



Public Service Commission

State of North Dakota

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Kevin Cramer
Tony Clark

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February 27, 2008

John Walstad, Code Revisor
Legislative Council
State Capitol
Bismarck, North Dakota 58505

Re: Public Service Commission
Public Utilities - Electric
Rulemaking
Case No. PU-06-490

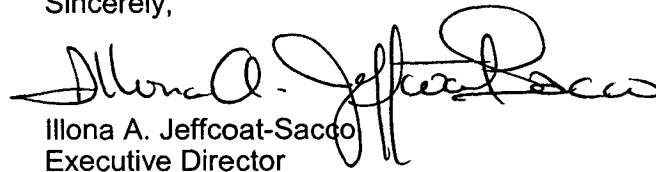
Dear Mr. Walstad:

Enclosed please find a copy of the Commissioner's January 16, 2008 order and newly adopted rules under Article 69-09 concerning the electrical safety code. The Commission's January 16, 2008 order includes a summary of the comments and the written record of the agency's consideration of all comments and the rules. No changes were made in the rules subsequent to submission to the Attorney General.

By letter dated February 14, 2008 the Attorney General approved the proposed rules as to their legality. On February 27, 2008 the Public Service Commission adopted the rules as approved, and is now submitting the rules for publication in the North Dakota Administrative Code.

Thank you for your attention to this matter.

Sincerely,


Illona A. Jeffcoat-Sacco
Executive Director

Enclosures

1. Copy of Attorney General Opinion
2. Copy of Order Adopting Rules
3. Copy of Proposed Rules
4. Copy of the Statement on Regulatory Analysis and Takings Assessment & Statement on Small Entity Regulatory Analysis
5. Copy of Testimony

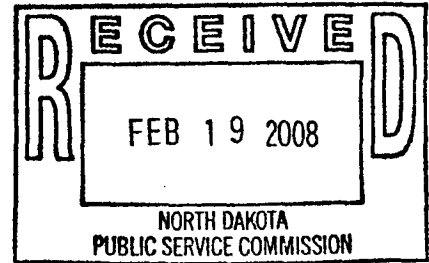


Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
STATE CAPITOL
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OPINION

February 14, 2008



Ms. Ilona A. Jeffcoat-Sacco
Executive Director
North Dakota Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck, ND 58505-0480

Dear Ms. Jeffcoat-Sacco:

The Office of Attorney General has examined the proposed amendments to N.D.A.C. Art. 69-05.2 concerning reclamation operations for surface coal mining (Case No. RC-07-163) and the proposed amendment to N.D.A.C. § 69-08-02-05 concerning use of the National Electrical Safety Code for electric service (Case No. PU-06-490), along with the notice of the proposed rules, the publication of that notice, and the filing of that notice with the Legislative Council. This office has also determined that 1) a written record of the agency's consideration of any comments to the proposed rules was made for the rules that received comments, 2) a regulatory analysis was issued, 3) a takings assessment was prepared, 4) a small entity regulatory analysis and an economic impact statement were prepared, and 5) the proposed rules are within the agency's statutory authority.

These administrative rules are in compliance with N.D.C.C. ch. 28-32 and are hereby approved as to their legality. Upon final adoption, these rules may be filed with the Legislative Council.

Sincerely,

Wayne Stenehjem
Attorney General

eee/vkk

cc: John Walstad, Legislative Council

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Public Service Commission
Reclamation
Rulemaking**

Case No. RC-07-163

**Public Service Commission
Public Utilities - Electric
Rulemaking**

Case No. PU-06-490

ORDER

January 16, 2008

Appearances

Commissioners Susan Wefald, Kevin Cramer, and Tony Clark.

William Binek, Chief Counsel, as Hearing Officer

Preliminary Statement

On October 3, 2007, the North Dakota Public Service Commission (Commission) issued its notice of proposed rulemaking proposing to revise several sections of the Administrative Code including the following two cases:

Reclamation: Case No. RC-07-163

The proposed rule changes in Case No. RC-07-163 affect coal mining and reclamation rules under North Dakota Administrative Code Article 69-05.2. The most significant change pertains to the self-bonding provisions and it will allow the Commission to accept, in addition to Moody's Investors Service and Standards and Poor's ratings, bond ratings from other national recognized rating organizations for companies that guarantee self-bonds. Another change updates the terminology used for native grassland descriptions that are required as part of the pre-mine land use information in permit applications. The other change corrects a cross reference error in the permit approval criteria. The proposed rule changes are not expected to have an impact on the regulated community in excess of \$50,000.

