

TESTIMONY

Presented by: John Schuh
Legal Counsel
Public Service Commission

Before: Administrative Rules Committee
Honorable Bill Devlin, Chairman

RE: N.D. Admin. Code Section 69-06-08-01
Energy Conversion Facility Siting Criteria
PSC Case No. PU-17-339

N.D. Admin. Code Ch. 69-06-11
Wind Energy Conversion Facility Lighting Systems
PSC Case No. PU-17-339

N.D. Admin. Code Section 69-09-03-02
Adoption of Regulations
PSC Case No. GS-17-370

N.D. Admin. Code Section 69-09-09-10
Wind Energy Conversion Facility - Waiver
PSC Case No. PU-17-371

Date: June 14, 2018

Mr. Chairman and committee members, my name is John Schuh. I am staff counsel for the North Dakota Public Service Commission. The Commission asked me to testify today concerning rules recently promulgated by the Public Service Commission.

Our responses to the questions are presented below with the question restated prior to our response. The Commission's order submitting rules to the Attorney General (Order) and the regulatory analysis are provided and are referenced in response to these questions.

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

Pg. 2 of the Order:

Section 69-06-08-01- Energy Conversion Facility Siting Criteria was amended to reflect the changes from SB 2313 providing a setback of from the inhabited residence of a nonparticipating landowner.

New Chapter 69-06-011 was adopted to implement HB 1378 enacted during the 65th legislative session as N.D.C.C. § 49-22-16.4, providing that the PSC “shall adopt rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities.”

- 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.**

Pg. 2 of the Order:

The Commission amended Section 69-09-03-02 to stay current with the most recent amendments to pipeline safety regulations adopted by the United States Department of Transportation. The Commission amended Section 69-09-03-02 to include safety standards for liquefied natural gas (LNG) facilities consistent with the United States Department of Transportation Part 193.

- 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.**

The rulemaking procedure used, public notice given and the extent of the public hearings are described in the attached Order. The rules were found to be in substantial compliance with N.D.C.C. ch. 28-32 and approved as to their legality by the Attorney General on April 25, 2018.

- 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.**

All written and oral comments, commission consideration, and changes made are discussed in the attached Order.

- 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.**

The total cost for publishing notices was \$3,732.40. 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.**

One pg. 1 and 2 of the attached Order provide an explanation of the subject matter and the reasons for adopting or amending those rules.

- 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.**

Due to an expected impact on the regulated community in excess of fifty thousand dollars for new Chapter 69-06-11 — Wind Energy Conversion Facility Lighting Systems — a regulatory analysis was issued and is attached.

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

N.D.C.C. § 28-32-08.1 did not require a small entity regulatory analysis and economic impact statement for these rule changes.

- 9. Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.**

There are no fiscal impacts anticipated from the rule changes.

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

A constitutional takings assessment was prepared for Section 69-06-08-01, but it is not expected to limit the use of private property from the current application of rules or siting practices.

11. 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. If these rules were adopted as emergency (interim final) rules, what steps were taken to make the rules known to persons who can reasonably be expected to have a substantial interest in the rules?

These rules were not adopted as emergency rules under N.D.C.C. § 28-32-03.

Mr. Chairman, this completes my testimony. I would be happy to respond to any questions the committee might have.

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

**Public Service Commission
Siting
Rulemaking**

Case No. PU-17-339

**Public Service Commission
Pipeline Safety
Rulemaking**

Case No. GS-17-370

**Public Service Commission
Wind Decommissioning
Rulemaking**

Case No. PU-17-371

ORDER SUBMITTING RULES TO ATTORNEY GENERAL

March 29, 2018

Appearances

Commissioners Randy Christmann, Brian Kroshus, and Julie Fedorchak

Preliminary Statement

On November 29, 2017, the North Dakota Public Service Commission (Commission) issued a formal Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and Abbreviated Notice of Intent to Amend Administrative Rules and Notice of Public Hearing, proposing to amend section 69-06-08-01, propose new chapter 69-06-11, amend section 69-09-03-02, and proposing new section 69-09-09-10 of the North Dakota Administrative Code.

On November 29, 2017, Staff filed statements regarding the required regulatory analysis, small entity analysis, and takings assessments.

On December 4, 2017, the Commission forwarded the notices to the Legislative Council for publication at least 30 days in advance of the hearing.

