



August 16, 2019

Via email only to: kpranis@liunagro.com

Mr. Tim Mackey
President and Business Manager
C/O Kevin Pranis, Marketing Manager
Laborers' District Council of Minnesota and North Dakota
81 Little Canada Road East
St. Paul, MN 55117-1322

Re: Statutory and Regulatory Authority for the Gathering and Consideration of Data Related to Local Labor Usage

Dear Mr. Mackey:

We have been asked by Laborers' District Council of Minnesota and North Dakota to provide an opinion on whether the Public Service Commission, when evaluating proposed energy conversion facility siting and transmission facility corridors and routes, has the authority to implement a policy that would accomplish the following:

1. Collect data from PSC applicants on their on their intentions and past practices regarding the use of local construction labor to construct and maintain projects proposed for permitting;
2. Collect data from permittees on their actual use of local construction labor; and
3. Consider PSC applicants' intentions and past practice regarding the use of local labor when evaluating applications.

Summary of Opinion

It is our opinion that certain North Dakota Statutes and the Commission's Administrative Rules enable and (to some degree) require these considerations as to conversion facility siting as well as transmission corridor and route evaluation. The applicable law and regulations directly address your first concern (data collection). Your second two concerns reflect a desire that the Commission put the data that it is required to collect to use.

Consideration of these questions required us to review the degree of consideration required regarding the selection and policy criteria. The Commission's review entails not only

considerations of site geography which are implemented through consideration of exclusion and avoidance areas, but also consideration of the ways to mitigate negative social impacts (selection criteria) as well as policies and practices that could provide additional benefits of a project (policy criteria). The language relating to the selection criteria is mandatory and requires a specific result depending upon the findings of the Commission. The language relating to the policy criteria is such that the factors must be considered, but there is no substantive result dictated by the Commission's findings.

There appears to be some confusion surrounding when and how the policy criteria are to be applied. It has been suggested that these criteria may only apply when there are competing projects or that they are optional, and only applicable at the request of the applicant. It is our opinion that an applicant is required to submit a discussion of these criteria before an application is deemed complete, and therefore a review of the selection and policy criteria are mandatory elements of the review process. Although the policy criteria regulations do not require any substantive outcome, they are required to be considered during the Commission's evaluation, and they apply regardless of whether the Commission is concurrently reviewing more than one competing project or only upon request of "preference" from the applicant.

Your second and third concerns flow directly from the first. A review that confirms the realization of anticipated project benefits is important in each individual case. Identifying structural and systemic factors would also be useful to the Commission's review of future projects and ensure that the continued growth of North Dakota's vibrant energy economy benefits North Dakota residents. Consideration of an applicant's past successes at mitigating adverse impacts and providing additional benefits are important considerations when evaluating new proposed projects. The Commission has the power to implement this reasonable policy as a "special condition" as to site designation.

Statutory Background of Authority to Consider the Use of Local Labor

The Commission is required to consider the direct and indirect economic impacts of proposed facilities and routes. N.D.C.C. § 49-22-09(1)(g) requires the Commission to consider the direct and indirect economic impacts in evaluating applications and designations of sites, corridors, and routes. Pursuant to N.D.C.C. § 49-22.1-09(7), "The Commission is guided by consideration [of direct and indirect economic impacts], when applicable, to aid the evaluation and designation of sites, corridors, and routes." This information is a required part of both siting and route applications. N.D.C.C. § 49-22.1-06(1)(h) requires that an application for a certificate contain an evaluation of the proposed site or corridor regarding the applicable considerations set out in section 49-22.1-09, including direct and indirect economic impacts under subsection 7. N.D.C.C. § 49-22.1-07(1)(c) requires the same discussion as to permits. Not only is the Commission required to consider the direct and indirect economic impacts of sites and routes, an Applicant has the duty to provide this information before an application is deemed complete because N.D.C.C. § 49-22.1-

06(1) requires that an application for a certificate of site compatibility include considerations set forth in N.D.C.C. § 49-22.1-09. It is only after all of this information (including a discussion of the direct and indirect economic impacts) is received that the Commission is under a duty under N.D.C.C. § 49-22.1-07(2) to serve and publish notice of filing. Your first concern, then, is arguably already a duty of the Commission (and also a requirement for an application to be deemed complete, *see* discussion of N.D.A.C. § 69-06-04-01(2)(e) & (h) and § 69-06-05-01(2)(k), *infra*), but it is doubtless within the Commission's authority to affirmatively request this data at any point. The consideration of this data is related to your third concern as well.

