

## WIND ENERGY DEVELOPMENT - BACKGROUND MEMORANDUM

Section 7 of 2017 House Bill No. 1008 ([appendix](#)) directs the Legislative Management to study the impact of wind energy development on the environment, addressing and researching issues common to North Dakota landowners, and identifying potential issues for legislation.

### PUBLIC SERVICE COMMISSION JURISDICTION General Jurisdiction of the Public Service Commission

Section 2 of Article V of the Constitution of North Dakota provides the Public Service Commission (PSC) consists of three Public Service Commissioners and the powers and duties of the commissioners must be prescribed by law. North Dakota Century Code Section 49-02-01 sets out the general jurisdiction of PSC. That section provides the general jurisdiction of the commission extends to:

- Contract and common carriers engaged in the transportation of persons and property, excluding air carriers.
- Telecommunications companies engaged in the furnishing of telecommunications services as provided for in Chapter 49-21.
- Pipeline utilities engaged in the transportation of gas, oil, coal, and water.
- Electric utilities engaged in the generation and distribution of light, heat, or power.
- Gas utilities engaged in the distribution of natural, synthetic, or artificial gas.
- All heating utilities engaged in the distribution of heat.
- Warehouse companies engaged in the marketing, storage, or handling of agricultural products.
- All other public utilities engaged in business in this state or in any county, city, township, or other political subdivision of the state.

### Energy Conversion and Transmission Facility Siting Act

The 1975 Legislative Assembly passed Senate Bill No. 2050, the North Dakota Energy Conversion and Transmission Facility Siting Act, codified as Chapter 49-22. This chapter provides areas of protection to individual landowners in the siting of transmission facilities, such as:

- Requiring PSC, in evaluating an application for a certificate of site compatibility, to consider the:
  - Effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment;
  - Effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites;
  - Potential for beneficial uses of waste energy from a proposed energy conversion facility;
  - Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated;
  - Alternatives to the proposed site, corridor, or route which are developed during the hearing process and which minimize adverse effects;
  - Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated;
  - Direct and indirect economic impacts of the proposed facility;
  - Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route;
  - Effect of the proposed site or route on areas which are unique because of biological wealth or because they are habitats for rare and endangered species; and
  - Problems raised by federal agencies, other state agencies, and local entities. (Section 49-22-09)
- Requiring PSC to hold a public hearing in each county in which any portion of a site, corridor, or route is proposed to be located in an application for a certificate or a permit. If more than one county is involved, PSC may hold a consolidated hearing in one or more of the affected counties. A hearing for any county may not be consolidated if five or more affected landowners in the county file a petition with the commission within

10 days of the publication of the notice of hearing. At the public hearing, PSC must afford interested persons an opportunity to be heard. Notice of a public hearing must be given by PSC by service on any persons and agencies the commission deems appropriate and twice by publication, once at least 20 days before the hearing and a second time within 20 days before the hearing. (Section 49-22-13)

- Prohibiting a certificate of site compatibility for an energy conversion facility from superseding or preempting any local land use, zoning, or building rules, regulations, or ordinances and prohibiting a site from being designated if the site violates local land use, zoning, or building rules, regulations, or ordinances. A permit for the construction of a transmission facility within a designated corridor may supersede and preempt any local land use, zoning, or building rules, regulations, or ordinances upon a finding by the commission that the rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location. Without such a finding by the commission, no route may be designated which violates local land use, zoning, or building rules, regulations, or ordinances. (Section 49-22-16)

### **Wind Energy Jurisdiction**

Section 49-02-24 authorizes PSC by rule to establish or participate in a program to track, record, and verify the trading of credits for electricity generated from renewable and recycled heat sources among electric generators, utilities, and other interested entities within North Dakota and with similar entities in other states. Renewable electricity and recycled energy include electricity generated from facilities using the wind as the source of energy for producing electricity.