On December 5, 2017, an email containing the proposed rules was submitted to each sponsor and cosponsor of implemented 2017 HB 1378 and related legislation 2017 SB 2313. Although the email and affidavit of service state that a full notice was provided, a copy of the full notice was inadvertently not enclosed.

The Abbreviated Notice was published once in each of the 52 official county newspapers in the state during the weeks of December 5 through December 11, 2017.

On January 3, 2018, the Commission held the public hearing as noticed, beginning at 9:00 a.m., CST, in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The Commission allowed a comment period until January 18, 2018, during which the Commission received and considered data, views, or written or oral comments concerning the proposed rulemaking as part of the rulemaking record.

The proposed rules and amendments are summarized as follows:

Case No. PU-17-339 - Section 69-06-08-01- Energy Conversion Facility Siting Criteria

The Commission proposed to amend North Dakota Administrative Code section 69-06-08-01 to reflect changes to North Dakota Century Code section 49-22-05.1 enacted during the 2017 legislative session (SB 2313) regarding setbacks from the inhabited residence of a nonparticipating landowner.

Case No. PU-17-339 – New Chapter 69-06-11 - Wind Energy Conversion Facility Lighting Systems

The Commission proposed new Chapter 69-06-11 to implement 2017 House Bill 1378 enacted during the Sixty-fifth legislative session as North Dakota Century Code section 49-22-16.4, providing that the North Dakota Public Service Commission “shall adopt rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities.”

Case No. GS-17-370 – Section 69-09-03-02 - Pipeline Safety

The Commission proposed to adopt, by reference, the most recent amendments to pipeline safety regulations adopted by the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA). The Commission also proposed to amend section 69-09-03-02 to include safety standards for liquefied natural gas (LNG) facilities.

Case No. PU-17-371 - Section 69-09-09-10 - Wind Decommissioning

The Commission proposed the addition of section 69-09-09-10 to provide that the Commission may grant a waiver of requirements under North Dakota Administrative Code section 69-09-09-03, section 69-09-09-06, and section 69-09-09-08 for a commercial

wind energy conversion facility with a nameplate generating capacity of no more than five megawatts of electricity upon a motion demonstrating good cause for the waiver.

Public Hearing and Comments

The Commission reviewed and considered all comments. The written and oral comments that were received are summarized and discussed below by case number.

Case No. PU-17-339 - Section 69-06-08-01- Energy Conversion Facility Siting Criteria and New Chapter 69-06-11 - Wind Energy Conversion Facility Lighting Systems

Written and oral comments by Jerry Lein of Commission Staff were provided at the hearing. Lyle Best, MD and Doug Darling, Ph.D., President of Lake Regional State College (Lake Region) provided written comments. During the hearing, Jean Schafer testified and provided comments on behalf of Basin Electric Power Cooperative (Basin).

69-06-08-01: Wind Energy Conversion Facility Siting Criteria

Commission Staff provided comments describing the proposal to amend the North Dakota Administrative Code section 69-06-08-01(2)(a)(5) to reflect the changes from the 2017 legislative session to North Dakota Century Code section 49-22-05.1 establishing a minimum wind turbine setback of three times the height of the turbine from an inhabited residence of a nonparticipating landowner.

The Commission received no further comments regarding this section and the Commission proposes to adopt this amendment without revisions.

69-06-11: Wind Energy Conversion Facility Lighting Systems

Commission Staff provided comments describing the new proposed chapter 69-06-11 to implement House Bill 1378 enacted during the 2017 legislative session as North Dakota Century Code section 49-22-16.4, providing that the Commission shall adopt rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities. The proposed new chapter provides that a wind energy conversion facility permitted after June 5, 2016 must be equipped with a functioning United States Department of Transportation, Federal Aviation Administration (FAA) approved light-mitigating technology by December 31, 2019. Facilities permitted before June 5, 2016 must be equipped by December 31, 2021. The rules provide that an extension may be granted based upon technical or economic feasibility considerations. The new chapter provides that the Commission may grant a waiver of the requirements for a wind energy conversion facility designed to produce up to five megawatts.

