

**Legislative Council
Administrative Rules Committee**

Presentation by: Susan Wefald, President
Public Service Commission

Before: Administrative Rules Committee
Senator Tom Fischer, Chairman

Date: September 11, 2008

TESTIMONY

ND ADMINISTRATIVE CODE SECTION

**PSC CASE
No.**

ND Admin. Code § 69-09 (Wind Turbine Decommissioning)

PU-07-642

Mr. Chairman and committee members, my name is Susan Wefald. I am the President, and speaking in behalf of the North Dakota Public Service Commission. With me today is Jerry Lein, an analyst with the Commission's Public Utilities Division, and Annette Bendish, an attorney with the Public Service Commission. We are here to respond to questions posed to us by the Legislative Council's staff concerning a recent rulemaking proceeding.

The rules submitted by the Public Service Commission for your consideration today begin on page 254. The rules in question involve wind turbine decommissioning. The wind turbine decommissioning rules as adopted by the Commission and approved by the Attorney General are attached to this testimony.

Our responses to the questions posed are presented below.

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.

Yes (2007).

- 2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.**

No.

- 3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.**

A notice of the rulemakings was published in daily newspapers throughout the state as required by N.D.C.C. Chapter 28-32. A public hearing was held at 1:00 p.m. CST, on November 26, 2007, in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

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 PU-07-642 was conducted on January 8, 2008.

- 4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.**

Comments were received on this case. Below are excerpts from the Public Service Commission order discussing the comments as well as the Commission's response to the comments. Note that although the order indicates that (at the time of the order) an Attorney General's opinion request was pending, we did receive the opinion on April 2, 2008.

Comments from 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 Electric preferred that corporate guarantees be available to companies that meet certain financial worthiness standard.

Comments from 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 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 as 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.

Public Service 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 100MW 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 8th workshop and a resulting modified version is incorporated into proposed section 69-09-10-08.

5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.

Legal notices associated with the rulemaking proceedings (which included all five rules packages – four previously submitted and the one submitted today, plus two additional rules proposals) cost \$2,096.50. Other than staff time, no other significant costs were incurred.

6. An explanation of the subject matter of the rules and the reasons for adopting those rules.

The rule change in the Wind Turbine Decommissioning case will 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.

7. **Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.**

Yes; a copy is attached.

8. **Whether a regulatory analysis or economic impact statement of impact on small entities as required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide a copy.**

Yes; a copy is attached.

9. **Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.**

Yes; a copy is attached.

10. **If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.**

These rules were not adopted as emergency rules.

Mr. Chairman, that completes our testimony. We would be happy to respond to any questions that the committee might have.

**State of North Dakota
Public Service Commission**

**Public Service Commission
Wind Turbine Decommissioning
Rulemaking**

Case No. PU-07-642

Regulatory Analysis, Takings Assessment, and Small Entity Analysis

October 3, 2007

N.D.C.C. Section 49-02-27 provides that 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.

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.

The proposed rule 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 and be responsible for all costs of decommissioning when a project has reached the end of its useful life. The proposal would require establishment of a decommissioning plan and, to the extent that it causes decommissioning of facilities that would otherwise be abandoned, the proposal will likely have an impact on the regulated community in excess of fifty thousand dollars. Therefore, a regulatory analysis is being issued.

Section 28-32-08 provides that a regulatory analysis must contain:

- a. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule:
 - Wind project owner and operators are expected to bear the costs of decommissioning when wind projects are retired. It is expected that the costs of decommissioning will be recovered from consumers of the electricity produced – just as other costs, including competing generation project decommissioning costs, are recovered.

- Landowners should benefit from the proposed rule as it will help ensure they are not stuck with abandoned facilities on their land.
 - The general public will benefit from not having abandoned wind turbines spread across the countryside.
- b. A description of the probable impact, including economic impact, of the proposed rule;
- The probably impact will be to decommission wind turbine facilities that might otherwise be abandoned when no longer useful for generating electricity. Actual decommissioning costs per turbine will depend on the number of turbines in the facility and other factors such as salvage value or whether there is a market for used towers, etc. An example was provided in testimony before the ND Legislature's Natural Resources Committee regarding 2007 HB 1506 where the Minnesota Public Utilities Commission estimated in 2006 that decommissioning of a 100 MW facility could cost in a range of approximately \$10,000 to \$30,000 per turbine. However, absent decommissioning, there may also be an impact from decreased land values if facilities were abandoned in place.
- c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues:
- Implementation and enforcement costs are expected to be limited to existing staff time. Revenue could be impacted by penalties assessed for non-compliance.
- d. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.
- No reasonable alternatives were identified or seriously considered.