Public Utilities - Electric – Case No. PU-06-490

The proposed rule change in Case No. PU-06-490 would amend section 69-09-02-35 of the North Dakota Administrative Code to adopt by reference the 2007 version

20 PU-06-490

Pages: 8

18 RC-07-163

Pages: 8

Order to Submit Proposed Changes to NDAC
to Atty General
by Public Service Commission
01/16/2008

Order to Submit Proposed Changes to NDAC
to Atty General
by Public Service Commission
01/16/2008

of the National Electric Safety Code for the installation and maintenance of electric supply and communication lines. The NESC is updated periodically, with a new edition issued every five years. The changes proposed would simply adopt the latest NESC 2007 Edition instead of the previously adopted 2002 Edition.

Public Hearing

A public hearing on the proposed rule changes was noticed for and held at 1:00 p.m. November 26, 2007. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The notice of rulemaking was published once in all official county newspapers as evidenced by the affidavit of publication on file with the Commission. The notice was also forwarded to the Legislative Council for publication at least 30 days in advance of the November hearing.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until December 6, 2007, during which data, views, or oral arguments concerning the proposed rulemaking could be received by the Commission and made a part of the rulemaking record to be considered by the Commission.

The following discusses the comments that were received:

Reclamation: Case No. RC-07-163

Commission staff testified at the hearing to explain the changes proposed to North Dakota Administrative Code Article 69-05.2, rules for surface coal mining and reclamation operations. The most significant rule change was based on a suggestion from the Falkirk Mining Company, a subsidiary of The North American Coal Corporation, and it pertains to the self-bonding provisions in North Dakota Administrative Code Section 69-05.2-12-05.1. A representative from The North American Coal Corporation also testified at the hearing and provided a letter of support for the proposed self-bonding change.

The Commission's comment period ended December 6, 2007. No other comments were received.

Public Utilities - Electric – Case No. PU-06-490

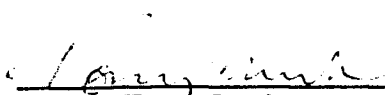
Commission staff testified at the hearing that the purpose of adopting the 2007 Edition of the National Electric Safety Code is to ensure that North Dakota safety requirements keep pace with industry standards. Staff testified that in practice the utilities are already applying the 2007 Edition.

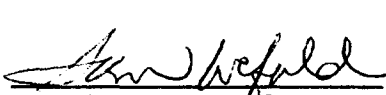
The Commission's comment period ended December 6, 2007. No other comments were received.


Order

The Commission orders that the proposed changes to the North Dakota Administrative Code, as attached to and made a part of this order, be submitted to the Attorney General for an opinion that the rules are in compliance with North Dakota Century Code Section 28-32-14 and are approved as to their legality.

PUBLIC SERVICE COMMISSION


Tony Clark
Commissioner


Susan E. Wefald
President


Kevin Cramer
Commissioner

69-05.2-08-08. Permit applications - Permit area - Vegetation and land use information.

1. The application must contain the following premining vegetation information:
 - a. A map or aerial photograph at a scale of 1:4,800 that delineates the existing mapping units within each premining land use. The mapping units for different land use categories are:
 - (1) For cropland, each soil mapping unit.
 - (2) For tame pastureland, each soil mapping unit.
 - (3) For native grasslands, each ~~range~~ ecological site. The soil mapping unit in each ~~range~~ ecological site must also be delineated.
 - (4) For woodland, each woodland type, i.e., trees, tall shrubs, and low shrubs.
 - (5) For fish and wildlife habitat, each vegetation type as further specified in subparagraphs a, b, and c.
 - (a) For woodland, each woodland type, i.e., trees, tall shrubs, and low shrubs;
 - (b) For wetlands, wetland classes based on ecological differentiation as set forth in Classification of Natural Ponds and Lakes in the Glaciated Prairie Region (United States department of the interior (1971) or other approved classification system.
 - (c) For grasslands (native or introduced), each soil mapping unit.
 - (6) For shelterbelts, the entire planting.
 - b. For each land use, a comprehensive species list of higher plants and identification of any species of rare, endangered, poisonous, or noxious plants, developed by a thorough reconnaissance of all mapping units.

- c. A description of each mapping unit delineated under subdivision a. This description must include:
- (1) The acreage [hectarage] of each mapping unit for each surface owner within the permit area.
 - (2) An assessment of the productivity of cropland, tame pastureland, and native grassland based on published data, historic data, or quantitative data.
 - (3) Natural resource conservation service ~~range—condition~~ similarity index in percent for native grassland.
 - (4) A detailed description of number and arrangement of trees and shrubs, probable age of trees, height of trees, and characteristics of understory vegetation for woodland and fish and wildlife habitat where woodland is the vegetation type.
 - (5) A detailed description of community structure, assemblages of plant species, water conditions, and size for fish and wildlife habitat where wetlands are the vegetation type.
 - (6) A description of number and arrangement of trees and shrubs, length and number of rows, and associated plant species for shelterbelts.
 - (7) When required for the proposed success standard, a quantitative assessment of applicable vegetation parameters using methods approved by the commission.
- d. A detailed narrative describing the nature and variability of the vegetation in each mapping unit and land use category, based on a thorough reconnaissance and qualitative assessment.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; June 1, 1997.

