

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Accounting, Electric and Gas  
Rulemaking**

**Case No. PU-06-486**

**Public Service Commission  
Public Utilities - Siting  
Rulemaking**

**Case No. PU-06-501**

**Public Service Commission  
Wind Turbine Decommissioning  
Rulemaking**

**Case No. PU-07-642**

**ORDER SUBMITTING PROPOSED RULES TO ATTORNEY GENERAL**

**February 27, 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:

**Accounting, Electric and Gas: Case No. PU-06-486**

The proposed rules will require regulated gas and electric companies to use a standard system of accounts prescribed by the Federal Energy Regulatory Commission and will limit the amount a utility can capitalize for the cost of funds used during the construction of assets.

**Public Utilities - Siting: Case No. PU-06-501**

The proposed rule sets forth administrative procedures for returning siting application fees that were not needed for processing energy conversion or transmission facility siting applications in accordance with N.D.C.C. section 49-22-22.

## **Wind Turbine Decommissioning: Case No. PU-07-642**

The proposed rule change in Case No. PU-07-642 would establish a new Chapter 69-09-10 of the North Dakota Administrative Code with requirements for the decommissioning of commercial wind turbines. N.D.C.C. section 49-02-27 provides that the Commission may adopt rules governing the decommissioning of commercial wind energy conversion facilities and that the rules may address:

1. The anticipated life of the project;
2. The estimated decommissioning costs in current dollars;
3. The method and schedule for updating the costs of the decommissioning and restoration;
4. The method of ensuring that funds will be available for decommissioning and restoration; and
5. The anticipated manner in which the project will be decommissioned and the site restored.

### **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. Additionally, a follow-up work session requested in Case No. PU-07-642 was conducted on January 8, 2008.

The following discusses the comments that were received:

## **Accounting, Electric and Gas: Case No. PU-06-486**

Commission staff testified at the hearing to explain that regulated gas and electric companies have been using the Federal Energy Regulatory Commission's system of accounts for a long time. The proposed rule simply codifies what is already occurring. The capitalization of Allowance for Funds Used During Construction (AFUDC) is not new, but the proposed rule would establish a limitation in that it would not permit the capitalization of AFUDC on

projects costing less than \$10,000 and taking less than 30 days to complete. Staff understands that the current practices of regulated utilities within North Dakota are within this limitation.

Staff further explained that AFUDC provides a method for capitalizing all finance costs related to a particular asset and then amortizing those costs over the in-service life of the asset. In this way, the beneficiaries of new asset pay for the asset and finance costs rather than charging some previous generation of customers for finance costs that occurred during the construction phase of an asset. The dollar and time limit of this proposed rule recognizes that smaller jobs are occurring on a regular basis and therefore any associated finance costs do not need to be capitalized and are appropriately expensed when incurred.

### **Public Utilities - Siting: Case No. PU-06-501**

Commission staff testified at the hearing to explain that North Dakota Century Code Section 49-22-22 requires every applicant for a certificate of site compatibility, a certificate of corridor compatibility or a waiver of siting procedures to pay an application fee. The Commission must deposit application fees into the Siting Process Expense Recovery Fund established in the state treasury. All moneys deposited in the fund are appropriated on a continuing basis to the Commission to pay expenses incurred in the siting process. The Commission must refund the portion of fees collected which exceeds the expenses incurred for the evaluation and designation process and the proposed rule would establish a process for doing so. No other comments were received.

### **Wind Turbine Decommissioning – Case No. PU-07-642**

#### Comments Received

#### Commission staff:

Commission staff testified at the hearing that the proposed rules would require owners and operators of new and existing commercial wind energy conversion facilities with total nameplate generating capacity ratings of 500 kW or more to decommission all such facilities to a depth of four feet below ground level and be responsible for all costs of decommissioning and reclaiming the land when a project has reached the end of its useful life. A facility is presumed to be at the end of its useful life if it generates no electricity for a continuous period of twelve months, unless the Commission approves a plan for returning the facility to service. Decommissioning would be required to begin within 8 months and be completed within 18 months after the facility reaches the end of its useful life.

