

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ENERGY DEVELOPMENT AND TRANSMISSION COMMITTEE

Tuesday, November 24, 2009
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Rich Wardner, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Rich Wardner, John M. Andrist, Robert M. Horne, Joe Miller, George Nodland; Representatives Tracy Boe, Mike Brandenburg, Lee Kaldor, Todd Porter, Dave Weiler

Members absent: Senator Jim Dotzenrod; Representative Matthew M. Klein

Others present: Tim Mathern, State Senator, Fargo

Representatives Shirley Meyer and Lisa Wolf, members of the Legislative Management, were also in attendance.

See [Appendix A](#) for additional persons present.

It was moved by Senator Andrist, seconded by Senator Nodland, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

COMPREHENSIVE ENERGY POLICY STUDY - TRANSMISSION

Mr. Bill Malcolm, Manager, State Regulatory Affairs, Midwest ISO, made a presentation ([Appendix B](#)) on what the Midwest ISO provides for services and for whom. He said the Midwest ISO has recently completed a winter reliability assessment, and demand is approximately half of capacity. He said electricity sales are expected to be down 9 percent due to the recession. He said the Midwest ISO received a United States Department of Energy grant for a smart grid project. He said the Midwest ISO has a midwest transportation expansion plan of 576 projects with \$4.3 billion of investment. He reviewed the new generator interconnection cost allocation approved by the Federal Energy Regulatory Commission in October 2009. He said the old cost allocation formula placed 50 percent of the cost with the interconnection customer and 50 percent with the transmission owner. He said the new cost allocation formula places 90 percent with the interconnection customer and 10 percent under the Midwest ISO postage stamp for lines 345 kilovolts and above; for lines under 345 kilovolts, the total cost is with the interconnection customer. He said the Midwest ISO is conducting a regional generator outlets study to develop transmission for mandates in Iowa, Illinois, Indiana, Michigan, Minnesota, Missouri, Ohio, and Wisconsin.

In response to a question from Senator Wardner, Mr. Malcolm said the reserve market for electricity will be transferred to the Midwest ISO on January 6, 2010.

In response to a question from Senator Miller, Mr. Malcolm said the new cost allocation formula is a benefit to this state because of the export of wind energy.

In response to a question from Senator Horne, Mr. Malcolm said the best solution for wind integration would be for the storage of electricity. He said wind energy and electric cars work well together because the car can be charged in the middle of the night. He said if there is too much wind to integrate into the system, the system would need a price signal, a mandatory curtailment, or plants to be taken off line.

In response to a question from Representative Kaldor, Mr. Malcolm said the license plate rate design is based on where the power sinks. He said the postage stamp rate design is based on the average over the system.

Mr. Scott Scovill, Director of Wind Development, NextEra Energy Resources, provided testimony to the committee. He said it is unfair for the generator to pay for all of the transmission. He said there will have to be further action on cost allocation.

In response to a question from Representative Kaldor, Mr. Malcolm said interconnection customers are generators like wind farms and coal plants.

COMPREHENSIVE ENERGY POLICY STUDY - PUBLIC SERVICE COMMISSION UPDATE

Mr. Tony Clark, Commissioner, Public Service Commission, presented written testimony ([Appendix C](#)) on recent energy developments and transmission issues. He said the recent decision by the Federal Energy Regulatory Commission to approve the Midwest ISO tariff revision decreased the risk that North Dakotans will pay an unfair share of the cost of generation development in our state. He said under the former pricing rules, North Dakota utilities were on the hook to pay for 50 percent of the transmission upgrades when new generation was brought on line. He said North Dakotans were expected to pay 50 percent of those costs even when the power was for the benefit of consumers elsewhere. He said under the new tariff, the generator will pay 100 percent of the costs, unless a project is above 345 kilovolts, in which case the

generator pays 90 percent and 10 percent of the costs is shared across the entire Midwest ISO footprint. He said siting fees totaled \$1,197,250 during the 2007-09 biennium. He said in the current biennium, developers have paid a total of \$230,000. He said the Public Service Commission returns the unspent portion of the fees to the developer. He said since the beginning of the 2007-09 biennium, the Public Service Commission has refunded \$718,414.13.