Lyle Best, MD. Mr. Best's written statement provided a number of comments outside the scope of the rulemaking regarding the reduction of flaring, reduction of energy consumption, and recommendations to the legislature before addressing the proposed rules. As a licensed private pilot, Mr. Best's comments on the proposed rules expressed concern with the reliability of a system that is "intermittent and dependent on (most likely) a radar detection system" and the risk of a more complex system having more modes of failure; the dangers of a hostile act or electronic interference preventing the wind turbine from lighting; concerns of litigation, liability and electronic records upon system failure; and whether the Commission will ensure parity between wind farms and other structures, such as radio towers.¹

The commission considered Mr. Best's comments and concerns. As proposed, the rules require each light mitigating technology to be installed, operated, and maintained in accordance with FAA regulations. The purpose of aeronautical studies for FAA approval is to ensure safe and efficient use of navigable airspace and air navigation equipment.² FAA regulations provide standards for inspection, repair and safety of lighting operations including daily monitoring and logging of system operations,³ partial permanent illumination of projects near obstructions to maintain safety,⁴ automatic turning on of lights in the event of system failure,⁵ and outage reporting.⁶ The legislature has not expressed intent for the Commission to determine liability as part of this rulemaking, and lighting for other structures such as radio towers is currently beyond the Commission's jurisdiction.

Basin Electric submitted comments for proposed North Dakota Administrative Code section 69-06-11-03. Basin commented that FAA approval is needed for modification or replacement of a wind farm's existing lighting system. The process may take a minimum of 90-120 days for approval. Basin commented that this process is complicated for a wind farm in close proximity to the Minot Air Force Base that surrounds a ballistic missile and helicopter pad and that changing the lighting system also requires approval from the United States Air Force. To allay their concerns, Basin requested a

¹ PU-17-339, Docket No. 16.

² 14 CFR § 77.1

³ See Advisory Circular No. 70/7460-1L, 4-4, Section 4.8. "Obstruction lighting systems should be closely monitored by visual or automatic means. It is extremely important to visually inspect obstruction lighting in all operating intensities at least once every 24 hours on systems without automatic monitoring. . . . For each structure, a log should be maintained in which the lighting system's daily operations status is recorded."

⁴ Id. at 14-2, Section 14.2.3. "It may be appropriate to keep certain obstructions closest to . . . activity areas illuminated during the nighttime hours, while the remainder of the group's obstruction lighting is controlled by ADLS."

⁵ Id. at 14-2. Section 14.2.5. "In the event of an ADLS component or system failure, the ADLS should automatically turn on all the obstruction lighting and operate . . . as if it was not controlled by ADLS. The obstruction lighting must remain in this state until the ADLS and its components are restored."

⁶ See *generally* Id. at 2.4. Reporting by FAA requirements is achieved by calling Outage Reporting and Notice to Airmen.

revision so that approval also be needed from “any other federal agency with regulatory authority.”

The commission considered Basin’s comments and proposed revision and believes that revising the proposed rule so that the systems simply must be installed, operated and maintained in accordance with 14 Code of Federal Regulations (CFR) 1.1. et. seq., but not specify the necessity of “approval prior to implementation” may provide a clearer alternative. By installing and operating in compliance with Title 14 CFR Part 77, Basin’s concerns regarding proximity to the Minot Air Force Base and ballistic missile base should be addressed. Under 14 CFR § 77.5, any proposed construction or alteration must provide adequate notice for the FAA to determine appropriate marking and lighting recommendations.⁷ As part of aeronautics studies and approval, the FAA considers the impact and proximity to flight routes, military use, airports, and the “interests of national security as determined by the Secretary of Defense.”⁸

Lake Region, submitted comments that the college operates a single turbine located just over 3 miles from the Devil’s Lake Airport. Lake Region’s comments expressed concern that the implementation of light mitigating technology is cost prohibitive with the turbine’s energy performance contract providing “just enough” to cover the payments for the purchase and construction of the turbine not funded by legislative appropriation.⁹ As a result, Lake Region requests a waiver as written in proposed N.D. Admin. Code § 69-06-11-02(3).¹⁰ The final proposed rules provide for extensions due to economic and technical inability to implement the technology, and retain the waiver up to five megawatts.

After reviewing the comments for the new chapter 69-06-11, the Commission adopts the rules as revised.

Case No. GS-17-370 – Section 69-09-03-02 - Pipeline Safety

Written and oral comments by the Director of Public Utilities, Patrick Fahn, were provided at the hearing on behalf of Commission Staff. The Commission received no further comments regarding this section.