The proposal would require Commission approval of a decommissioning plan prior to construction of new facilities. For existing facilities the plan would need to be filed within one year after the rules become effective. The Commission would have six months to act on a filed plan. The plan would describe how the owner or operator will ensure resources are available to pay for decommissioning. After the 10<sup>th</sup> year of operation the Commission could order a performance bond or other form of financial assurance to cover the anticipated costs of decommissioning. If decommissioning were not completed then the commission could take action as necessary to complete the decommissioning, including forfeiture of the bond.

Basin Electric Power Cooperative:

Basin Electric Power Cooperative (Basin Electric) commented that under proposed section 69-09-10-03 twelve months of non-production is too short of a period for assuming a turbine is at the end of its useful life and suggested 24 months would be better given long lead times sometimes experienced for repairs. Basin Electric was further concerned that reclaiming original top soil quality under proposed section 69-09-10-05 could require stockpiling of the original topsoil and suggested that the area disturbed be reclaimed on a best engineering practice basis with a goal of achieving comparative topsoil quality and topography. Basin Electric further requested greater specify in options for demonstrating financial assurance under proposed section 69-09-10-08. Basin preferred that corporate guarantees be available to companies that meet certain financial worthiness standard.

Cass County Electric Cooperative:

Cass County Electric Cooperative (Cass Electric) concurred with proposed section 69-09-10-05 with the exception of the requirement to remove underground cables to a depth of 48 inches. Cass Electric commented that removal of abandoned underground power cables is a time-consuming and expensive process that yields little benefit and might be more detrimental to the land than any benefit gained. Cass Electric recommended not requiring cable removal beyond a depth of 36 inches in the immediate site area of a wind turbine and not beyond a depth of 24 inches outside of the immediate site area.

FPL Energy, LLC:

FPL Energy, LLC (FPL Energy) questioned the Commission's authority to regulate wind farms with less than 100 MW of generating capacity and requested the Commission conduct a working session, in which interested parties may participate, to consider comments being submitted by FPL Energy and others. FPL Energy requested that section 69-09-10-05 be revised to clarify that underground cables and other structures need only be removed to a depth of four feet. FPL Energy was concerned that reclaiming original top soil quality was impractical as it could require stockpiling of the original topsoil and suggested that the standard for reclamation be set instead at "good or prudent engineering practices." FPL Energy was further concerned with the requirement for Commission approval of a decommissioning plan under proposed

section 69-09-10-06. Specifically, FPL Energy questioned what happens if a plan is disapproved and noted that there were no standards proposed for approving or disapproving a plan. FPL Energy also suggested that creditworthiness standards should be established for the qualification of corporate guarantees as sufficient financial assurance under proposed section 69-09-10-08.

North Dakota Chapter of The Wildlife Society:

North Dakota Chapter of The Wildlife Society (The Wildlife Society) commented in general support of the proposed rules, but recommended there be a requirement that disturbed areas of native prairie be reseeded with a high-diversity native seed mixture to minimize the invasion of non-native species. The Wildlife Society questioned how the 10 year indicator for determining whether to require bonds or other financial assurance under proposed section 69-09-10-08 was chosen and why financial assurance would not be required from start-up. Additionally, The Wildlife Society proposed strengthening the wording in section 69-09-10-08 be changed from “may require a performance bond...” to “will require a performance bond...” and recommended the bond be sufficient to complete reclamation to state standards.

Otter Tail Corporation:

Otter Tail Corporation d/b/a Otter Tail Power Company (Otter Tail) commented that the requirements for reclamation to a depth of four feet under section 69-09-10-05 would be unnecessarily burdensome in view of new structure footing designs and should be reduced to a reclamation depth of three feet below the surface.

### Commission Discussion

In response to jurisdictional questions raised by FPL Energy, the Commission sent a letter to the Attorney General’s Office requesting an opinion on whether the Commission has authority to establish decommissioning rules for facilities with less than 100 MW of generating capacity. A response to that request is pending.

Proposed Section 69-09-10-03:

The Commission agrees with concerns raised by Basin Electric and the assumption of when a turbine is at the end of its useful life is revised from 12 months of non-production to 24 months as Basin Electric proposed.