In response to a question from Senator Horne, Mr. Clark said the fees are used for anything to process the permit, including consultants, travel, and direct out-of-pocket expenses. He said staff time is not included. He said most of the fees are refunded. He said the fees are placed in a special fund and some of the fees are held back for future inspections.

In response to a question from Senator Wardner, Mr. Clark said under the new formula, the developer pays 100 percent and that cost is rolled into rates, most likely through a power purchase agreement. He said the developer paying 100 percent can create an unfair situation. He said under open access, others can use the same transmission for free. He said this is like building a highway for one additional car and having that car pay for the highway, even though others can use the highway. He said the new cost allocation is better than the old cost allocation.

COMPREHENSIVE ENERGY POLICY STUDY - FEDERAL ACTION

Ms. Sandi Tabor, Vice President, Administration and Policy Development, Lignite Energy Council, made a presentation ([Appendix D](#)) on federal legislation and issues and lignite study initiatives. She reviewed the Waxman-Markey bill, the Kerry-Boxer bill, and the energy bill. She provided the economic impact of the Waxman-Markey bill. She reviewed Environmental Protection Agency regulatory initiatives to regulate carbon dioxide emissions, mercury, air quality, and coal combustion byproducts. She reviewed the Clean Water Restoration Act, which would change the definition of navigable waters to give the federal government jurisdiction over all waters in the United States. She reviewed the lignite study initiatives, including the beneficiated lignite marketing study, the lignite-based advanced generation technology systems study, and the carbon dioxide capture technologies and costs associated with lignite-based power plants study.

In response to a question from Senator Andrist, Ms. Tabor said there are congressional members who think coal can be removed as an energy source.

COMPREHENSIVE ENERGY POLICY STUDY - TAX INCENTIVES

Mr. Ryan Rauschenberger, Deputy Tax Commissioner, made a presentation ([Appendix E](#)) on the three primary incentives for wind--sales tax exemption, property tax reduction, and income tax credit.

In response to a question from Senator Nodland, Mr. Rauschenberger said income tax information for developers is confidential because there are fewer than five users of the credit. He said the sales tax exemption is for anything used on a wind farm before the expiration in 2015. He said some wind farms are assessed at 3 percent because they were built during the time at which property tax was 3 percent.

Senator Andrist said the wind incentives were to launch the industry. He said developers are standing in line to create wind energy in this state. He said there do not need to be incentives for wind energy. He said North Dakota exports 70 percent of its energy and exports the incentive with the energy.

Representative Brandenburg said in 2001, a wind tower would pay approximately \$7,000 in property tax in Minnesota and \$20,000 in North Dakota. He said the Legislative Assembly balanced the states with the reduction to 3 percent. He said this placed a tax of approximately \$6,000 per tower on the wind company. He said we were competitive with Minnesota and South Dakota until those states changed their tax to be based on the cost of generation. As a result, he said, this state was at twice the cost per tower. He said the Legislative Assembly reduced the tax from 3 percent to 1.5 percent to make the tax competitive. He said if the tax had remained at 10 percent, there would be no tax collected because wind farms would not have been built in this state.

Ms. Sara Hewson, Tax Department, answered questions for the committee. In response to a question from Senator Horne, Ms. Hewson said Minnesota has a generation tax of .012 per kilowatt-hour. She said South Dakota is based on depreciated costs at the local level. She said North Dakota is comparable to South Dakota.

In response to a question from Representative Kaldor, Ms. Hewson said this state uses a combination of the income approach and the cost/depreciation approach. She said the cost/depreciation approach is weighed heavier because some companies do not provide income information. She said the depreciation is 2.5 percent per year, which is book depreciation.

Representative Brandenburg said North Dakota appears to have a better tax policy than Minnesota and South Dakota.

