State of North Dakota
Public Service Commission

Public Service Commission **Case No. GE-14-763**
Licensing
Rulemaking

Statements on Regulatory Analysis, Small Entity Regulatory Analysis and Economic Impact, and Takings Assessment

November 13, 2014

The Commission is proposing amendments to North Dakota Administrative Code Sections 69-07-02-02 and 69-07-02-02.1. The proposed rules change the way a grain warehouse bond is determined, including requiring additional bond coverage for newer licensees, and those with substantial annual purchase volume. A reduction is available for a licensee with a shorter scale ticket conversion policy. The proposed rules also change the way the bond is determined for a roving grain buyer. The proposed rules also increase the maximum bond for all licensees.

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 law provides, in part:

2. The 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;

   b. A description of the probable impact, including economic impact, of the proposed rule;

   c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; and

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.

While it is not possible to determine an exact impact, it is likely the proposed rules will impact the regulated community in excess of fifty thousand dollars.

The proposed changes will affect new grain warehouse licensees, licensees that handle a substantial annual grain purchase volume, and licensees currently bonded at the current maximum. The proposed changes will also affect roving grain buyer licensees that handle more than one hundred thousand bushels of grain and grain buyers that handle a substantial annual purchase volume.

Grain Warehouse Bonds

A grain warehouse licensee currently operating a 50,000 bushel facility is required to file a $50,000 bond. The following is an example of the proposed bond costs for a licensee operating a 50,000 bushel grain warehouse with an annual grain purchase volume of 2,600,000 bushels (50,000 bushels a week X 52 weeks). Under the proposed rules, the bond for this facility would increase substantially.

Bond – based on capacity and years licensed:			
1-6 years	$ 65,000	≥7 years	$ 50,000
Additional Bond - 20¢ per bushel:			
>7 times capacity, add	$450,000		$450,000
Total Bond	**$515,000**		**$500,000**
Credit for Conversion Policy			
≤10 days-30% discount	$154,500		$150,000
Total Bond	**$360,500**		**$350,000**
Credit for Conversion Policy			
11-21 days-15% discount	$ 77,250		$ 75,000
Total Bond	**$437,750**		**$425,000**

Using the example above, farmers will benefit from the proposed rules in the event a licensee becomes insolvent since there should be more trust fund proceeds available to distribute to unpaid noncredit-sale contract claimants. However, farmers may also be negatively affected by the proposed rules because they will likely bear the additional costs incurred by a licensee because these additional operating costs will be passed on to the farmers in the form of lower grain prices.

Increasing the maximum warehouse bond from $1,500,000 to $2,000,000 will affect twelve existing licensees. Of these twelve licensees, six will be required to increase their bond to an amount less than $2,000,000 and six will be required to increase their bond to $2,000,000. A licensee required to increase its bond from $1,500,000 up to $2,000,000 dollars will realize additional bond costs of approximately ten dollars per thousand.

Grain Buyer Bonds

Increasing the maximum facility-based grain buyer bond from $1,000,000 to $2,000,000 will affect five existing licensees. Of these five licensees, three will be required to increase their bond from $1,000,000 to an amount less than $2,000,000 and two will be required to increase their bond to $2,000,000. A facility-based grain buyer licensee required to increase its bond from $1,000,000 up to $2,000,000 will realize additional bond costs of between five and ten dollars per thousand.

Increasing the maximum roving grain buyer bond from $1,500,000 to $2,000,000 will affect eight existing licensees who will be required to increase their $1,500,000 bond to $2,000,000. A number of additional roving grain buyer licensees will be required to increase their bonds ranging from minimal amounts to more than double current bonds and will realize additional bond costs that will likely be passed on to the farmers in the form of lower grain prices.

Probable Impact of Higher Bonds

There are a number of factors that affect bond premiums, including the costs charged by different sureties and the licensee's net worth, working capital, and business history. Although these factors may affect each licensee differently, making it difficult to identify a specific impact due to higher bond premiums, it is very likely the additional bond premium costs alone will exceed $50,000 total impact on regulated industry.

One possible impact of requiring a higher bond during the first six years of business is that a higher bond could make it more difficult or impossible for a new grain business to get established or for a beginning business to continue operating. Another possible impact on regulated industry is that when a licensee is required to collateralize a higher bond, the higher bond may make it difficult or impossible for the licensee to obtain or maintain its operating cash flow. This may force a licensee to close.

In the broadest sense, it may be the farmers who will be significantly impacted if higher operating costs result in lower grain prices or in a grain business failing. If a licensee is forced to close its doors, a farmer may have to drive a longer distance to sell his grain which will create additional operating expenses for the farmer.

On the other hand, if a farmer sells to a licensee that is inadequately bonded and the licensee becomes insolvent, this ultimately will result in a loss of income for the farmer. Raising required bonds should result in additional protection to the farmers.

Probable Cost to Agency

There should be no cost to the agency to implement and enforce the proposed rules unless these changes result in a need for additional staff for monitoring or enforcement.

Purpose of Proposed Rules

The North Dakota Office of the State Auditor performed an audit of the Public Service Commission for the biennium ended June 30, 2013. The report issued by the State Auditor included a recommendation that the Commission take steps to increase grain buyer bonds. Over the years, the Public Service Commission has considered the issue of grain bond levels and the impact of the bonding requirements on recovery in the event of insolvency. In 2008 and 2009 the Public Service Commission met with various members of the agriculture community and interested legislators to identify and discuss alternative bond options. In January 2010, the Commission testified before the Interim Legislative Agriculture Committee about whether the current bonds were inadequate, whether bonds should be increased, whether a new "processor" class should be created, or whether current bonds should remain as is. Bond discussions have been ongoing and the Commission is proposing these rules to address bonding concerns. All suggestions or comments from interested parties are welcome.

Alternatives for Achieving Purpose

The purpose of the bond is to protect holders of outstanding receipts. Recent insolvencies have resulted in noncredit-sale contract claimants recovering less than 100% and as little as 7%, in one instance. There is no way to guarantee 100% bond protection for farmers. Raising bonds too high could make bonding unattainable or unfordable for licensees. Lowering bonds to save the impact of higher bond costs, results in no increase in protection. The only possible alternative to raising bonds to an amount that provides 100% protection for farmers is to create an indemnity fund for noncredit-sale contract claimants. This would require a change in statute, not in rule.

Small Entity Regulatory Analysis and Economic Impact

North Dakota Century Code section 28-32-08.1 requires that before adoption of any proposed rule, the adopting agency prepare a regulatory analysis in which the agency considers options to minimize adverse impact on small entities. The law provides, in part:

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;

2. 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. . . .

6. This section does not apply to rules mandated by federal law.

There is a good chance that requiring additional bonding could make it impossible for small businesses first licensed within the past six years to continue operating, or for a new licensee to establish a grain business in North Dakota. Requiring additional bonding for new licensees may be challenged as discriminatory. If so, licensees could initiate legal action against the State of North Dakota, resulting in legal costs to the State for defending such an action.

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.

None of the proposed rules constitutes a taking of private real property so no Taking Assessment is being prepared.