Takings Assessment

North Dakota Century Code Section 28-32-09(1) requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private property. The assessment must:

- a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
- To the extent that the proposed rule results in the removal of wind generating facilities that otherwise would be abandoned in place, then the rule would limit the use of private property by not allowing "junk" wind turbines to remain erected upon it.
- b. Clearly and specifically identify the purpose of the proposed rule.
- The purpose of the proposed rule is to ensure that wind generating facilities are properly decommissioned at the end of their useful life rather than simply abandoned in place.

- c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.
 - The proposed rule will establish requirements, and require a funding plan, for decommissioning of wind generating facilities that may not otherwise be properly decommissioned at the end of their useful life. The legislature has authorized the establishment of the rule and no alternative action has been identified that will ensure proper decommissioning of the facilities
- d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
 - We do not have sufficient expertise to estimate potential cost to the government. However, there could be salvage value or other factors that may affect the cost to government.
- e. Identify the source of payment within the agency's budget for any compensation that may be ordered.
 - There are no sources in this agency's budget without further appropriation from the Legislature.
- f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.
 - So certified by the State Legislature. Proposed rule authorized under NDCC 49-02-27.

Small Entity Regulatory Analysis

An economic impact analysis under North Dakota Century Code Section 28-32-08.1 requires a regulatory analysis which considers utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. Subsection 2 states that 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.
- e. Exemption of small entities from all or any part of the requirements contained in the proposed rule.

Small entities employ fewer than 25 full-time employees or have gross annual revenue sales of less than \$2.5 million dollars.

As proposed, the rules would provide flexibility for the Commission to establish project-specific decommissioning plans to assist wind energy developers that are small entities to fund decommissioning of facilities. Absent a decommissioning plan it is likely more difficult for small entities to fund decommissioning and more likely that facilities will be abandoned in place.

No additional compliance standards, reporting requirements or performance standards are proposed by the rule changes. Small entities will not be exempt from any part of the requirements contained in the proposed rule

Section 28-32-08.1 provides that 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;
 - There are some small entity developers, but generally commercial wind energy facility owners and operators are unlikely to be small entities because of the financial and operating resources necessary to develop commercial scale wind energy projects. Possible exceptions include possible school or small community based projects.
- b. The administrative and other costs required for compliance with the proposed rule;
 - Aside from the cost of decommissioning the facilities, administrative and other costs are expected to be limited to the cost of preparing and obtaining approval of a decommissioning plan and the costs of a bond if one is needed.
- c. The probable cost and benefit to private persons and consumers who are affected by the proposed rule;
 - Wind energy facility owners and operators typically enter into a lease arrangement with private land owners and consequently the landowner can be left with facility removal if the developer fails to do so. The proposed rule will benefit private land owners by ensuring that a plan is in place to remove abandoned facilities from their land.
- d. The probable effect of the proposed rule on state revenues:
 - If facilities are abandoned then the state could end up removing them at state expense. The proposed rule will benefit the state by ensuring that a plan is in place to ensure that the state will be left to remove abandoned facilities.
- e. Any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule:
 - No less intrusive or less costly alternatives have been identified.

CHAPTER 69-09-09
WIND TURBINE DECOMMISSIONING

| | |
|--------------------|-------------------------------------|
| <u>Section</u> | |
| <u>69-09-09-01</u> | <u>Definitions</u> |
| <u>69-09-09-02</u> | <u>Cost Responsibility</u> |
| <u>69-09-09-03</u> | <u>Useful Life</u> |
| <u>69-09-09-04</u> | <u>Decommissioning Period</u> |
| <u>69-09-09-05</u> | <u>Decommissioning Requirements</u> |
| <u>69-09-09-06</u> | <u>Decommissioning Plan</u> |
| <u>69-09-09-07</u> | <u>Existing Facilities</u> |
| <u>69-09-09-08</u> | <u>Financial Assurance</u> |
| <u>69-09-09-09</u> | <u>Failure to Decommission</u> |

69-09-09-01. 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.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-02. 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.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-03. 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 continuing period of twenty-four 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.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-04. Decommissioning period. The facility owner or operator shall begin decommissioning a commercial wind energy conversion facility or wind turbine within eight months after the time the facility or turbine reaches the end of its useful life, as determined in section 69-09-09-03. Decommissioning must be completed within eighteen months after the facility or turbine reaches the end of its useful life.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-05. 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 three 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. 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.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-06. 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.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-07. Existing facilities. Owners and operators of existing commercial wind energy conversion facilities shall file with the commission the information required in section 69-09-09-06 within one year after July 1, 2008.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-08. Financial assurance. After the tenth 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.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27

69-09-09-09. 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.

History: Effective October 1, 2008.

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

Law Implemented: NDCC 49-02-27