

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Public Utilities – Wind Decommissioning  
Rulemaking**

**Case No. PU-17-23**

**REGULATORY ANALYSIS, STATEMENT ON SMALL ENTITY ANALYSIS,  
AND TAKINGS ASSESSMENT**

The Commission is proposing to amend North Dakota Administrative Code chapter 69-09-09 to strengthen decommissioning requirements and require decommissioning plans with financial assurances for decommissioning expenses be filed for Commission approval prior to construction.

**Regulatory Analysis**

N.D.C.C. § 28-32-08 requires an agency to prepare a regulatory analysis if the rule is expected to have an impact on the regulated community in excess of fifty thousand dollars. The amendment to North Dakota Administrative Code chapter 69-09-09 is expected to have an impact in excess of fifty thousand dollars on the regulated community, therefore a regulatory analysis is performed.

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:

**Analysis**

- *Wind farm developers and consumers of wind energy will bear the costs.*
- *Landowners and the general public receive benefit from ensuring proper decommissioning.*

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

**Analysis**

- *Require financial assurance prior to construction instead of after ten years in service:*

Assume developer is required to obtain a decommissioning bond and construction takes one year. Further assume decommissioning costs are estimated to be \$5 million and the bond cost is 1.5% per year. Then for this example the impact would be  $0.015 * \$5\text{million} * 11 \text{ years} = \$825,000$ .

- Require Moody's "A" bond rating for self-bonding.  
For previous example a developer with a BBB rating that would have been allowed self-bonding would have to pay bond costs over the life of the facility. The impact using the previous example would be  $\$0.015 * \$5 \text{ million} * 30 \text{ years} = \$2.25 \text{ million}$ .
  - Foundation removal to depth of 4 feet instead of 3 feet:  
From previous rulemaking in PU-07-642 OTP testified an extra foot increase would increase turbine pad removal cost by 50%. Assume estimated turbine pad removal to 3 feet costs about \$6000 per turbine. Then 4 feet removal would increase to \$9,000 per turbine. The impact on a 50 turbine project would be an increase in decommissioning costs of  $\$3,000 * 50 \text{ turbines} = \$150,000$  for a typical wind farm.
  - Annual Certificate of Operation.  
Assume \$200/ Certificate of Operation \* 30 year life = \$6,000.
- c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues:

Analysis

Assume proceedings to consider the decommissioning plan for a project are combined with siting proceedings and the decommissioning cost estimate is not disputed. Then costs to the agency for that project would be negligible.

If separate hearings are required the cost per hearing would typically be \$5,000 or more.

If an engineering consultant is necessary to assist in determining a disputed decommissioning cost estimate then the cost would likely be an additional \$20,000 or more per project.

- 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:

Analysis

No alternatives were considered.

**Statement on Small Entity Regulatory Analysis**

N.D.C.C. § 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:

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.

These proposed amendments do not affect small entities so there is no need to provide less-stringent requirements or exemptions for small entities.

**Takings Assessment**

Regulatory Analysis, Statement on Small Entity Analysis,  
and Takings Assessment - PU-17-23

N.D.C.C. § 28-32-09 requires an entity to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. The law provides, in part:

1. . . . The agency's assessment must:
  - a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.

The proposed rulemaking does not appear to cause a taking of private property by government action. Article I, § 16, N.D. Const., provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." This right is "broader than the guarantee of the Fifth Amendment to the United States Constitution." See Grand Forks-Trail Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987).

Under N.D.C.C. § 28-32-09(3), a 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 accordance with applicable or state or federal law.

While the current proposed rulemaking could affect the use of private land, any affect should be de minimis and should not constitute a taking or regulatory taking. Proposed changes to N.D. Admin. Code § 69-09-09-05 states decommissioning includes:

Grading and topsoiling of areas disturbed by the facility, and reseeding according to natural resource conservation service recommendations, unless the commission approves an owner request signed by the applicable landowner, identifying the surface features the landowner prefers to remain in place, and the reason the landowner prefers those features to remain.

The requirement of full decommissioning unless the Commission approves a landowner request to retain the surface areas leaves the

possibility of a conflict between the Commission and a landowner regarding whether a surface area is to be fully decommissioned. This may occur if a landowner prefers that site restoration and reclamation not occur either on the landowner's own accord or in an instance where a company may provide compensation to the landowner in order to avoid the responsibility of reclamation and site restoration. The rule contemplates the instances where an access road or land surface area may be personally or economically beneficial to a landowner and allows the opportunity for landowners to request that access roads and land surface areas remain unrestored.

In the unlikely instance where a conflict between the commission and landowner may occur, site restoration would not deny a landowner economically viable use of the land. The land should be restored and reclaimed to the same economic use prior to the construction of the wind energy conversion facility. This allows the Commission to ensure that long-term economic use of property for agriculture and natural resource development be protected from the risk of a "buyout" that may be offered by a company in lieu of decommissioning responsibilities.

Since the proposed changes will not deny a landowner "economically viable use of the land," force the landowner to allow someone else to enter the property, impose burdens or costs on the landowner that do not reasonably bear a reasonable relationship to the impacts of the project on the environment and state, there is no manner in which the purpose of decommissioning can be equally accomplished through regulation that would be less intrusive, and does not fall under the North Dakota Century Code § 28-32-09 definition of a regulatory taking, the Commission does not believe the proposed will result in a constitutional taking.

- b. Clearly and specifically identify the purpose of the proposed rule.

The purpose of the proposed rule changes is to ensure that commercial wind energy conversion facilities are decommissioned and sites restored, and ensure funding will be available for complete decommissioning and restoration.

- 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 rules are necessary to substantially advance this purpose by requiring financial assurances adequate to decommission the wind energy conversion facility prior to construction. The proposed rules ensure that a company has the proper mechanisms to successfully decommission and restore the site.

- d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

Given that the proposed rules are not expected to constitute a constitutional taking, there is no estimated potential cost.

- e. Identify the source of payment within the agency's budget for any compensation that may be ordered.

Given that the proposed rules are not expected to constitute a constitutional taking, there is no estimated potential cost.

- f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

Given that the proposed rules are not expected to constitute a constitutional taking, the benefits exceed estimated compensation costs.