The direct and indirect economic impacts of a project will change based upon whether local labor is used. It is apparent that the use of local labor has more direct and indirect economic impact than the use of outside labor. The use of local labor for construction and maintenance of facilities and routes provides economic stability to an area by injecting wages into the local economy that support local governments, schools and businesses. Using local labor means that the earned wages will be much more likely to be spent locally. Local laborers live and raise families in the area of the project—this means that their wages are much more likely to support local schools and governments through property taxes and that all of the needs of their children and other dependents will be met at local businesses. Compare this to transient laborers that earn wages in the area but send a portion of it to where they consider home—wages earned here effectively go to support other schools, government infrastructure, and businesses. We assume you have data and factual support for these propositions and suggest providing this to the Commission as part of your argument in favor of collecting data on local hiring.

Regulatory Authority for Consideration of the Use of Local Labor

A discussion of the selection and policy criteria are an integral part of an application for both a certificate of site compatibility and a transmission facility permit. In addition to a discussion of the factors outlined in N.D.C.C. § 49-22-09, The Commission's rules require an applicant to provide "a discussion of the criteria evaluated within the study area, including exclusion areas, avoidance areas, selection criteria, policy criteria, design and construction limitations, and economic considerations" in its application for a certificate of site compatibility for an energy conversion facility. N.D.A.C. § 69-06-04-01(2)(e) & (h). This same language appears in N.D.A.C. § 69-06-05-01(2)(h) & (j) with respect to transmission facility permitting. This section also requires that an applicant put forth a discussion that includes "the relative value of each criteria and how the applicant selected the proposed corridor location, giving consideration to all criteria and how the location, construction, and operation of the facility will affect each criteria." N.D.A.C. § 69-06-05-01(2)(k).

The selection and policy criteria referenced in N.D.A.C. Ch. 69-06-08 are authorized by and an implementation of the provisions found at N.D.C.C. §§ 49-22-05.1(1) and 49-22.1-03. This statutory authority requires the Commission to develop criteria

- 1) to be used in identifying exclusion and avoidance areas and
- 2) to guide the site, corridor, and route suitability evaluation process.

The Commission adopted rules to guide the identification of exclusion and avoidance areas pursuant to the first factor quoted above to deal with the geographic concerns that a proposed project may raise. The Commission also adopted its Selection criteria and Policy criteria pursuant to the second factor quoted above. These statutes further state that the criteria may also include an identification of

- 3) impacts and
- 4) policies or practices

which may be considered in the evaluation and designation process. *Id.* There is no reference here to giving any kind of “preference” to one project over another, but rather, only a reference to policy statements that guide the evaluation process. Additionally, under N.D.A.C. § 69-06-01-01(3), “‘Criteria’ means policy statements that guide and govern the preparation of the inventory of exclusion and avoidance areas, and the energy conversion facility site and transmission facility corridor and route suitability evaluation process.” The term “Selection Criteria” is defined as “criteria that guide and govern the selection of energy conversion facility sites and transmission facility corridors and routes in order to minimize adverse human and environmental impact after the exclusion and avoidance criteria have been applied.” N.D.A.C. § 69-06-08-01(14). The term “Policy Criteria” is defined as “criteria that guide and govern the selection of energy conversion facility sites and transmission facility corridors and routes in order to maximize benefits during the construction and operation of a facility. N.D.A.C. § 69-06-08-01(12).

The implemented and authorizing statute refers, for example, to criteria to be developed for “impacts.” The “Selection criteria” then refer to “any significant adverse *effects* resulting” from the siting of a given project and go on to reference “*impacts* upon agriculture” and the “*impact* upon the availability and adequacy of” various programs and services at N.D.A.C. § 69-06-08-01(5). Similarly, the implemented and authorizing statute refers to criteria to be developed for “policies and practices.” The “Policy criteria” then refer to “the following *policies and practices*” at N.D.A.C. § 69-06-08-01(6).