Commission Staff provided comments that under North Dakota Administrative Code chapter 69-09-03, the Commission adopts by reference the most recent amendments to pipeline safety regulations adopted by PHMSA.

⁷ 14 CFR § 77.5

⁸ Title 49 CFR § 44718; *See also* 14 CFR § 77.5(c)(3) and Advisory Circular No. 70/7460-1L, Section 14.2.3 (The FAA may deny ADLS applications based upon “proximity of the obstruction or group of obstructions to airports, low-altitude flight routes, military training areas, or other areas of frequent flight activity.”)

⁹ PU-17-339, Docket No. 17, 18.

¹⁰ PU-17-339, Docket No. 18.

For gas pipeline safety and hazardous liquids pipeline safety, this proposed amendment updates and adopts by reference the current December 31, 2017 PHMSA safety regulations. The proposed amendments also update the rules to include the current December 31, 2017 PHMSA safety standards for LNG facilities under Title 49 CFR Part 193. Although the Commission currently has statutory authority over liquefied natural gas facilities, there were no jurisdictional intrastate liquefied natural gas facilities in North Dakota until 2017. As a result, PHMSA safety standards for LNG facilities are part of the proposed rulemaking.

The Commission received no further comments regarding this section and proposes to adopt these amendments without revision.

Case No. PU-17-371 -- Section 69-09-09-10 - Wind Decommissioning

Written and oral comments by Jerry Lein of Commission Staff were provided at the hearing. Staff testified that the Commission is proposing to amend the North Dakota Administrative Code chapter 69-09-09 to add a new section 69-09-09-10 establishing an ability to exempt small projects of only one or two turbines from certain decommissioning requirements:

The commission may grant a waiver of any requirement described in sections 69-09-09-03, 69-09-09-06, or 69-09-09-08 for a commercial wind energy conversion facility with a nameplate generating capacity of no more than five megawatts of electricity upon a motion demonstrating good cause for the waiver.

The Commission received no further comments regarding this section and the Commission proposes to adopt this new section without revision.

Discussion

The Commission agrees with adopting the proposed chapter 69-06-11 as revised and all other new sections or amendments without revisions.

Having reviewed the proposed rules, and the testimony and comments received, the Commission finds good cause for submitting the proposed rules, attached to and made a part of this order, to the Attorney General for an opinion as to legality.

Order

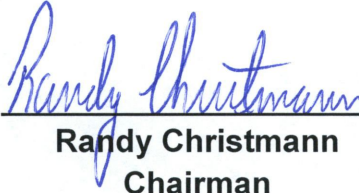
The Commission orders the proposed chapter 69-06-11, as revised, the proposed new section 69-09-09-10 and the proposed amendments to the North Dakota

Administrative Code attached to and made a part of this order, be submitted to the Attorney General for an opinion that the rules are approved as to legality.

PUBLIC SERVICE COMMISSION



**Brian Kroshus
Commissioner**



**Randy Christmann
Chairman**



**Julie Fedorchak
Commissioner**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Siting
Rulemaking

Case No. PU-17-339

March 29, 2018

ARTICLE 69-06
ENERGY CONVERSION AND TRANSMISSION FACILITY SITING

Chapter	
69-06-01	General Provisions
69-06-02	Utility Reporting Requirements
69-06-02.1	Requests for Jurisdictional Determination
69-06-03	Letter of Intent [Repealed]
69-06-04	Certificate of Site Compatibility
69-06-05	Transmission Facility Permit
69-06-06	Waiver of Procedures and Time Schedules
69-06-07	Emergency Certificate or Permit [Repealed]
69-06-08	Criteria
69-06-09	Continuing Suitability of Certificate or Permit
69-06-10	Small Wind Energy Conversion Facilities
<u>69-06-11</u>	<u>Wind Energy Conversion Facility Lighting Systems</u>

69-06-08-01. Energy conversion facility siting criteria.

The following criteria must guide and govern the preparation of the inventory of exclusion and avoidance areas, and the site suitability evaluation process.

1. **Exclusion areas.** The following geographical areas must be excluded in the consideration of a site for an energy conversion facility.
 - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; historic districts; monuments; wilderness areas; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
 - b. Designated or registered state: parks; forests; forest management lands; historic sites; monuments; historical markers; archaeological sites; grasslands; wild, scenic, or recreational rivers; game refuges; game management areas; management areas; and nature preserves.
 - c. County parks and recreational areas; municipal parks; parks owned or

administered by other governmental subdivisions; hardwood draws; and enrolled woodlands.