Proposed Section 69-09-10-05:

The Commission agrees with Otter Tail’s concerns that reclamation to a depth of four feet would be burdensome and the depth is revised to 36 inches for everything except the removal of underground cables. For underground cables the Commission agrees with Cass Electric’s concern that removal at depths greater than 24 inches for areas outside the immediate project area would be unnecessarily burdensome and could do more harm to the land than benefit. The Commission does not find it necessary or practical to define boundaries for different depth requirements and the

proposed rule is revised to require removal of underground cable only to a depth of 24 inches.

The Commission agrees with FPL Energy and Basin Electric that proposed language regarding top soil restoration was impractical and could infer that stockpiling would be necessary. Therefore, the proposed rule is revised to clarify that the area need only be returned to the same general topography with topsoil to a depth similar to what it was before the project.

The Commission agrees with The Wildlife Society that more specific reseeded requirements are needed and proposed section 69-09-10-05 is revised to incorporate reseeded requirements commonly specified by the Commission for other site reclamations.

Proposed Section 69-09-10-06:

The Commission agrees with FPL Energy that there are no formal standards or consequences proposed for approval or disapproval of decommissioning plans and so Commission approval of plans should not be required. Proposed section 69-09-10-06 is revised to require that plans be filed for Commission review rather than for approval.

Proposed Section 69-09-10-08:

The Commission agrees with FPL Energy and Basin Electric that creditworthiness standards for accepting corporate guarantees should be established. Standards currently being used for accepting corporate guarantees for financial assurance in coal mine reclamation were discussed during the January 8<sup>th</sup> workshop and a resulting modified version is incorporated into proposed section 69-09-10-08.

**Order**

The Commission orders that the revised 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**

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**Tony Clark  
Commissioner**

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**Susan E. Wefald  
President**

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**Kevin Cramer  
Commissioner**

**Proposed Accounting Rules for Electric and Gas**

**Four new Sections to Chapter 69-09-05.1:**

**69-09-05.1-02. Accounting practices - Rate regulated gas companies.** The system of accounts used by all North Dakota natural gas distribution companies subject to rate regulation by the commission must conform to the uniform system of accounts set forth in title 18, Code of Federal Regulations, part 201, prescribed by the Federal Energy Regulatory Commission.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-12

**69-09-05.1-03. Accounting practices - Rate regulated electric companies.** The system of accounts used by all North Dakota electric companies subject to rate regulation by the commission must conform to the uniform system of accounts set forth in title 18, Code of Federal Regulations, part 101, prescribed by the Federal Energy Regulatory Commission.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-12

**69-09-05.1-04. Accounting practices - Allowance for funds used during construction for rate regulated gas companies.** A North Dakota natural gas

distribution company subject to rate regulation by the commission may not capitalize allowance for funds used during construction (AFUDC) as prescribed in title 18, Code of Federal Regulations, part 201 for projects costing less than \$10,000 and taking less than 30 days to complete.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-12

**69-09-05.1-05. Accounting practices - Allowance for funds used during construction for rate regulated electric companies.** A North Dakota electric company subject to rate regulation by the commission may not capitalize allowance for funds used during construction (AFUDC) as prescribed in title 18, Code of Federal Regulations, part 101 for projects costing less than \$10,000 and taking less than 30 days to complete.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-12

**Proposed Rule**

A new section to Chapter 69-06-01

**69-06-01-05 Siting fee refund.** After all siting permits and certificates are issued by the commission and after all notice and hearing costs and expenses are paid, the commission will refund to the applicant all of the application fee paid by the applicant except \$5,000 or the amount of the fee remaining if that amount is less than \$5,000. When construction and all post-construction inspections are complete, and when the Commission has determined that any required tree mitigation is satisfactory, any remaining balance of the application fee will be refunded to the applicant. No refunds for less than \$50 will be processed.