WIND EASEMENT AND WIND ENERGY LEASE PROVISIONS STUDY

At the request of Chairman Wardner, committee counsel presented a handout ([Appendix F](#)) entitled *Wind Turbine Lease Considerations for Landowners* published by the North Dakota State University Extension Service. In addition, he provided wind energy leases from NextEra Energy Resources ([Appendix G](#)), Crownbutte Wind Power, Inc. ([Appendix H](#)), Basin Electric Power Cooperative ([Appendix I](#)), and Minnesota Power ([Appendix J](#)). He said he sent a letter requesting a copy of the wind

easement or lease from each developer in this state and had received four documents to date. The

following table summarizes key provisions in the leases or easements:

	Years	Confidentiality Clause	Underground Facilities Requirements Stricter Than Public Service Commission Rules	Noise	Other
Basin Electric Power Cooperative	45 + 10	For wind monitoring and operating data	Foundation removal to 48"	71 dBA or less at 650' from facilities	None
NextEra Energy Resources	99	General clause	Collection facilities buried to 48"	Not to exceed 50 dBA within 200' of residence	Waive right to jury trial
Crownbutte Wind Power, Inc.	40	None	None	None	Owner waiver of setbacks
Minnesota Power	50	None	None	Less than 50 dBA within 100' of dwelling	Most-favored nation payment

Mr. Scovill presented testimony on wind energy leases and easements. He said NextEra Energy Resources supports confidentiality agreements. He said NextEra Energy Resources encourages landowners to hire an attorney of the landowner's choice. He said NextEra Energy Resources compensates the landowner for attorney's fees. He said NextEra Energy Resources pays everyone the same in the same project. He said the marketplace determines the rates offered to landowners. He said landowners do not have to sign the lease. He said the wind energy business is highly competitive and NextEra Energy Resources wants confidentiality so that competitors do not learn from NextEra Energy Resources. He said NextEra Energy Resources does not want bidding wars. He said the confidentiality clauses are contained in private agreements between parties, and if the marketplace demands the removal of confidentiality clauses, then the confidentiality clauses will be removed.

In response to a question from Senator Wardner, Mr. Scovill said the financial terms in the agreement are at arm's length and should be private and not bantered around the community.

In response to a question from Representative Meyer, Mr. Scovill said although some people may wish to discuss the agreement and cannot due to the confidentiality clause, those people had to sign the agreement for the confidentiality clause to apply to them.

In response to a question from Representative Boe, Mr. Scovill said NextEra Energy Resources has never sued any landowner in North Dakota for violation of a confidentiality clause. The decision to sue would be based upon the damages caused by the violation of the clause.

In response to a question from Representative Weiler, Mr. Scovill did not have an example of when damages from violation of a confidentiality clause might result in a lawsuit.

In response to a question from Senator Nodland, Mr. Scovill said NextEra Energy Resources has an

escalation clause and payment clauses vary from state to state.

Senator Andrist said he does not like confidentiality clauses because they take away a person's free speech. He said NextEra Energy Resources has never sued, probably never will sue, and probably would lose if it did sue. He said it does not make any sense to have a confidentiality clause.

In response to a question from Senator Andrist, Mr. Scovill said a confidentiality clause allows NextEra Energy Resources to protect the economics in the project.

Representative Brandenburg said if a landowner is paid on a percentage, and the landowner violated the confidentiality clause by providing information to a competitor, the competitor could figure what was paid in the final power purchase agreement.

ALLOCATION OF WIND RIGHTS STUDY

Mr. Tom Factor, NextEra Energy Resources, provided information based on handouts ([Appendix K](#)) on the allocation of wind rights, including information on wind turbine sound and health. In addition, he read from *Romero v. Bernell*, 603 F.Supp.2d 1333 (D.N.M. 2009) ([Appendix L](#)). In particular, the case states:

Strictly speaking, the ownership of wind is a misnomer. Wind, in and of itself, does not appear to be susceptible of any ownership. It is not like oil and gas in place where there is a deposit of hydrocarbons which can be reduced to possession by one or more mineral owners of the tracts under which the hydrocarbon deposit resides. Wind itself is more akin to a wild animal or percolating waters which must first be reduced to possession before they have value. To reduce wind to "possession" appears to require that it be focused on driving the fins of a windmill which turn a generator and ultimately generates electricity. Then and only then can wind a) be reduced to possession and b) have value.