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-14, 38-14.1-24

69-05.2-10-03. Permit applications - Criteria for permit approval or denial.

6. In addition to the requirements of subsection 3 of North Dakota Century Code section 38-14.1-21, no permit or significant revision will be

approved, unless the application affirmatively demonstrates and the commission finds, in writing, on the basis of information in the application or otherwise available, which is documented in the approval and made available to the applicant, that:

- a. The permit area is not on any lands subject to the prohibitions or limitations of North Dakota Century Code section 38-14.1-07 or the area has met the application review procedures of section ~~69-05.2-04-01~~ 69-05.2-04-01.1.

History: Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; May 1, 1992; June 1, 1994; July 1, 1995; June 1, 1997; May 1, 2001: □□□□□□□□□□

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-21, 38-14.1-33

69-05.2-12-05.1. Performance bond - Self-bond of permit applicant.

1. The commission may accept a self-bond if the following conditions are met:
 - a. The applicant designates an agent for service of process in the state.
 - b. The applicant has been in continuous operation as a business entity the five years preceding the application. The commission may allow a joint venture with less than five years of continuous operation if each member has been in continuous operation for the five years preceding the application.
 - c. The applicant submits financial information in sufficient detail to show one of the following:
 - (1) The applicant has a current ~~Moody's Investor Service or Standard and Poor's~~ rating for its most recent bond issuance of "A" or higher as issued by Moody's Investors Service, Standards and Poor's Corporation or an equivalent rating by any other nationally recognized statistical rating organization, as defined and approved by the United States securities and exchange commission, that is acceptable to the commission.
 - (2) The applicant has a tangible net worth of at least ten million dollars, a ratio of total liabilities to net worth of 2.5 or less,

and a ratio of current assets to current liabilities of 1.2 or greater.

- (3) The applicant's fixed assets in the United States total at least twenty million dollars and the applicant has a ratio of total liabilities to net worth of 2.5 or less, and a ratio of current assets to current liabilities of 1.2 or greater.

d. The applicant submits:

- (1) Financial statements for the last complete fiscal year audited by an independent certified public accountant, and a report containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion; and
- (2) Financial statements for completed quarters in the current fiscal year and additional information requested by the commission.

e. "Tangible net worth" means net worth less intangibles.

History: Effective May 1, 1988; amended effective January 1, 1993;

General Authority: NDCC 38-14.1-03

Law Implemented: NDCC 38-14.1-16

Proposed Rule Change

69-09-02-35. Installation and maintenance - Conformance to National Electrical Safety Code. The installation and maintenance of electric supply and communication lines shall conform to rules and regulations established in the ~~2002~~ 2007 edition of the National Electrical Safety Code, issued August 1, ~~2004~~ 2006, which is adopted by reference. Copies of these regulations may be obtained from the public service commission, state capitol, Bismarck, North Dakota 58505-0480.

History: Amended effective September 1, 1984; January 1, 1988; December 1, 1990; August 1, 1993; July 1, 1997; March 1, 2003.

General Authority: NDCC 28-32-02, 49-02-04

Law Implemented: NDCC 49-02-04, 49-20-02

**State of North Dakota
Public Service Commission**

**Public Service Commission
Public Utilities - Electric
Rulemaking**

Case No. PU-06-490

**Statements Regarding Regulatory Analysis, Takings Assessment,
and Small Entity Analysis**

September 6, 2007

Statement Regarding Regulatory Analysis:

North Dakota Century Code Section 28-32-08 requires that an agency issue a regulatory analysis if the proposed rule is expected to have an impact on the regulated community in excess of fifty thousand dollars or if a written request for the analysis is filed by the governor or a member of the legislative assembly.

Adopting the latest 2007 edition of the National Electric Safety Code is not expected to have a \$50,000 impact on the regulated Community. Electric transmission and distribution facilities are constructed in accordance with current codes as a matter of sound engineering and construction practice regardless whether the Commission's rules reflect the latest code issuance. Therefore, a regulatory analysis is not needed.