- d. Prime farmland and unique farmland, as defined by the land inventory and monitoring division of the soil conservation service, United States department of agriculture, in 7 C.F.R. part 657; provided, however, that if the commission finds that the prime farmland and unique farmland that will be removed from use for the life of the facility is of such small acreage as to be of negligible impact on agricultural productions, this exclusion does not apply.
- e. Irrigated land.
- f. Areas critical to the life stages of threatened or endangered animal or plant species.
- g. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
- h. Areas within one thousand two hundred feet of the geographic center of an intercontinental ballistic missile (ICBM) launch or launch control facility.

2. **Additional exclusion areas for wind energy conversion facilities.** The following geographical areas must be excluded in the consideration of a site for a wind energy conversion facility:

- a. Areas ~~less than~~ within:
 - (1) One and one-tenth times the height of the turbine from interstate or state roadway right of way;
 - (2) One and one-tenth times the height of the turbine plus seventy-five feet from the centerline of any county or maintained township roadway;
 - (3) One and one-tenth times the height of the turbine from any railroad right of way;
 - (4) One and one-tenth times the height of the turbine from a one hundred fifteen kilovolt or higher transmission line; and
 - (5) One and one-tenth times the height of the turbine from the property line of a nonparticipating landowner and three times the height of the turbine from an inhabited rural residence of a

nonparticipating landowner, unless a variance is granted. A variance may be granted if an authorized representative or agent of the permittee, the nonparticipating landowner, and affected parties with associated wind rights file a written agreement expressing all parties' support for a variance to reduce the setback requirement in this subsection. A nonparticipating landowner is a landowner that has not signed a wind option or an easement agreement with the permittee of the wind energy conversion facility as defined in North Dakota Century Code chapter 17-04.

3. **Avoidance areas.** The following geographical areas may not be approved as a site for an energy conversion facility unless the applicant shows that under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility the commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative sites. Economic considerations alone will not justify approval of these areas. A buffer zone of a reasonable width to protect the integrity of the area must be included. Natural screening may be considered in determining the width of the buffer zone.
 - a. Historical resources which are not designated as exclusion areas.
 - b. Areas within the city limits of a city or the boundaries of a military installation.
 - c. Areas within known floodplains as defined by the geographical boundaries of the hundred-year flood.
 - d. Areas that are geologically unstable.
 - e. Woodlands and wetlands.
 - f. Areas of recreational significance which are not designated as exclusion areas.
4. **Additional avoidance areas for wind energy conversion facilities.** A wind energy conversion facility site must not include a geographic area where, due to operation of the facility, the sound levels within one hundred feet of an inhabited residence or a community building will exceed fifty dBA. The sound level avoidance area criteria may be waived in writing by the owner of the occupied residence or the community building.
5. **Selection criteria.** A site may be approved in an area only when it is demonstrated to the commission by the applicant that any significant adverse effects resulting from the location, construction, and operation of the facility in that area as they relate to the following, will be at an acceptable minimum, or

that those effects will be managed and maintained at an acceptable minimum. The effects to be considered include:

- a. The impact upon agriculture:
 - (1) Agricultural production.
 - (2) Family farms and ranches.
 - (3) Land which the owner demonstrates has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.
 - (4) Surface drainage patterns and ground water flow patterns.
 - (5) The agricultural quality of the cropland.

- b. The impact upon the availability and adequacy of:
 - (1) Law enforcement.
 - (2) School systems and education programs.
 - (3) Governmental services and facilities.
 - (4) General and mental health care facilities.
 - (5) Recreational programs and facilities.
 - (6) Transportation facilities and networks.
 - (7) Retail service facilities.
 - (8) Utility services.

- c. The impact upon:
 - (1) Local institutions.
 - (2) Noise-sensitive land uses.
 - (3) Light-sensitive land uses.
 - (4) Rural residences and businesses.
 - (5) Aquifers.