Mr. Factor said wind, oil, and water are significantly different. Comparing water and oil legislatively to wind is inappropriate. He said under present setbacks, there is a 3.2 rotor diameter dead zone surrounding a property line. He said most manufacturers require at least a 3 rotor diameter separation for maintaining a warranty. He said if there were greater setbacks, a small landowner could stop larger landowners around the small landowner from developing wind resources, and that would not be fair to the other landowners. He said the payment to landowners at present is the floor for which landowners are willing to have a wind tower. He said unitization would require additional money.

In response to a question from Senator Miller, Mr. Factor said 1.1 times the total height is approximately equal to 1.6 times the rotor diameter.

In response to a question from Senator Horne, Mr. Factor said if there is unitization then there will have to be another income source, besides the developer, to provide payments for impacts from wind farms. He said once impacts other than those related to real property are considered, there is an opening of Pandora's box.

In response to a question from Representative Kaldor, Mr. Factor said the Stillings' house is unique in that it is surrounded by wind turbines. He said there have been studies done on values of homes inside and outside the view shed of a wind farm. He said over time there is no diminution of property values as a result of a wind farm. He said some people like wind farms because they are progressive and people like the way they look.

Mr. Warren Enyart, Secretary, M-Power, LLC, presented testimony to the committee. He provided written testimony ([Appendix M](#)) in response to testimony at the previous meeting. He said he is the general manager and a founder of M-Power. He said M-Power consists of landowners in the Luverne Wind Farm. He said M-Power gathered property owners for a construction-ready transfer to Florida Power and Light for the development of a wind farm. He said when M-Power signed landowners there were no promises as to who got turbines. He said M-Power purchased a footprint. He said shareholders in M-Power are remunerated. He said some shareholders have turbines and some have no turbines. He said the most controversial issue is who gets a turbine and who does not get a turbine. He said being a shareholder of M-Power to some extent mitigates not getting a tower. He said the income is distributed to shareholders in an equitable manner from the power purchase agreement. He said landowners on the edge of a footprint may need to be compensated.

In response to a question from Senator Wardner, Mr. Enyart said everyone in M-Power voluntarily entered and received stock in the company. He said the stock was doubled when the project was on the ground.

In response to a question from Representative Brandenburg, Mr. Enyart said in future contracts M-Power would consider a margin for the peripheral of a footprint for a person who does not want to enter M-Power. He said there is a gentleman in the footprint who did not enter because he does not sign leases on principle; however, he supports the wind farm.

In response to a question from Senator Horne, Mr. Enyart said in the Luverne Wind Farm those located outside the wind farm were adequately addressed by current siting guidelines.

Senator Mathern presented testimony based upon handouts ([Appendix N](#)) that relate to his petition for a reevaluation of setbacks, the notification of members of the Legislative Assembly of his petition, and the response to the petition. He said there must be support for business and families affected by wind. He said people have had concerns about wind but are afraid of being sued. He said he filed a petition in support of their position. He said there should be a means by which to protect unique individuals and deal with people who are damaged by wind development. He said there must be promotion of North Dakota ownership of wind farms so that this state does not become an energy colony. He said wind farms do not have enough local ownership. He said the more people are involved in the process, the more people are willing and able to deal with the downside of wind development. He said there should be a focus on the Public Service Commission. He said the Public Service Commission is confusing to people. He said each commissioner should have expertise in particular areas. He said the design of the Public Service Commission should be reviewed.

In response to a question from Senator Wardner, Senator Mathern said M-Power began as a local wind developer but sold the project to a large out-of-state wind developer. He said the profit made by large out-of-state corporations should be made by North Dakotans.