Section 49-02-27 requires PSC to adopt rules governing the decommissioning of commercial wind energy conversion facilities. The rules must address:

- The anticipated life of the project;
- The estimated decommissioning costs in current dollars;
- The method and schedule for updating the costs of the decommissioning and restoration;
- The method of ensuring that funds will be available for decommissioning and restoration;
- The anticipated manner in which the project will be decommissioned and the site restored; and
- Present and future natural resource development.

Section 49-22-05.1 requires PSC 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. Areas less than one and one-tenth times the height of the turbine from the property line of a nonparticipating landowner and less than three times the height of the turbine or more from an inhabited rural residence of a nonparticipating landowner, must be excluded in the consideration of a site for a wind energy conversion area, unless a variance is granted. The Public Service Commission may grant a variance if an authorized representative or agent of the permittee, the nonparticipating landowner, and affected parties with associated wind rights file a written agreement expressing the support of all parties for a variance to reduce the setback requirement. 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. A local zoning authority may require setback distances greater than those required under Section 49-22-05.1. "Height of the turbine" means the distance from the base of the wind turbine to the turbine blade tip when it is in its highest position.

### **RENEWABLE ENERGY COUNCIL**

The Renewable Energy Council consists of:

- The Commissioner of Commerce or the commissioner's designee;
- A member with a substantial interest in the agriculture industry appointed by the Governor;
- A member with a substantial interest in the biodiesel industry appointed by the Governor;
- A member with a substantial interest in the biomass industry appointed by the Governor;
- A member with a substantial interest in the wind industry appointed by the Governor;
- A member with a substantial interest in the ethanol industry appointed by the Governor; and

- A member with a substantial interest in advanced biofuel and sugar-based biofuel, appointed by the Governor.

Section 54-63-01 provides the term of office for members of the council is 3 years and the council must meet at least once a year. The purpose of the Renewable Energy Council is to recommend to the Industrial Commission the approval of grants, loans, or other financial assistance necessary or appropriate for funding, research, development, marketing, and educational projects or activities.

Under Section 54-63-03, the Industrial Commission may:

- Make grants or loans, and provide other forms of financial assistance as necessary or appropriate, to qualified persons for funding research, development, marketing, and educational projects or activities, feasibility studies, applied research and demonstrations, venture capital investments, and low-interest loans and loan buydowns to foster the development of renewable energy, including wind, biofuels, biomass, solar, hydroelectric, geothermal, and hydrogen, that is produced from the foregoing renewable energy sources. Any financial assistance the commission awards to a project must not be the project's sole support. Any financial assistance the commission awards must be conditioned on the assurance the applicant or a third party will support the project by either monetary or nonmonetary means. The amount of this additional support is at the commission's discretion.
- Execute contracts and all other instruments necessary or convenient for the performance of its powers and functions.
- Accept aid, grants, or contributions of money or other things of value from any source, to be held, used, and applied to carry out Chapter 54-63, subject to the conditions upon which the aid, grants, or contributions are made, including aid, grants, or contributions from any department, agency, or instrumentality of the United States for any purpose consistent with the chapter.

## **WIND ENERGY PROPERTY RIGHTS**

Chapter 17-04 pertains to wind energy property rights and addresses wind option agreements, wind easements, and wind energy leases.

### **Wind Option Agreement**

Section 17-04-01 provides a wind option agreement is a contract in which the owner of property gives another the right to produce energy from wind power on that property at a fixed price within a time period not to exceed 5 years on agreed terms. A wind option agreement is void and terminates if, within 5 years after the agreement commences, a certificate of site compatibility or conditional use permit has been issued (if required) and a transmission interconnection request is in process and not under suspension, have not occurred. If the requirements are not met by the owner of the wind option agreement, the owner of the energy rights may provide to the owner of the wind option agreement a notice of termination, by certified mail or other personal delivery, and file the notice with the county recorder in the county in which the real property is located. Termination of the wind option agreement is effective 5 years after the wind option commences.

### **Wind Easements**

Section 17-04-02 provides a wind easement means a right, whether stated in the form of a restriction, easement, covenant, or condition, in a deed, will, or other instrument executed by or on behalf of an owner of land or airspace for the purpose of ensuring adequate exposure of a wind power system to the winds.