- (6) Human health and safety.
 - (7) Animal health and safety.
 - (8) Plant life.
 - (9) Temporary and permanent housing.
 - (10) Temporary and permanent skilled and unskilled labor.
- d. The cumulative effects of the location of the facility in relation to existing and planned facilities and other industrial development.
6. **Policy criteria.** The commission may give preference to an applicant that will maximize benefits that result from the adoption of the following policies and practices, and in a proper case may require the adoption of such policies and practices. The commission may also give preference to an applicant that will maximize interstate benefits. The benefits to be considered include:
- a. Recycling of the conversion byproducts and effluents.
 - b. Energy conservation through location, process, and design.
 - c. Training and utilization of available labor in this state for the general and specialized skills required.
 - d. Use of a primary energy source or raw material located within the state.
 - e. Not relocating residents.
 - f. The dedication of an area adjacent to the facility to land uses such as recreation, agriculture, or wildlife management.
 - g. Economies of construction and operation.
 - h. Secondary uses of appropriate associated facilities for recreation and the enhancement of wildlife.
 - i. Use of citizen coordinating committees.
 - j. A commitment of a portion of the energy produced for use in this state.
 - k. Labor relations.
 - l. The coordination of facilities.

- m. Monitoring of impacts.
- n. A commitment to install lighting mitigation technology for wind energy conversion facilities subject to commercial availability and federal aviation administration approval.

History: Amended effective August 1, 1979; July 1, 2006; April 1, 2013; July 1, 2017;_____.

General Authority: NDCC 28-32-02, NDCC 49-22-18

Law Implemented: NDCC 49-22-05.1, NDCC 49-22.1-03

CHAPTER 69-06-11

Wind Energy Conversion Facility Lighting Systems

Section

69-06-11-01 Definitions

69-06-11-02 Implementation

69-06-11-03 Service, Maintenance, Safety, and Lighting System Standards

69-06-11-01. Definitions.

In this chapter:

1. “Aircraft Detection Lighting System” means a sensor-based system designed to detect aircraft as they approach a wind energy conversion facility; this system automatically activates obstruction lights until they are no longer needed.
2. “Commission” means the public service commission.
3. “Light Intensity Dimming Solution Technology” means obstruction lighting that provides a means of tailoring the intensity level of lights according to surrounding visibility.
4. “Light-Mitigating Technology System” means aircraft detection lighting system, lighting intensity dimming solution technology, or a comparable solution capable of reducing the impact of nighttime lighting while maintaining night conspicuity sufficient to assist aircraft in identifying and avoiding collision with the facilities.
5. “Owner” means a person who holds a certificate of site compatibility pursuant to North Dakota Century Code chapter 49-22.
6. “Wind Energy Conversion Facility” means any plant, addition, or combination of plant and addition, designed for or capable of generation

by wind energy conversion exceeding one-half megawatt of electricity.

69-06-11-02. Implementation.

1. A wind energy conversion facility for which a certificate of site compatibility was issued after June 5, 2016 must be equipped with a functioning light-mitigating technology in compliance with this chapter by December 31, 2019.
2. A wind energy conversion facility for which a certificate of site compatibility was issued before June 5, 2016 must be equipped with a functioning light-mitigation technology in compliance with this chapter by December 31, 2021. The Commission may grant an extension of time based on technical or economic feasibility considerations.
3. The commission may grant a waiver of this chapter for a wind energy conversion facility designed for or capable of generating no more than five megawatts of electricity upon a motion demonstrating good cause for the waiver.
4. To allow proper conspicuity of a turbine at night during construction, a turbine may be lighted with temporary lighting until the permanent lighting configuration including the light mitigation technology is implemented.
5. Owner shall provide written notice to the commission upon implementation of light-mitigating technology in compliance with this chapter.
6. Owner is solely responsible for any costs associated with the implementation, operation, and maintenance of each light-mitigating technology system.
7. An extension request must be in writing and contain:
 - a. The purpose of the extension;
 - b. A description of the light-mitigating technologies submitted to the Federal Aviation Administration;
 - c. The technical or economic inability to implement light-mitigation technology systems;
 - d. The length of extension requested; and
 - e. Any other information requested by the commission.

69-06-11-03. Service, Maintenance, Safety, and Lighting System Standards.

Each light-mitigating technology system must be installed, operated, and maintained in accordance with United States Department of Transportation Federal

Aviation Administration regulations [14 CFR 1.1. et. seq] in effect as of [date of publishing rules].

History: Amended Effective 2017.

