the law would be where a wind generation project was originally designed and built to be less 40 megawatts, and under those circumstances it would not be sited. Then, at some later date, the developers of the project decide to expand the project by adding an additional 20 megawatts. Questions that arise are: 1) whether the additional 20 megawatts should be sited, 2) whether the whole project should be sited at that time, or 3) whether there should be any siting at all. Staff stated that its preliminary opinion is that under these circumstances, the additional 20 megawatts, at a minimum, should be sited, because under the definition in N.D.C.C. § 49-22-03(5), "energy conversion facility" includes any "combination of plant and addition" that is designed for or capable of generation of 50 megawatts of more of electricity. Staff also stated that it believes a strong case could be made for siting of the entire project at the point a project reaches the 50 megawatt level because we would not be dealing with a "grandfather" situation under those circumstances. The developers are aware of and are subject to the laws at the time of the initial construction, so if they subsequently increase the size of the project to trigger

the siting obligation under the laws, they subject themselves to siting for the entire project.

According to information provided by FPL Energy, LLC ("FPLE"), FPL Energy North Dakota Wind, LLC ("ND Wind") is a wholly owned subsidiary of FPLE. ND Wind proposes to build a wind generation facility designed for and capable of generating 40 megawatts (MW) of electricity. A power purchase agreement has been executed between ND Wind and Basin Electric Power Cooperative ("Basin") for the purchase by Basin of 100% of the project's generating capacity.

FPLE states that a second proposed North Dakota wind generation project is a wind generation facility designed for and capable of generating 25 MW of electricity. The second project would be owned by a separate and distinct subsidiary of FPLE which at this time is referred to as "ND Wind II." One-hundred percent of the electricity generated by ND Wind II would be sold to an independent third party unrelated to Basin.

According to the information provided by FPLE, ND Wind II would interconnect into an entirely different substation than ND Wind and would not share any common facilities or equipment with ND Wind other than a centrally located maintenance and administrative building to serve the needs of the two North Dakota projects and a project that is proposed to be built in South Dakota. The same operating and maintenance personnel would be staffed to service all three projects and would likely be employees of an entity called FPLE Operating Services. The maintenance and administrative building will be owned by ND Wind, and if the ND Wind II project is developed, ND Wind II will rent space in the maintenance and administrative building from ND Wind.

According to FPLE, the economics of both ND Wind and ND Wind II will be evaluated as separate and distinct projects by FPLE's management, and neither project is contingent on the other project being built. FPLE contemplates that the same contractors may construct the wind towers and roads for each of the projects, but different contractors would be engaged to construct the separate and distinct interconnection facilities used by each project. ND Wind and ND Wind II will each contract separately for the work performed by contractors on each of the respective projects.

FPLE states that the turbines, towers and other equipment for each project may be located adjacent to each other on adjoining parcels of land to the extent ND Wind is located in a superior wind availability region. FPLE states, however, that each parcel would be independently leased by each separate project company such that the equipment of one project company would not be located on the land leased by the other. ND Wind and ND Wind II will contract separately for the purchase of the wind turbines and towers for each project. FPLE recognizes that it may be required to enter into a guarantee arrangement for the purchase of the wind turbines and associated facilities.

Staff requested additional information from FPLE concerning separation of substations for the collection of electric energy produced from each of the projects. On November 14, 2002, the attorney for FPLE responded that each project will have separate collector substations. FPLE stated, for example, that at the ND Wind site, 27 wind turbines are contemplated which would have collection lines leading to a collector substation built on the ND Wind site. At the collector substation FPLE transfers title to the power to Basin. It is contemplated that a transmission line would then carry the power to a Western Area Power Administration ("WAPA") substation on a WAPA transmission line. ND Wind II would have the same type of arrangement. FPLE states that the turbines on a particular wind farm will only serve one customer. FPLE states that the projects are not linked electronically, so the turbines in ND Wind's 40 megawatt wind farm will not serve customers of ND Wind II's 25 megawatt project.

The potential of two projects owned by separate subsidiary companies of a common parent company being located immediately adjacent to each other with a combined generating capacity that puts the total over the minimum for siting under the Siting Act is a concern. As noted previously, siting is required under North Dakota law prior to construction of a 50 megawatt or larger generation facility.

The Legislature specifically adopted a statement of policy in N.D.C.C. § 49-22-02 in which it found that "the construction of energy conversion facilities . . . affects the environment and the welfare of the citizens of this state." They went on to state that "it is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse affects on the environment and upon the welfare of the citizens of this state by providing that no energy conversion facility . . . shall be located, constructed, and operated within this state without a certificate of site compatibility . . . acquired pursuant to this chapter." The Legislature then declared it to be the policy of the state to site energy conversion facilities "in an orderly manner compatible with environmental preservation and the efficient use of resources."

The construction of these two small generation facilities that are located adjacent to each other and that together exceed the statutory minimum generation capacity, is the immediate concern. The long-term concern is the proliferation of small generation facilities under the 50 megawatt generation threshold, that when combined might exceed the minimum several times over. That result would appear to violate the purpose of the Siting Act as stated by the Legislature.

We have to remember that the Siting Act was enacted into law in 1975. At that time, it is unlikely that anyone would have envisioned wind generation facilities that would generate 50 megawatts or more of electricity. Consequently the Siting Act and administrative rules may be deficient in some respects when it comes to issues relating to siting of wind generation projects. Some thought should be given to addressing deficiencies in the law and rules. However, at this time, the very real possibility exists that two wind generation projects which together total 65 megawatts of capacity may be

built on adjoining parcels of land. The Commission must determine whether the Siting Act applies to these projects.

Staff's first recommendation is that the Commission should make clear that whatever is decided regarding these two FPLE projects should not establish precedent for any future wind generation projects. These are the first wind farm projects proposed in the state, and it is immediately evident that it will take some time to work through the process of determining how the Siting Act should apply or what changes or modifications may need to be made to the Siting Act or the administrative rules to fulfill the policy set forth by the Legislature in N.D.C.C. § 49-22-02.

It is Staff's opinion that the information provided by FPLE adequately supports FPLE's position that these are two separate and distinct projects. There appears to be a complete separation of the generation facilities and the electric power collection facilities. There will also be separate legal ownership of the facilities (although the ownership will be through subsidiaries of FPLE), and the electric power from each project will be sold exclusively to separate unrelated buyers.

FPLE also advised the Commission that WAPA has initiated a National Environmental Policy Act ("NEPA") review of the expansion to its substation, the transmission line to its substation, and the lands upon which the wind farms will be located. It is FPLE's understanding that the study will incorporate both the 40 megawatt project and the 25 megawatt project.

The Commission has never substituted a NEPA review for its own siting review. However, the fact that there will be a NEPA review provides some assurance of environmental protection for these two proposed projects until the Commission and the Legislature can determine how the Siting Act may or should apply to preserve the environmental protections envisioned by Legislature when applied to a proliferation of small wind farm projects on adjacent tracts of land.