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November 25, 2019

Via Hand Delivery and Electronic Mail

Mr. Steve Kahl
Executive Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

E-mail: ndpsc@nd.gov

In re: Ashtabula Wind, LLC
N.D.C.C. § 49-22-03(3)(a) Certification
Case No. PU-19-284
Our File No. 035218-000052

Dear Mr. Kahl:

On November 21, 2019, during the Commission's administrative meeting, the Commission requested Ashtabula Wind, LLC ("Ashtabula Wind") provide information regarding improvement activities at the Ashtabula Wind Energy Center ("Ashtabula I WEC") (Case No. PU-19-284), including the status of improvements, setbacks, and operations. The following information is provided on behalf of Ashtabula Wind in response to this request and in advance of the Commission's work session scheduled for November 26, 2019.

I. Background

On July 15, 2019, Ashtabula Wind filed a certification for various improvements to the Ashtabula I WEC pursuant to the statutory certification procedures set forth in N.D.C.C. § 49-22-03(3)(a) (the "Certification"). *See*, Docket No. 1. As described in the Certification, Ashtabula Wind is currently authorized to own and operate up to 101 turbines capable of producing 152 megawatts ("MW") of electrical generation under its Certificate of Site Compatibility No. 7. *See* Case No. PU-08-32, Order at Ordering ¶ 3 (authorizing Ashtabula Wind to site and construct up to 200 MW of wind turbines); Case No. PU-09-53, Order at Ordering ¶ 2 and First Amended Site Certificate No. 7 (authorizing Ashtabula Wind to transfer 48 MW of the Ashtabula I WEC to Otter Tail Power Company). Ashtabula Wind constructed 99 1.5 MW turbines, capable of generating 148.5 MW of nameplate capacity. *See*, Docket No. 1, Certification at ¶ 4.

The “improvement activities” at the Ashtabula I WEC (referred to in the Certification as the “Project”) include the addition of new gearboxes and rotors, which will improve turbine performance, operations, and maintenance. The Commission’s 2008 Order contemplated that Ashtabula Wind may undertake such activities to extend the useful life of the Ashtabula I WEC. *See*, Case No. PU-08-32, Order at Finding of Fact No. 33 (“Retrofitting the turbines and power systems with upgrades based on new technology may allow the wind farm to produce efficiently and successfully for many more years.”). The Project will increase the nameplate capacity of the Ashtabula I WEC to 160.4 MW, although, per existing commercial agreements, the facility output will be capped at the current nameplate capacity of 148.5 MW. *See*, Docket No. 1, Certification at ¶ 7.

II. Improvement Activity Status

There was discussion at the November 21 meeting regarding the status of the improvement activities. In the Certification, which was filed on July 15, 2019, Ashtabula Wind provided notice of its intent to commence improvement activities, expressly stating that it anticipated initiating the activities by mid-August 2019. Additionally, Ashtabula Wind has had discussions with Commission staff informing staff that improvement activities have been ongoing.

Ashtabula Wind respectfully submits that it was within its rights to commence these activities following the filing of its Certification. The Certification was filed pursuant to provisions in the Siting Act that provide for an exemption from the siting process upon a utility’s certification in writing to the Commission regarding a facility improvement and/or increase in generation capacity. Specifically, N.D.C.C. § 49-22-03(3)(a) provides that certain activities do not constitute “construction” that would otherwise require Commission siting approval.

With respect to the current certificated capacity of the Ashtabula I WEC, an amendment to Certificate No. 7 or the underlying Order is not necessary to allow improvement activities to commence. Pursuant to N.D.C.C. § 49-22-07, “[a] utility may not begin construction of an electric energy conversion facility . . . in the state without first having obtained a certificate of site compatibility . . . from the commission pursuant to this chapter.” However, pursuant to N.D.C.C. § 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 provisions of § 49-22-03(3)(a) are met.¹ Although improvement activities will increase the capacity of the existing energy conversion facility, because the activities do not constitute “construction” as defined in the statute, Ashtabula Wind was within its rights to commence the improvement activities, and Commission

¹ Ashtabula Wind has complied with the other provisions listed in N.D.C.C. § 49-22-03(3)(a). These provisions are: if the activities do not affect any known exclusion or avoidance area; if the activities improve the existing electric energy conversion facility; and if, before conducting the activities, the utility certifies in writing to the Commission that the activities will not affect a known exclusion or avoidance area; the activities are for to improve an existing electric energy conversion facility; and the utility will comply with all applicable conditions and protections in the siting laws and rules and Commission orders previously issued for any part of the facility.

approval was not required to do so. Ashtabula Wind understands this is consistent with the Commission's prior precedent where certification filings are submitted under § 49-22-03(3)(a).