General Authority: NDCC 28-32-02, NDCC 49-22-18

Law Implemented: NDCC 49-22-16.4

State of North Dakota
Public Service Commission

Public Service Commission
Pipeline Safety
Rulemaking

Case No. GS-17-370

69-09-03-02. Adoption of regulations. The following parts of title 49, Code of Federal Regulations in effect as of ~~December 31, 2015~~December 31, 2017, are adopted by reference:

1. Part 190 - Pipeline Safety Programs and Rulemaking
Procedures.
2. Part 191 - Transportation of Natural Gas and Other Gas by
Pipeline, Annual Reports, Incident Reports, and Safety-Related
Condition Reports.
3. Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum
Federal Safety Standards.
4. Part 193 – Liquefied Natural Gas Facilities: Federal Safety Standards
- 4.5. Part 194 – Response Plans for Onshore Oil Pipelines
- 5.6. Part 195 - Transportation of Hazardous Liquids by Pipeline.
- 6.7. Part 199 - Drug and Alcohol Testing.

Copies of these regulations may be obtained from:

Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0480

History: Effective June 1, 1984; amended effective July 1, 1986; January 1, 1988; March 1, 1990; February 1, 1992; August 1, 1993; August 1, 1994; February 1, 1996; July 1, 1997; July 1, 1998; September 1, 1999; August 1, 2000; January 1, 2002; November 1, 2003; May 1, 2005; July 1, 2006; April 1, 2008; January 1, 2010; April 1, 2012; April 1, 2015; October 1, 2016, _____.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 49-02-01.2

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Public Service Commission
Wind Decommissioning
Rulemaking

Case No. PU-17-371

CHAPTER 69-09-09
WIND FACILITY DECOMMISSIONING

Section

69-9-9-1 69-09-09-01	Definitions
69-9-9-2 69-09-09-02	Decommissioning Responsibility
69-9-9-3 69-09-09-03	Abandonment and Useful Life - Certificate of Operation
69-09-09-04	Decommissioning Period
69-9-9-5 69-09-09-05	Decommissioning Requirements
69-9-9-6 69-09-09-06	Decommissioning Plan
69-9-9-7 69-09-09-07	Existing Facilities
69-9-9-8 69-09-09-08	Financial Assurance
69-9-9-9 69-09-09-09	Failure to Decommission

69-09-09-10. Wind Energy Conversion Facility – Waiver

The commission may grant a waiver of any requirement described in sections 69-09-09-03, 69-09-09-06, or 69-09-09-08 for a commercial wind energy conversion facility with a nameplate generating capacity of no more than five megawatts of electricity upon a motion demonstrating good cause for the waiver.

History: Effective _____

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

Law Implemented: NDCC 49-02-27

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Siting
Rulemaking

Case No. PU-17-339

**Statements on Regulatory Analysis, Small Entity Analysis,
and Takings Assessment
and
Regulatory Analysis for new Chapter 69-06-11**

November 29, 2017

The proposed rules consist of changes to the Public Service Commission's rules in the following areas:

Section 69-06-08-01. Energy Conversion Facility Siting Criteria

The Commission is proposing to amend the North Dakota Administrative Code section 69-06-08-01 to reflect the changes from the 2017 legislative session to North Dakota Century Code section 49-22-05.1 regarding setbacks from the property line of a nonparticipating landowner and the inhabited residence of a nonparticipating landowner.

The proposed rules are not pursuant to emergency rulemaking. Chapter 69-06-11 has adopted Federal Aviation Regulations [14 CFR 1.1. et. Seq.] in accordance with a requirement of N.D.C.C. § 49-22-16.4 to have rules consistent with [14 CFR 1.1. et. Seq.]. 14 CFR § 77.4 requires appropriate marking and lighting recommendations to use FAA Advisory Circular 70/7460-1 Obstruction Marking and Lighting to determine appropriate markings and lighting for wind turbine towers.

Chapter 69-06-11. Wind Energy Conversion Facility Lighting Systems

The Commission is proposing the new Chapter 69-06-11 to implement House Bill 1378 enacted during the most recent legislative session as North Dakota Century Code section 49-22-16.4 providing that the North Dakota Public Service Commission "shall adopt rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities" (Wind Farms).

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, or if one is requested as provided in the law. 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.

Section 69-06-08-01. Energy Conversion Facility Siting Criteria

A regulatory analysis has not been requested, and the proposal is not expected to impact the regulated community by an amount in excess of fifty thousand dollars (\$50,000.00). Consequently, no regulatory analysis has been prepared.

