

September 27, 2019

Via Hand Delivery & Electronic Mail

Patrick Fahn
Director, Public Utilities Division
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov

In re: Ashtabula Wind, LLC
Case No. PU-19-284
Our File No.: 035218-000052

Dear Mr. Fahn:

I am writing in response to your request in PU-19-284 (Docket No. 2) for Ashtabula Wind, LLC (“Ashtabula Wind”) to provide information regarding Ashtabula Wind Energy Center’s (“Ashtabula I WEC”) improvement project and compliance with current setbacks designated in North Dakota Administrative Code section 69-06-08-01(2).

The Commission’s certification of the Ashtabula I WEC predates the Commission’s current setbacks. On May 30, 2008, the Commission issued Findings of Fact, Conclusions of Law and Order granting Ashtabula Wind Certificate of Site Compatibility No. 6 (“Certificate”) for the Ashtabula I WEC (PU-08-32), which was subsequently amended and reissued on April 13, 2009 (PU-09-53) (collectively, “Order”). A more detailed discussion of Ashtabula I WEC’s procedural siting history is provided in Ashtabula Wind’s certification for facility improvements (“Certification”) (PU-19-284, Docket No. 1).

Ashtabula I WEC’s Order incorporated the then-existing siting criteria, which is attached hereto as Exhibit 1. In 2009, Ashtabula Wind constructed the Ashtabula I WEC consisting of 99 General Electric 1.5 megawatt (MW) turbines with a nameplate capacity of 148.5 MW. The Commission’s siting criteria did not contain rules governing wind facility setbacks when the Order and Certificate were first issued and subsequently amended. The Commission did not adopt wind facility setbacks until April 1, 2013, which were most recently amended July 1, 2018 and July 1, 2019, well after Ashtabula I WEC had already been certificated, constructed, and placed into operation.

North Dakota Century Code section 49-22-07 provides, “a utility may not begin construction of an electric energy conversion facility or an electric transmission facility in the state without having first obtained a certificate of site compatibility . . . from the commission pursuant to this chapter.” However, pursuant to Section 49-22-03(3)(a), “activities . . . [c]onducted wholly within the geographic location for which a utility has previously obtained a certificate or permit under this chapter” do not constitute “construction” so long as the remaining provision of Section 49-22-03(3) are met. Pursuant to the procedural process designated in N.D.C.C. § 49-22-03(3), Ashtabula Wind filed a certification and supporting documentation to improve the Ashtabula I WEC by installing new gear boxes and rotors on existing turbines. In accordance with these requirements, Ashtabula Wind has certified that it “will comply with all *applicable* conditions and protections in siting laws and rules and commission orders previously issued for any party of the facility.” N.D.C.C. § 49-22-03(3)(a)(4) (emphasis added). As provided for in the Certification, the improvements will utilize Ashtabula I WEC’s existing turbine foundations and hubs at all turbine locations previously approved by the Commission. Current setbacks are not applicable to the Ashtabula I WEC because the Order incorporates the siting criteria that existed at the time the facility was permitted by the Commission, which did not include any of the Commission’s existing setbacks.¹ Ashtabula Wind has complied with the statute’s procedural requirements and has met its burden to improve the existing facility.

Additionally, retroactive application of setbacks to an existing energy conversion facility is not warranted and is contrary to North Dakota law. Neither the Siting Act nor the Commission’s siting criteria provide for retroactive application. The North Dakota Century Code states that no part of the code is retroactive unless it is expressly declared to be or if retroactive intent can be implied. N.D.C.C. § 01-02-10; *Smith v. Baumgartner*, 2003 ND 120, ¶ 9, 665 N.W.2d 12, 14. “Administrative rules are derivatives of statutes and are construed using well-established principles of statutory construction.” *Davis v. Davis*, 2010 ND 67, ¶ 13, 780 N.W.2d 707, 711 (citing *Simon v. Simon*, 2006 ND 29, ¶ 11, 709 N.W.2d 4). Therefore, because statutes and administrative rules are interpreted similarly, and the Commission’s setbacks do not expressly or implicitly provide for retroactive application to facilities that predate their enactment, current setbacks do not apply to the Ashtabula I WEC or its improvement activities. Furthermore, the policy implications of retroactive application of siting criteria to existing energy infrastructure are significant. If retroactive application of the Commission’s siting criteria is applied to existing energy conversion facilities, it will encourage operators to avoid making minor but beneficial improvements to facilities as to not jeopardize a project.

Although current setbacks do not retroactively apply to the Ashtabula I WEC improvements, Ashtabula Wind provides the following information in response to your request for additional information. All turbines meet existing setbacks with the exception of the following turbines as noted below. Six turbines do not meet the existing setback of 1.1 times the height of the turbine plus 75 feet from the centerline of any county or maintained township roadway. N.D. Admin. Code § 69-06-08-01(2)(a)(2).

¹ Notwithstanding the following, Ashtabula Wind has voluntarily elected to comply with the Commission’s current noise and shadow flicker standards.

Turbine No.	Setback after improvement. 1.1 x height of turbine + 75 feet from centerline of county/maintained township roadway = 527 feet
12	445.9 feet
30	514.8 feet
73	498.9 feet
83	491.1 feet
102	452.2 feet
131	430.9 feet

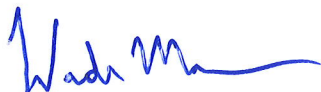
Ashtabula Wind has obtained all necessary permits from Barnes County and associated townships for improvement activities to the Ashtabula I WEC and neither the County nor any township has expressed concerns with respect to the turbines' setback from roads or the locations of any other turbines. Attached hereto as Exhibit 2, is a copy of the conditional use permit received from Barnes County for the improvement activities.

With respect to the current setback of 1.1 times the height of the turbine from the property line of a nonparticipating landowner, N.D. Admin. Code § 69-06-08-01(2)(a)(5), three turbines do not meet this current setback. While these landowners are not "participants" in the Ashtabula I WEC, Ashtabula Wind has obtained waivers from these landowners confirming that they do not oppose the Project or the location of the turbines.

Turbine No.	Setback after improvement. 1.1 x height of turbine from property line of non-participant = 452 feet
3	144.7 feet
124	125.5 feet
131	430.9 feet

For the reasons discussed herein, current setbacks are not applicable to the Ashtabula I WEC. Ashtabula Wind has complied with all applicable siting laws and rules with respect to its improvement activities and has provided supporting information to demonstrate its compliance.

Sincerely,



Wade C. Mann

WCM/lh

Enc.

cc: Tracy C. Davis (via email)
Casey Furey (via email)