**General Authority:** NDCC 49-22-18

**Law Implemented:** NDCC 49-22-22

## Proposed Rule

A new Chapter to Article 69-09:

### 69-09-10

#### **01. Definitions:**

1. “Commercial wind energy conversion facility” means a wind energy conversion facility of equal to or greater than five hundred kilowatts in total nameplate generating capacity.
2. “Commission” means the public service commission
3. “Wind turbine” means a wind turbine of equal to or greater than five hundred kilowatts in total nameplate generating capacity.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**02. Decommissioning Responsibility:** The owner or operator of a commercial wind energy conversion facility is responsible for decommissioning that facility and for all costs associated with decommissioning that facility and associated facilities.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**03. Useful Life:** A commercial wind energy conversion facility or individual wind turbine is presumed to be at the end of its useful life if the facility or turbine generates

no electricity for a continuous period of 24 months. The presumption may be rebutted by submitting to the commission for approval a plan outlining the steps and schedule for returning the commercial wind energy conversion facility or wind turbine to service.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**04. Decommissioning Period:** The facility owner or operator shall begin decommissioning a commercial wind energy conversion facility or wind turbine within 8 months after the time the facility or turbine reaches the end of its useful life, as determined in (#3). Decommissioning must be completed within 18 months after the facility or turbine reaches the end of its useful life.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**05. Decommissioning Requirements:** Decommissioning and site restoration includes dismantling and removal of all towers, turbine generators, transformers, and overhead cables; removal of underground cables to a depth of 24 inches; removal of foundations, buildings and ancillary equipment to a depth of 36 inches; and removal of surface road material and restoration of the roads and turbine sites to substantially the same physical condition that existed immediately before construction of the commercial wind energy conversion facility or wind turbine. The site must be restored and reclaimed to the same general topography that existed just prior to the beginning of the construction of the commercial wind energy conversion facility or wind turbine and with topsoil respread over the disturbed areas at a depth similar to that in existence prior to

the disturbance. Areas disturbed by the construction of the facility and decommissioning activities must be graded, topsoiled and reseeded according to Natural Resource Conservation Service technical guide recommendations and other agency recommendations, unless the landowner requests in writing that the access roads or other land surface areas be retained.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**06. Decommissioning Plan:** Prior to commencement of operation of a commercial wind energy conversion facility or wind turbine, the facility or turbine owner or operator shall file for commission review the estimated decommissioning cost per turbine, in current dollars at the time of filing, for the proposed facility or turbine and a comprehensive decommissioning plan that describes how the facility or turbine owner or operator plans to pay for decommissioning the facility or turbine as required by section 69-09-10-05 at the appropriate time. The commission may at any time require the owner or operator of a commercial wind energy conversion facility or wind turbine to file a report with the commission describing how the facility or turbine owner or operator is fulfilling this obligation.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**07. Existing Facilities:** Owners and operators of existing commercial wind energy conversion facilities shall file with the commission the information required in section 6 within one year of the effective date of the rules.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**08. Financial Assurance:** After the 10<sup>th</sup> year of operation of a commercial wind energy conversion facility or wind turbine, the commission, by order, may require the owner or operator to secure a performance bond, surety bond, letter of credit, corporate guarantee or other form of financial assurance that is acceptable to the commission to cover the anticipated costs of decommissioning the commercial wind energy conversion facility or turbine. The commission may accept a corporate guarantee if the corporation 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; or if it has an investment grade current rating for its most recent bond issuance of "Baa" or higher as issued by Moody's Investors Service, "BBB" or higher as issued by 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.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27

**09. Failure to Decommission:** If the commercial wind energy conversion facility owner or operator does not complete decommissioning, the commission may take such action as may be necessary to complete decommissioning, including requiring forfeiture of the bond. The entry into a participating landowner agreement shall constitute agreement and consent of the parties to the agreement, their respective heirs,

successors, and assigns, that the commission may take such action as may be necessary to decommission a commercial wind energy conversion facility or wind turbine, including the exercise by the commission, commission staff, and their contractors of the right of ingress and egress for the purpose of decommissioning the commercial wind energy conversion facility.

**General Authority:** NDCC 28-32-02, 49-02-27

**Law Implemented:** NDCC 49-02-27