Regulatory Analysis for new CVchapter 69-06-11

Chapter 69-06-11. Wind Energy Conversion Facility Lighting Systems

The implementation of N.D.C.C. § 49-22-05.1 requiring wind farms to have light-mitigating technology systems is expected to have an impact on the regulated community in excess of fifty thousand dollars. Therefore, a regulatory analysis was performed.

- a. The classes of persons who will bear the costs of the proposed rule are the owners and developers of wind farms, and subsequently the costs are expected to be passed through to ratepayers and power cooperative members. Classes that will benefit are the producers and sellers of light mitigation technology.
- b. The probable impact will vary depending on the type of light-mitigating technology system used, number of turbines, facilities required for implementation, and whether or not retrofitting is needed.
 - i. The Public Service Commission staff estimates that for new wind farms of approximately 50 turbines, light intensity dimming solutions (“LIDS”) may cost up to 400,000. For aircraft detection lighting systems (“ADLS”), it is estimated that implementation may be up to \$1,000,000. The costs may

vary greatly for aircraft detection lighting systems depending upon the number of tower pads that needed, which are expected to cost between \$400,000 to \$500,000 apiece.

- c. It is difficult to estimate the costs to the agency of implementation, but our estimates are:
 - i. For future wind farms being sited, the light mitigation technology will likely be considered concurrently with the siting process. No additional costs are anticipated for implementation for new wind farms.
 - j. Currently there are 61 operating or sited wind facilities. If we take a conservative number and conservative cost, 10% of these previous facilities may require a hearing for compliance, enforcement, or determination of the appropriate technology used. That may result in a total cost of \$48,800 over the next two bienniums.

- d. No other alternative methods for achieving the purpose of the proposed rule were considered.

Takings Assessment

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 rules do 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 of the United States Constitution.” See Grand Forks—Traill 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 the 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 in accordance with applicable state or federal law.

Proposed Section 69-06-08-01 reflects the statutory requirements of N.D.C.C. § 49-22-05.1 for setbacks from nonparticipating landowners, however, it is not expected to change the application of the rules or current siting practices. Proposed Chapter 69-06-11 may require additional costs to implement light mitigation technology, but it is not expected to limit the use of private property.

Since the proposed changes are not expected to deny a landowner “economically viable use of the land” or “reduce the real property by more than fifty percent,” and is in accordance with applicable state law, the Commission does not believe the proposed rule will result in a Constitutional or regulatory taking.

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

Section 69-06-08-01. Energy Conversion Facility Siting Criteria

The Commission is proposing to amend the North Dakota Administrative Code section 69-06-08-01 to reflect the changes from the 2017 legislative session to North Dakota Century Code section 49-22-05.1 regarding setbacks from the property line of a nonparticipating landowner and the inhabited residence of a nonparticipating landowner.

- 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 to private land owners.

Chapter 69-06-11. Wind Energy Conversion Facility Lighting Systems

The Commission is proposing Chapter 69-06-11 to implement House Bill 1378 enacted during the most recent legislative session as North Dakota Century Code section 49-22-16.4 providing that the North Dakota Public Service Commission shall adopt rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities (“Wind Farms”).

The proposed rules are necessary to substantially advance the legislative changes to the Siting Act by implementing House Bill 1378 and the changes to N.D.C.C. § 49-22-5.1 from the 2017 legislative session. No alternative action was chosen, as the changes were closely tied to the legislative policy.

- 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.

The proposed rules are not expected to constitute a constitutional taking, therefore, there are no estimated potential costs. The benefit to landowners and the public from implementation of light mitigation technology and protection for nonparticipating landowners by implementing legislative changes have been found to be of public importance by the legislature.

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.

The proposed chapter and amendments are not expected to affect small entities, so the Commission has not provided less-stringent requirements or exemptions for small entities.

Small Entity Economic Impact Statement

1. Which small entities are subject to the proposed rule?

2. What are the administrative and other costs required for compliance with the proposed rule?
3. What is the probable cost and benefit to private persons and consumers who are affected by the proposed rule?
4. What is the probable effect of the proposed rule on state revenues?
5. Is there any less intrusive or less costly alternative methods for achieving the purpose of the proposed rule?

The proposed chapter and amendments are not expected to affect small entities or have an economic impact on them, so the Commission has not provided less-stringent requirements or exemptions for small entities.