The important point is that the authorizing statute states: “The commission shall develop criteria to be used in identifying exclusion and avoidance areas and to guide the site, corridor, and route suitability evaluation and designation process. The criteria also may include an identification of *impacts* and *policies or practices* which may be considered in the evaluation and designation process.” N.D.C.C. § 42-22.1-03. There is no authority here to develop a “preference” protocol for competing applications, but rather, simply a reference to two different sets of criteria that may

be developed in order to evaluate siting applications. The Selection criteria refer back to the “impacts,” and the Policy criteria refer back to the “policies and practices.”

The Impacts Related to the Use of Skilled and Unskilled Labor are Required to be Mitigated

The North Dakota Administrative Code permits the Commission to approve a proposed facility’s siting application only “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 [temporary and permanent skilled and unskilled labor], will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum.” NDAC § 69-06-08-01 (5)(c)(10). This establishes a mandatory duty upon the Commission to deny a project which will cause significant adverse effects that are not minimized.

This requirement would certainly be furthered by the three policies that you are suggesting. In order to make its required determination, the Commission would at least find it very helpful to be apprised of the source of the skilled and unskilled labor that would be used in the construction and maintenance of these facilities.¹

A Discussion of Labor Relations as well as the Training and Utilization of In-State Labor are Required Elements of an Application

Given that a discussion of the selection and policy criteria are required parts of an application, their consideration is not optional. N.D.A.C. § 69-06-04-01(2)(e) & (h); N.D.A.C. § 69-06-05-01(2)(h), (j) & (k). The Commission does have the discretion as to the weight afforded the policy criteria in reaching its decision on whether to approve a project, but providing a discussion as to each of the criteria is a mandatory element of an application, and therefore must be considered by the Commission in the first instance. Failure to consider a required element of an application would make the requirement itself an idle act.

The Commission may give preference to an applicant that will maximize benefits from policies such as the “training and utilization of available labor in this state for the general and specialized skills required” as well as “labor relations.” N.D.A.C. § 69-06-08-01(6)(c) & (k). These same policy criteria are echoed in the Commission’s rules that govern the approval of corridors and routes for transmission facilities. N.D.A.C. § 69-06-08-02(4)(b) & (f). As mentioned above, the term preference should be interpreted with an eye toward the statutes that it implements as well as

¹ I will also note that subsection 10 of this rule requires consideration of the impact upon temporary and permanent housing, implying that the Commission should be aware of whether construction and/or maintenance activities will be performed by individuals who reside within a reasonable travel distance from the facility, or whether employees will be brought in from afar and affect the supply of permanent, long term housing through the creation of long-term jobs and/or temporary, short-term housing through the creation of temporary jobs.

practicality and logic. When one interprets the term “preference” in relation to “policies and practices which may be considered in the evaluation and designation process,” it is clear that the factors listed in N.D.A.C. § 69-06-08-01(6) are those that, when present, may sway the Commission to favor development over denial, or, “in a proper case” may condition their approval on certain of these criteria being met.

It is my understanding that the Commission has taken the position in the past that the sections involving “preference” have been interpreted to mean that they will only be applied when there are competing projects, specifically, during the June, 17 public hearing on the Ruso Wind Project. N.D. P.S.C. Case No. PU-19-028, Doc. Id. No. 102. The language used here (i.e. “impacts” and “policies or practices”) is critical to understanding how the criteria are to be applied, and whether or not the policy criteria are a “preference” such as those used in employment preference laws, for example. Based on the language of the statute and these rules, that is not the case.