Mr. Ron Rebenitsch, Manager of Alternative Technologies, Basin Electric Power Cooperative, made a presentation ([Appendix O](#)) regarding wind rights and project development. In addition, he provided a white paper ([Appendix P](#)) on setbacks, siting, and allocation of wind rights. He said siting involved choosing the best wind sites for economic reasons and balancing tower placement with landowner concerns relating to cropland, access, proximity, and lack of interest. He said after exclusions areas are mapped, the areas that may have a wind tower are greatly limited. He said siting is critical because a 15 percent increase in wind speed yields a 50 percent increase in production. He said the effects of adjacent turbines is less than 2 percent if within three rotor diameters for crosswind. He said for predominant wind, the separation would have to be approximately five rotor diameters to have less than a 2 percent effect. He said the cost to the project developer for a wind turbine is \$3 million to \$5 million

and includes the transmission risk, two to three years of wind studies, engineering, permitting risks, operating risk, market risk, and tax risk. He said the landowner risks one-quarter acre to one-half acre of land per turbine for \$4,000 to \$7,000 per turbine per year. He said the key points to consider are whether a nearby landowner should have virtual veto rights over a neighbor's land. He said wind is not "produced" on the wind site and could be considered an interstate resource. He said existing projects should be considered when establishing new rights.

In response to a question from Senator Wardner, Mr. Rebenitsch said Basin Electric Power Cooperative blades and waters roads continuously and pays for this upkeep. He said Basin Electric Power Cooperative avoids an area for a wind turbine if there is an environmental reason not to place the turbine at that location.

In response to a question from Representative Meyer, Mr. Rebenitsch said there are spots where there may be too much wind. He said high gusts shut down the wind tower at 56 miles per hour. He said North Dakota has fairly steady wind which makes it ideal for the location of wind towers. He said the goal of Basin Electric Power Cooperative is to place wind towers at least five rotor diameters away from each other.

In response to a question from Senator Nodland, Mr. Rebenitsch said Basin Electric Power Cooperative improves section lines with gravel, geotextile fabric, and a ditch. He said roads on private property are left as flat as possible.

Mr. Dennis Stillings, Valley City, provided a DVD presentation for the committee, a copy of which is on file in the Legislative Council office. The DVD includes three papers on the siting of wind turbines.

Mr. Jim and Ms. Mary Ann Miller, Luverne, provided testimony on the impact of wind facilities. Mr. Miller said he had to spend a night in the basement when there were high winds because of the loud noise. He said when there is not any wind, the turbine still turns and there still is noise. He said when it is quiet the noise sticks out more. He said the generator makes noise as well as the blades. He said he is now experiencing shadow flicker and it is disturbing.

Ms. Miller said her aluminum venetian blinds do not block the shadow flicker in her office. She said the only place there is no flicker is in the bathroom with the door shut. She said she raises dogs and the dogs are affected by the shadow flicker.

Mr. Miller said the tower making the flicker is 1,800 feet away from his home. He said the flicker lasts 20 minutes to one and one-half hours per day.

In response to a question from Senator Wardner, Mr. Miller said one turbine causes the bulk of the problem. He said as the sun moves, another may cause flicker as well.

In response to a question from Senator Nodland, Mr. Miller said the flicker began after the last meeting of the Energy Development and Transmission

Committee. He said the flicker begins at about 8:00 a.m. and continues until around 9:30 a.m. He said the standard of no more than 23 hours in a year for flicker will be met by December.

Ms. Miller said the flicker takes away her most productive time of the day in her office. She said she invested everything in the farm where she lives and has her business, and it is not fair that a wind farm can impact her life this severely. She said North Dakota citizens are unable to protect themselves from large out-of-state companies. She said these companies are not willing to work with individuals because it would set unwanted precedents. She said people are afraid to speak out against wind farms because the neighbors may be offended and because of confidentiality clauses. She said people did not know that the wind farm would have the effects it has on people.

In response to a question from Senator Wardner, Ms. Miller said wind developers should provide more information up front. She said there should be larger setbacks from residences. She said there should be a one mile setback from residences. She said NextEra Energy Resources offered a contract ([Appendix Q](#)) of \$6,000 a year in exchange for the release of claims by her and her husband. She said she did not accept the contract because it gives claims to her property to NextEra Energy Resources.

In response to a question from Representative Brandenburg, Ms. Miller said the contract from NextEra Energy Resources was objectionable because it locked in her property for 99 years, but allowed NextEra Energy Resources to back out of the agreement with 30 days' notice.

In response to a question from Representative Brandenburg, Ms. Miller said the only thing that NextEra Energy Resources could do to make her whole is to relocate her home and business. She said because of state policy, the same thing could happen to her in her new location.