III. Setbacks

On September 27, 2019, Ashtabula Wind filed a response to staff's request for information regarding Ashtabula Wind's compliance with the Commission's current setbacks governing wind facilities. *See*, Docket No. 12. This filing explained that the Order for Ashtabula I WEC incorporated the siting criteria existing at the time of Order issuance, and attached a copy of the then-existing siting criteria (which is also attached hereto as Exhibit 1 for ease of reference). Ashtabula Wind constructed the Ashtabula I WEC in 2009. As explained in Ashtabula Wind's September 27 filing, the Commission's siting criteria did not contain rules governing wind facility setbacks when the Order and Certificate No. 7 were issued. 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.

In accordance with the requirements set forth in N.D.C.C. § 49-22-03(3), Ashtabula Wind 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); *see*, Docket No. 1, Certification at ¶ 24. As described in the Certification, the Project will utilize Ashtabula I WEC's existing turbine foundations 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 current setbacks.

Additionally, and as previously explained in Ashtabula Wind's September 27 filing, retroactive application of setbacks to an existing energy conversion facility would be contrary to North Dakota law. The filing of a certification under § 49-22-03(3)(a) does not automatically and/or retroactively apply new siting criteria to an existing and previously permitted facility. 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 so as to not jeopardize a project.

Although current setbacks do not retroactively apply to the Ashtabula I WEC improvements, Ashtabula Wind provided information responsive to staff's request for an assessment with respect to the Commission's current setbacks. Ashtabula Wind identified six turbines that do not meet the current setback of 1.1 times the height of the turbine plus 75 feet from the centerline of any county or township roadway. N.D. Admin. Code § 69-06-08-01(2)(a)(2). *See*, Docket No. 12. Ashtabula obtained all necessary permits from Barnes County and associated townships for the improvement activities for these six turbines, and neither Barnes County nor any township expressed concerns with respect to the turbines' setback from roads or the locations of any other turbines. A copy of the conditional use permit obtained from Barnes County was previously provided to the Commission. *See*, Docket No. 12. Ashtabula also identified three turbines that do not meet 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); *see*, Docket Nos. 12, 13. While these landowners are not participants in the Ashtabula I WEC, Ashtabula Wind voluntarily obtained waivers from these landowners confirming these landowners do not oppose the improvement activities or the location of the turbines and previously filed copies of these waivers with the Commission. *See*, Docket No. 13. With respect to the nine turbines that do not meet existing setbacks that were adopted after issuance of the Order and Certificate No. 7, improvement activities have not yet commenced at these turbine locations.

IV. Operations

The Siting Act clearly provides that a utility may increase or decrease a facility's capacity by way of a certification filing and contains no requirement that an order and/or certificate be amended for a utility to invoke this statutory right. Under the certification provisions of § 49-22-03(3)(a), once a certification is filed, the Legislature did not include additional requirements in order for a utility to invoke its right to make modifications to improve an existing facility. Amendments to the order and/or certification and corresponding notice of opportunity for hearing are not required as a condition of the utility's compliance and ability to engage in the activities set forth with § 49-22-03(3)(a). Furthermore, this position is consistent with the Commission's current practice of excluding designated capacity thresholds from ordering provisions and site certificates for new facilities.

Notwithstanding the foregoing, Ashtabula Wind confirms that the Ashtabula I WEC has not operated in excess of the 152 MW nameplate capacity as designated in First Amended Certificate No. 7. Based on the current construction status, the site is currently capable of generating 138.66 MW.

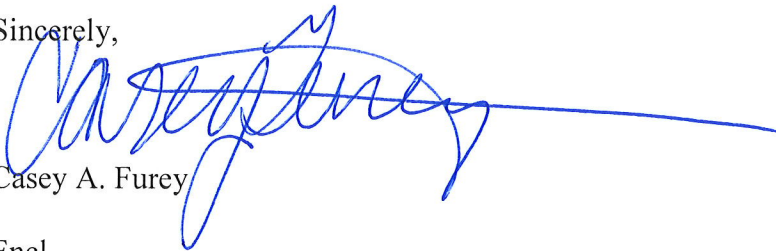
V. Conclusion

A review of the docket in Case No. PU-19-284 demonstrates that Ashtabula Wind has been transparent about its activities from the onset of the certification process, which has been

pending since July 2019. Ashtabula Wind has provided detailed information to the Commission regarding the improvement activities and its assessment of the siting criteria. This information reflects that Ashtabula Wind has thoroughly reviewed the applicable law and proceeded in a manner consistent with its provisions and requirements.

Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Casey A. Furey', with a long horizontal flourish extending to the right.

Casey A. Furey

Encl.

