



Public Service Commission

State of North Dakota

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Honorable Wayne K. Stenehjem
Attorney General
State Capitol
600 East Boulevard
Bismarck, ND 58505-0040

Re: Request for opinion regarding the Public Service Commission's authority to establish rules for wind turbine decommissioning.

Dear Attorney General Stenehjem:

We are requesting an opinion regarding whether the Public service Commission ("Commission") has the authority under section 49-02-27 of the North Dakota Century Code to adopt rules governing the decommissioning of wind generation facilities of less than 100 megawatts (100,000 kilowatts).

House Bill No. 1317 passed by the Legislature during the 2007 legislative gives the Public Service Commission ("Commission") authority to adopt rules governing the decommissioning of commercial wind energy conversion facilities. The law provides:

49-02-27. Power of commission to establish rules to decommission wind energy conversion facilities. The commission may adopt rules governing the decommissioning of commercial wind energy conversion facilities. 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.

The Commission held a hearing on the proposed rules on November 26, 2007. On December 5, 2007, an interested party filed comments with the Commission

questioning the Commission's authority to establish rules for decommissioning of a wind energy facility of less than 100 megawatts (100,000 kilowatts). The question regarding the Commission's authority arises because although N.D.C.C. §49-02-27 addresses "commercial wind energy conversion facilities," the statute contains no definition of "commercial wind energy conversion facilities."

Under the Commission's proposed rules "commercial wind energy conversion facility" is defined as "a wind energy conversion facility of equal to or greater than five hundred kilowatts in total nameplate generating capacity." A copy of the Commission's proposed rules is attached as "Exhibit 1."

The Energy Conversion and Transmission Facility Siting Act, Chapter 49-22 of the North Dakota Century Code, does contain a statutory definition of "energy conversion facility." Section 49-22-03(5)(a) provides that an "energy conversion facility" is any plant, addition, or combination of plant and addition that is designed for or capable of generation of 100,000 kilowatts or more of electricity.

N.D.C.C. §1-01-09 provides that "[w]henver the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears." The North Dakota Supreme Court ruled that when a virtually identical definition of a word or phrase is defined in the Code, "that definition applies to any use of the word or phrase in other sections of the Code, except where a contrary intent plainly appears. Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830, 834 (N.D. 1995).

The Legislative History reveals that Engrossed House Bill No. 1317 was amended by the Senate to include decommissioning provisions. The amendment approved by the Senate included a definition of "commercial wind energy conversion facility" that is identical to the definition in the proposed rules. The minutes of the House Finance and Taxation Committee indicate that the Committee discussed the fact that the amendment approved by the Senate would cover wind farms under 100 megawatts and the possible effect on developers. At the hearing on April 2, 2007, the following exchange took place:

Chairman Brandenburg: That would be fine if you wanted to check that out but I do know Joe Richardson. There's one thing we visited about after our last meeting. In this amendment that was put on here about decommissioning, the one thing that hasn't been brought out is that not only would this deal with decommissioning, it would also deal with any size wind farm under 100 mw that came under the strings of the Public Service Commission (PSC). Right now if you're 100 mw or less, you would not fall under the strings of the PSC, so this amendment on decommissioning does put the PSC back in control of any size project to

zero. You'd have to put all the regulatory issues that are required of the PSC, that's really what this issue is about. It's kind of ties the hands of developers that wanted a piece and that process can take quite a bit of time.

Sen. Cook: So your concern is not just the decommissioning but also that put in the amendment for the PSC.

Chairman Brandenburg: That is part of my concern because to be competitive with South Dakota (SD); SD's got 100 mw and ND needs to have that too. If you were a developer looking at where the wind farms or any energy facility would you go the SD or ND? That's the issue right there.

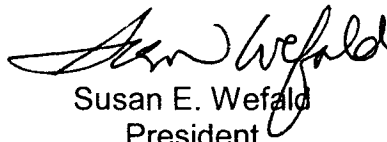
The Report of the Conference Committee recommended that the Senate recede from its amendments regarding decommissioning and that the language currently in section 49-02-27 of the North Dakota Century Code be adopted.

Thank you for your consideration of this request.

Sincerely,



Tony Clark
Commissioner



Susan E. Wefald
President



Kevin Cramer
Commissioner

**Public Service Commission
Wind Turbine Decommissioning
Rulemaking**

Case No. PU-07-642

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 49-02

Law Implemented: NDCC 49-02-27

69-09-10-02. Cost 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 49-02

Law Implemented: NDCC 49-02-27

69-09-10-03. 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 twelve (12) 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 49-02

Law Implemented: NDCC 49-02-27

69-09-10-04. 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 49-02

Law Implemented: NDCC 49-02-27

69-09-10-05. Decommissioning Requirements: Decommissioning and site restoration includes dismantling and removal of all towers, turbine generators, transformers, overhead and underground cables, foundations, buildings and ancillary equipment to a depth of four feet; 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. To the extent possible, the site must be restored and reclaimed to the topography and topsoil quality that existed just prior to the beginning of the construction of the commercial wind energy conversion facility or wind turbine. Disturbed earth must

be graded and reseeded, unless the landowner requests in writing that the access roads or other land surface areas be retained.

General Authority: NDCC 49-02

Law Implemented: NDCC 49-02-27

69-09-10-06. 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 with the commission the estimated decommissioning cost per turbine, in current dollars at the time of the application, for the proposed facility or turbine and a decommissioning plan that describes how the facility or turbine owner or operator will ensure that resources are available to pay for decommissioning the facility or turbine at the appropriate time. The commission shall review a plan filed under this section and shall issue an order approving or disapproving the plan within 6 months after the decommissioning plan was filed. 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 49-02

Law Implemented: NDCC 49-02-27

69-09-10-07. 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 49-02

Law Implemented: NDCC 49-02-27

69-09-10-08. Financial Assurance: After the 10th year of operation of a commercial wind energy conversion facility or wind turbine, the commission, by order, may require 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.

General Authority: NDCC 49-02

Law Implemented: NDCC 49-02-27

69-09-10-09. 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 49-02

Law Implemented: NDCC 49-02-27