In response to a question from Senator Wardner, Ms. Miller said there are many people in her situation and cited the example of a bed and breakfast owner's business that was destroyed by the wind farms. She said people used to visit the bed and breakfast from around the world. She said now the guests talk about how they hate the wind farm when they visit the bed and breakfast.

In response to a question from Senator Wardner, Ms. Miller said farmers cannot complain because they have signed the agreement. She said Florida Power and Light is not taking care of wind farms in other states and cited an example in California ([Appendix R](#)). In addition, she provided some sample letters ([Appendix S](#)) from individuals impacted by a wind farm.

In response to a question from Representative Boe, Mr. Miller said M-Power is the group that sold the site to NextEra Energy Resources. He said NextEra Energy Resources had alternative sites when the

Public Service Commission required NextEra Energy Resources to move a tower.

In response to a question from Representative Brandenburg, Ms. Miller said she is willing to work with neighbors so the moving of a wind tower is not unduly burdensome on her farmer neighbors.

Mr. Joseph Richardson, Richardson Farms, Fargo, made a presentation ([Appendix T](#)) on wind power development.

In response to a question from Senator Horne, Mr. Richardson said the system he proposes is not used in any state.

In response to a question from Representative Brandenburg, Mr. Richardson said the five rotor diameter standard does not address anomalous situations in which there is a 500 foot dropoff and any policy should allow the Public Service Commission to grant a variance for anomalous conditions.

In response to a question from Representative Porter, Mr. Richardson said competitive pressures make it a disincentive for landowners to voluntarily adopt the system he proposes.

In response to a question from Representative Porter, Mr. Richardson said his system addresses turbulence and fairness.

In response to a question from Representative Porter, Mr. Richardson said those paid under his system who do not have a wind tower, have wind. He said wind is reduced by a neighbor having a wind tower. He said the areas that would share are areas that the resource is not developable because it is inside a wind farm. Otherwise, he said, the wind resource would be able to be developed.

Mr. Doug Schonert, Burleigh County Commissioner, presented information on the study. He said wind developers should be bonded. He said some counties would not be able to handle the cleanup of an abandoned wind farm. He said he was for unitization. He said he has concerns with real estate values, and it would be difficult to sell a farmstead surrounded by wind towers. He said he is a real estate agent. He said there should be state direction in the area of wind development.

Mr. Tim Simons, Crownbutte Wind Power Inc., provided testimony on the study. He said he is against the new Midwest ISO cost allocation. He said wind towers need to be sited in the best places, which

is an exact science. He said a wind farm needs a financeable wind report. He said in western North Dakota neighbors are not downwind, but downhill. He said bonding is not necessary because a wind tower has approximately 350,000 pounds of high-grade steel valued at \$300 to \$500 per ton. He said each turbine has three tons to four tons of copper. He said the copper is worth \$120,000 to \$150,000.

Mr. Enyart said M-Power, is made up of 150 investors. He said there are 75 landowners in M-Power, and 74 are in favor of the wind farm. He said the Millers were at the first two meetings when M-Power began.

Mr. Factor said wind towers do not turn in low wind. He said the power from the local utility is for the oil pumps and lights. He said this power does not spin the rotor. He said NextEra Energy Resources considered the tower moves suggested by Mr. Miller; however, the placement of wind towers is very complex and NextEra Energy Resources was unable to honor his suggestions. He said the second turbine that Mr. Miller fears may cause flicker will not cause flicker because the sun will change trajectory on December 21. He said differences in terrain are the norm and not anomalous in North Dakota. He said a metal tower is a \$3 million asset. He said it is fully depreciated in 10 years and that is why there is a wait of 10 years before the Public Service Commission may require a bond.

Mr. Scovill said NextEra Energy Resources works with county road departments. He said sometimes roads are unable to be fixed immediately because of rain. He said NextEra Energy Resources has a \$2.5 million bond on roads. He said NextEra Energy Resources receives a call for every problem with roads and addresses these concerns as part of an ongoing relationship with the community.

No further business appearing, Chairman Wardner adjourned the meeting at 3:20 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:20