I will also point out that an interpretation of the term “preference” to mean that it is only applicable if the Commission is faced with two competing projects creates a confusing result in most circumstances. One necessary condition to planning and implementing an energy conversion facility project is ownership and/or control of the site. Presumably, the only way that regulatory preference would be a factor is if the owner of a site had himself proposed two competing projects that were irreconcilable, forcing the Commission to choose for the undecided applicant. If two projects were competing over a transmission route, these would not be irreconcilable as they could be adjacent to each other or otherwise co-located. This approach also assumes that the Commission would evaluate more than one project in a particular case, and it is our understanding that the Commission evaluates each proposed facility and transmission project on its own merits. A better and more reasonable interpretation of this term is that the Commission can give preference to development over nondevelopment if policy criteria are met.

It appears that the Commission has agreed with this interpretation in the past, such as when it evaluated whether preference was merited for a single wind energy siting application. *See* N.D. P.S.C. Case Nos. PU-18-302 & PU-18-344, Findings of Fact, Conclusions of Law, and Order, ¶¶ 70, 71 (Jun. 12, 2019) (“The Commission recognizes the Wind Project may have a positive impact on some of the criteria set forth in N.D.A.C § 69-06-08-01(6). However, under the Case Nos. PU-18-302 & PU-18-344 Findings of Fact, Conclusions of Law and Order Page 18 circumstances, the Commission is not of the opinion that any preference that could apply under these criteria outweighs the adverse direct and indirect impacts as a whole. Therefore, no preference will be given under N.D.A.C. § 69-06-08-01(6).”) This passage implies that the Commission’s grant of “preference” may act as a counterweight to negative impacts under certain circumstances. This suggests that consideration of the policy criteria may be given dispositive weight if the factors weighing in favor of approval and disapproval of a project are more or less equal. However, this interpretation is not at odds with the notion that the Commission must still consider these factors in all cases.

I will also note that, in addition to a grant of “preference”, the “Commission may require the adoption of [the] policies and practices” outlined in section 6 of N.D.A.C. § 69-06-08-01 “in a proper case”. N.D.A.C. § 69-06-08-01; *See* N.D.A.C. § 69-06-04-02(2)(a); *See* N.D.A.C. § 69-06-05-02(1)(b). This portion of the regulation is further authority for the Commission to reach the same result that you desire even if the Commission wishes to continue interpreting its regulations regarding preference in a way that would require two simultaneous, competing project applications in order to be applicable.

Authority for the Collection of Data Regarding Actual Use of Local Labor

The Commission has the power to require a successful applicant to report on its actual use of in-state and local labor by means of a “special condition” as to site designation (N.D.A.C. § 69-06-04-02(2)(a)) and the designation of corridors and routes (N.D.A.C. § 69-06-05-02(1)(b)). This broad authority allows the Commission to attach conditions to its approval of any project that the applicant may accept with the permit. The conditional approval process is used in all levels of government, from local zoning boards to the Commission and its sister agencies such as the Department of Environmental Quality in order to further their policies and procedures. It allows a project to move forward upon an applicant’s acceptance of the authority’s reasonable use of discretion. Importantly, an approval conditioned on the applicant reporting back to the Commission regarding the composition of its workforce would not be burdensome, especially given that your request does not call for any quota of actual hires. Were this reporting requirement implemented, it would inform and guide the Commission as to the impacts and benefits of these projects to the state.

Conclusion

It is our opinion that the Commission has the authority to collect data on the efforts of applicants to use local labor in construction and maintenance of wind energy conversion projects. There is also authority for the Commission to require this information be included in the application itself. This subject is germane to required elements of applications for certificates of site compatibility and for permits for transmission routes. This data will also materially affect the direct and indirect economic impacts of a project and should therefore be addressed by the Commission under its statutory mandate. Auditing the success (or lack thereof) that a successful applicant has encountered in meeting representations made to the Commission regarding local hiring practices would be useful to identify the positive impacts of Commission approved projects. On another level, the inability of applicants to hire locally could be helpful in identifying specific skills that are in demand which could be addressed by state training programs, etc. The review of these applications requires more than a geographical review of exclusion zones and avoidance areas. The Commission has a responsibility to review all elements of an application—including those

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dealing with the impacts, policies & practices that are a part of the regulations that are enabled by the relevant statutory law.

Please contact me should you have any questions.

Sincerely,



Derrick Braaten