Statement Regarding Takings Assessment:

N.D.C.C. Section 28-32-09 requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. Subsection 28-32-09(3) states:

In an agency's analysis of the takings implications of a proposed rule, "taking" means the taking of private real property, as defined in section 47-01-03, by government action which requires compensation to the owner of that property by the fifth or fourteenth amendment to the Constitution of the United States or section 16 of article I of the Constitution of North Dakota. "Regulatory taking" means a taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law.

This proposed rule to adopt an updated 2007 Edition of the National Electric Safety Code does not constitute a taking or regulatory taking. Adoption of the 2007 Edition is not expected to reduce the value of any real property by more than fifty percent because adequate safety standards should reduce the impact of utility facilities on

people and property, and we believe the utilities are already in substantial compliance with the new code. Even if adopting the 2007 Edition were to somehow cause some devaluation, it still should not be considered a taking because adoption would substantially advance legitimate state interests in safety.

Statement Regarding Small Entity Analysis:

N.D.C.C. subsections 28-32-08.1 requires agencies to perform a small entities analysis when proposing rules. The statute states:

28-32-08.1. Rules affecting small entities - Analysis - Economic impact statements - Judicial review.

1. As used in this section:

- a. "Small business" means a business entity, including its affiliates, which:
(1) Is independently owned and operated; and
(2) Employs fewer than twenty-five full-time employees or has gross annual sales of less than two million five hundred thousand dollars;*
- b. "Small entity" includes small business, small organization, and small political subdivision;*
- c. "Small organization" means any not-for-profit enterprise that is independently owned and operated and is not dominant in its field; and*
- d. "Small political subdivision" means a political subdivision with a population of less than five thousand.*

2. Before adoption of any proposed rule, the adopting agency shall prepare a regulatory analysis in which, consistent with public health, safety, and welfare, the agency considers utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. The agency shall consider each of the following methods of reducing impact of the proposed rule on small entities:

- a. Establishment of less stringent compliance or reporting requirements for small entities;*
- b. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities;*
- c. Consolidation or simplification of compliance or reporting requirements for small entities;*
- d. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule; and*
- e. Exemption of small entities from all or any part of the requirements contained in the proposed rule.*

3. Before adoption of any proposed rule that may have an adverse impact on small entities, the adopting agency shall prepare an economic impact statement that includes consideration of:

- a. The small entities subject to the proposed rule;*
- b. The administrative and other costs required for compliance with the proposed rule;*

- c. The probable cost and benefit to private persons and consumers who are affected by the proposed rule;*
- d. The probable effect of the proposed rule on state revenues; and*
- e. Any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.*

Response to subsection 2: There are no reporting requirements under the proposed rule. Establishing an exemption from the code or less stringent standards for small entities would not be consistent with public safety.

Response to subsection 3: The National Electric Safety Code applies to facilities owned by electric utilities, which usually are not small entities. However, some North Dakota municipal or cooperative electric suppliers may be small entities under subsection 28-32-08.1(1). Costs of compliance with this proposed rule update are expected to be minimal or non-existent because sound engineering and construction practices require compliance with the code in effect at the time of construction, regardless whether Commission rules have been updated to reflect the latest code issuance. No effect is anticipated on state revenues. The purpose of updating this rule is to maintain public safety. No less intrusive or less costly alternatives for achieving that purpose have been identified.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Public Service Commission
Public Utilities – Electric
Rulemaking**

Case No. PU-06-490

STAFF TESTIMONY

November 26, 2007

My name is Jerry Lein. I am employed as a Public Utility Analyst within the Public Utility Division of the Public Service Commission. The purpose of my testimony is to explain and provide support for changes proposed to the Commission's administrative rules in section 69-09-02-35 of the North Dakota Administrative Code. This section adopts the National Electric Safety Code (NESC) by reference.

The NESC is updated periodically, with a new edition issued every five years. The changes proposed would simply adopt the latest NESC 2007 Edition instead of the previously adopted 2002 Edition. The purpose of adopting the 2007 Edition is to ensure that North Dakota safety requirements keep pace with industry standards. In practice, the utilities are very committed to safety and are already applying the 2007 Edition.

A summary of changes for the 2007 Edition is attached to my testimony.

A small entities analysis under N.D.C.C. section 28-32-08 was prepared with the conclusion that any costs of small entity compliance with this proposed rule update are expected to be minimal or non-existent.

A regulatory analysis under N.D.C.C. section 28-32-08 was not performed because no requests were received and because the proposed rule is not expected to have an impact on the regulated community in excess of fifty thousand dollars.

A takings assessment under N.D.C.C. section 28-32-09 was prepared with the conclusion that the proposal is not a taking or regulatory taking.

That concludes my testimony. Thank You.