- cc: Adam Renfandt (via email)
- Patrick Fahn (via email)
- Brian Johnson (via email)
- John Schuh (via email)
- Tracy Davis (via email)

NORTH DAKOTA ADMINISTRATIVE CODE

Supplement 321

July 2006

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for the
Administrative Rules Committee**

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TITLE 69
PUBLIC SERVICE COMMISSION

JULY 2006

CHAPTER 69-06-08

69-06-08-01. Energy conversion facility siting criteria. The following criteria shall 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 shall be excluded in the consideration of a site for an energy conversion facility, and shall include a buffer zone of a reasonable width to protect the integrity of the area. Natural screening may be considered in determining the width of the buffer zone.
 - 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, such exclusion shall 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.
2. **Avoidance areas.** The following geographical areas shall 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 shall not justify approval of these areas. A buffer zone of a reasonable width to protect the integrity of the area shall 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.
3. **Selection criteria.** A site shall 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.
- 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) Rural residences and businesses.
 - (4) Aquifers.
 - (5) Human health and safety.
 - (6) Animal health and safety.
 - (7) Plant life.
 - (8) Temporary and permanent housing.
 - (9) 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.

4. **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.
- 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. Nonrelocation of 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.

History: Amended effective August 1, 1979; July 1, 2006.

General Authority: NDCC 49-22-18

Law Implemented: NDCC 49-22-05.1

69-06-08-02. Transmission facility corridor and route criteria. The following criteria shall guide and govern the preparation of the inventory of exclusion and avoidance areas, and the corridor and route suitability evaluation process. Exclusion and avoidance areas may be located within a corridor, but at no given point shall such an area or areas encompass more than fifty percent of the corridor width unless there is no reasonable alternative.

1. **Exclusion areas.** The following geographical areas shall be excluded in the consideration of a route for a transmission facility. A buffer zone of a reasonable width to protect the integrity of the area shall be included. Natural screening may be considered in determining the width of the buffer zone.
 - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; monuments; and wilderness areas.
 - b. Designated or registered state: parks; historic sites; monuments; historical markers; archaeological sites; and nature preserves.
 - c. County parks and recreational areas; municipal parks; and parks owned or administered by other governmental subdivisions.
 - d. Areas critical to the life stages of threatened or endangered animal or plant species.
 - e. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.

2. **Avoidance areas.** The following geographical areas shall not be considered in the routing of a transmission 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 routes. Economic considerations alone shall not justify approval of these areas. A buffer zone of a reasonable width to protect the integrity of the area shall be included unless a distance is specified in the criteria. Natural screening may be considered in determining the width of the buffer zone.
 - a. Designated or registered national: historic districts; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
 - b. Designated or registered state: wild, scenic, or recreational rivers; game refuges; game management areas; management areas; forests; forest management lands; and grasslands.
 - c. Historical resources which are not specifically designated as exclusion or avoidance areas.
 - d. Areas which are geologically unstable.

- e. Within five hundred feet [152.4 meters] of a residence, school, or place of business. This criterion shall not apply to a water pipeline transmission facility.
 - f. Reservoirs and municipal water supplies.
 - g. Water sources for organized rural water districts.
 - h. Irrigated land. This criterion shall not apply to an underground transmission facility.
 - i. Areas of recreational significance which are not designated as exclusion areas.
3. **Selection criteria.** A corridor or route shall be designated only when it is demonstrated to the commission by the applicant that any significant adverse effects which will result from the location, construction, and maintenance of the facility 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.
- a. The impact upon agriculture:
 - (1) Agricultural production.
 - (2) Family farms and ranches.
 - (3) Land which the owner can demonstrate 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.
 - b. The impact upon:
 - (1) Noise-sensitive land uses.
 - (2) The visual effect on the adjacent area.
 - (3) Extractive and storage resources.
 - (4) Wetlands, woodlands, and wooded areas.
 - (5) Radio and television reception, and other communication or electronic control facilities.
 - (6) Human health and safety.
 - (7) Animal health and safety.

(8) Plant life.

4. **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.
- a. Location and design.
 - b. Training and utilization of available labor in this state for the general and specialized skills required.
 - c. Economies of construction and operation.
 - d. Use of citizen coordinating committees.
 - e. A commitment of a portion of the transmitted product for use in this state.
 - f. Labor relations.
 - g. The coordination of facilities.
 - h. Monitoring of impacts.
 - i. Utilization of existing and proposed rights of way and corridors.
 - j. Other existing or proposed transmission facilities.

History: Amended effective August 1, 1979; January 1, 1982; February 1, 1995; July 1, 2006.

General Authority: NDCC 49-22-18

Law Implemented: NDCC 49-22-05.1