Section 17-04-03 allows a property owner to grant a wind easement in the same manner and with the same effect as the conveyance of an interest in real property. The easement runs with the land benefited and burdened and terminates upon the conditions stated in the easement. The easement is void if, within 5 years after the easement commences, a certificate of site compatibility or conditional use permit has been issued (if required) and a transmission interconnection request is in process and not under suspension, have not occurred. A wind easement is presumed to be abandoned if a period of 36 consecutive months has passed with no construction or operation of the wind farm facility. If the operator of the wind farm facility does not file a plan with PSC outlining the steps and schedule for continuing construction or operation of the facility within the 36-month period, the owner of the energy rights may provide, by certified mail or other personal delivery to the owner of the wind easement, a 60-day written notice of the intent to terminate the easement. If, within 60 days of the receipt of the notice of the intent to terminate, the owner of the easement fails to provide a written objection to the notice by certified mail or other personal delivery, the owner of the energy rights may file a notice of termination with the county recorder in the county in which the real property is located. Termination of the easement becomes effective when the notice of termination is filed and recorded with the county recorder.

Except for a wind easement, an interest in a resource located on a tract of land and associated with the production of energy for wind power on the tract of land may not be severed from the surface estate.

### **Wind Energy Leases**

Section 17-04-05 provides a lease for wind energy purposes is void and terminates if, within 5 years after the lease commences, a certificate of site compatibility or conditional use permit has been issued (if required) and a transmission interconnection request is in process and not under suspension, have not occurred.

A wind lease is presumed to be abandoned if a period of 36 consecutive months has passed with no construction or operation of the wind farm facility. If the operator of the wind farm facility does not file a plan with PSC outlining the steps and schedule for continuing construction or operation of the facility within the 36-month period, the owner of the energy rights may provide, by certified mail or other personal delivery to the owner of the wind easement, a 60-day written notice of the intent to terminate the lease. If, within 60 days of the receipt of the notice of the intent to terminate, the owner of the lease fails to provide a written objection to the notice by certified mail or other personal delivery, the owner of the energy rights may file a notice of termination with the county recorder in the county in which the real property is located. Termination of the easement becomes effective when the notice of termination is filed and recorded with the county recorder.

### **Wind Easement and Wind Energy Lease Requirements**

Section 17-04-06 provides in a wind easement and a wind energy lease, the easement and lease:

- Must be delivered to the property owner with a cover page containing specific language informing the property owner of certain property owner rights.
- May not be executed by the parties until at least 10 business days after the first proposed easement or lease has been delivered to the property owner.
- May not require either party to maintain the confidentiality of any negotiations or the terms of any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement.
- Must preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement. When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility.
- May not make the property owner liable for any property tax associated with the wind energy facility or other equipment related to wind energy generation.
- May not make the property owner liable for any damages caused by the wind energy facility and equipment or the operation of the generating facility and equipment, including liability or damage to the property owner or to third parties.
- Must obligate the developer, owner, and operator of the wind energy facility to comply with federal, state, and local laws and regulations and may not make the property owner liable in the case of a violation.
- Must allow the property owner to terminate the agreement if the wind energy facility has not operated for a period of at least 3 years unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time.
- Must state clearly any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner.

Section 17-04-06 requires the owner of the wind energy facility to carry general liability insurance relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may include the property owner as an additional insured on the policy.

### **SUGGESTED STUDY APPROACH**

In conducting the study, the committee may desire to receive testimony regarding the impact of wind energy development on the environment and the relationship between wind energy development and North Dakota landowners from PSC and impacted parties including the Agriculture Commissioner, North Dakota Association of Counties, North Dakota League of Cities, North Dakota Township Officers Association, and the North Dakota Appraisers Association. The committee also may want to request PSC and the impacted parties to suggest methods to address the impact of wind energy development on the environment, including aesthetic impacts, the impact of

wind energy development on property values, the impact of wind energy development on agriculture, the advantages and disadvantages of implementing legislation for pooling or unitization of wind resources similar to that of the oil and gas industry, and the necessary processes for the decommissioning of a wind energy project.

ATTACH:1