

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ENERGY DEVELOPMENT AND TRANSMISSION COMMITTEE

Wednesday, October 21, 2009

Bridges Room, AmericInn

Valley City, 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, George Nodland; Representatives Mike Brandenburg, Lee Kaldor, Matthew M. Klein, Dave Weiler

Members absent: Senators Jim Dotzenrod, Joe Miller; Representatives Tracy Boe, Todd Porter

Others present: Ralph Metcalf, State Representative, Valley City

Phillip Mueller, State Representative, Valley City

Richard G. Holman, State Representative, Mayville

Benjamin A. Vig, State Representative, Sharon

Senator Larry J. Robinson, member of the Legislative Management, was also in attendance.

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

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

DEVELOPMENT OF WIND AND OTHER NATURAL RESOURCES IN THE SAME LOCATION STUDY

At the request of Chairman Wardner, committee counsel presented a background memorandum entitled [Development of Wind and Other Natural Resources in Same Location - Background Memorandum](#).

Mr. Tom Factor, NextEra Energy Resources, answered questions for the committee. In response to a question from Senator Andrist, he said the anticipated life of a wind facility is 25 years, but the use of the land may be longer. He said if there is better technology after 25 years, a new wind facility could be built using much of the infrastructure remaining from the previous wind farm. He said in repowering a wind farm there most likely would need to be new spacing and new bases. He said generally wind towers are on top of hills and coal veins are in valleys. He said this removes much of the conflict in areas in which there are located coal and wind resources.

Senator Horne said there is no mandatory bond requirement for wind as there is for coal. He said the committee should review this issue.

Representative Brandenburg said the cost of the bond would be built into the price of electricity, ultimately paid for by the consumer. In addition, he

said, additional costs would make this state less competitive with other states for wind development. He said the rule allowing bond after 10 years is a good balance that allows the Public Service Commission to require bonds only when necessary. He said there are only a few companies in this state developing wind farms, and the companies can be monitored by the Public Service Commission.

In response to a question from Representative Brandenburg, Mr. Factor said when a turbine is new it has the intrinsic value of \$3 million to \$5 million plus its electricity generating capabilities. He said the price for the steel in a tower would cover the cost of decommissioning the tower.

Senator Wardner said the Legislative Assembly has had the policy of making wind competitive with other energy sources. He said the Legislative Assembly has created tax incentives in the area of sales tax, property tax, and an income tax credit. He said this state has a large resource in wind. He said the largest limiting factor for wind is transmission.

WIND EASEMENT AND WIND ENERGY LEASE PROVISIONS STUDY

At the request of Chairman Wardner, committee counsel presented a background memorandum entitled [Wind Easement and Wind Energy Lease Provisions - Background Memorandum](#). Attached to the memorandum was a document entitled *Landowner Guidelines for Evaluating Wind Energy Production Contracts*.

Senator Nodland said the landowner guidelines document would be useful for a person signing a wind lease or an oil lease.

Representative Brandenburg said when Florida Power and Light (FPL) came into his area it provided the contract and offered to pay for landowners to take the contract to a lawyer. He said FPL had the lawyer send the bills to FPL. He said people in his area chose the flat payment instead of the percentage of royalties. He said there is a balance to these negotiations and landowners need to do their due diligence. He said any regulation of wind easements or leases is a balance between allowing good companies to operate and keeping the poor companies out of the state. He said there will not be any development of wind if there are too many protections for landowners.

Mr. Scott Scovill, Director of Wind Development, NextEra Energy Resources, provided information to the committee. He said the most important contract clause to NextEra is the confidentiality clause. He said negotiations between NextEra and landowners are one-on-one negotiations. He said these negotiations take into account the particular needs and wants of the landowners and their families as to the use of the property of each landowner. He said each landowner has different concerns that should not be allowed to be shared with other landowners. He said choosing the percentage of royalties is risky for landowners. He said some companies have lesser value turbines and there is a lack of availability of parts that can have a turbine down for up to nine months.

In response to a question from Senator Wardner, Mr. Scovill said landowners have had concerns with coal leases and NextEra has moved collection lines so there is not any impact on coal development. He said some landowners do not want turbines. He said if the landowner does not want turbines, NextEra will end the negotiations.

In response to a question from Senator Wardner, Mr. Scovill said NextEra has paid every owner in the same project the same amount. He said the confidentiality clause is not so NextEra can pay one price to one landowner and another price to another landowner. He said this would create enormous animosity and would be bad business. He said people talk in coffee shops regardless of confidentiality clauses.

In response to a question from Representative Kaldor, Mr. Scovill said his company asked landowners to go to an attorney and has paid the attorney's fees. He said NextEra chooses the attorneys so that common concerns can be the template for the agreement for the project.

In response to a question from Senator Andrist, Mr. Scovill said when an individual negotiates an agreement, another person does not have the right to know what is in the agreement.

Senator Nodland said oil leases have changed the market payment over time from one-eighth to one-sixth to 18 percent to 20 percent. He said none of this information is confidential and is good for the marketplace.

In response to a question from Senator Horne, Mr. Scovill said the top concerns for landowners in negotiating leases are:

1. The continuation of farming and using the land. He said this includes how roads are built and located. He said farmers want to be able to move equipment.
2. Pricing terms.

Representative Brandenburg added as a concern of landowners, the number of turbines that the landowner can have.

Mr. Joe Richardson, Richardson Farms, Fargo, presented information on wind rights law. He said some landowners believe they cannot talk with the

committee because of confidentiality clauses. He said confidentiality clauses create a constitutional issue. He said he is opposed to confidentiality clauses. He said in the sale of land the information on the sale is open information. He said a closed market protects one person's interests over another. He said having the information available would allow the state to have the information to make policy determinations. He said wind farms should disclose production. He said then people would have a basis to make a determination on whether to have royalty payments or fixed payments. He said information for oil wells is quite specific. He said the same information should be provided for wind towers. He said a confidentiality clause would prohibit him from telling a prospective buyer of the land how much he was receiving unless the developer allowed the sharing of the information. He said most confidentiality clauses allow a person that discusses the matter with financial advisors, bankers, family, or attorneys to have these people recognize and maintain the confidentiality of the information. He said this places a burden on the landowner to have these people sign a document agreeing to follow the confidentiality clause before sharing any information. He said he had more information on wind rights at www.windrights.blogspot.com.

In response to a question from Senator Andrist, Mr. Richardson said he is not aware of any instance in which a wind farm developer had taken legal action against a landowner for violation of a confidentiality clause. He said because of the time length of the contracts there will be plenty of opportunity in the future.

Representative Mueller provided information to the committee. He said as a policy, wind development should occur. He said it is important for a landowner to know about lease provisions. He said having information available is good for landowners and the industry. He said it would provide a better image for the industry and would be good business practice. He said the policy issue is how much the Legislative Assembly should regulate or not regulate the landowner and developer relationship.

Senator Wardner said the state needs development of the industry but needs to take care of the people that will live here.

In response to a question from Representative Brandenburg, Representative Mueller said if landowners are violating confidentiality agreements on a regular basis, perhaps the clauses should be regulated as to provide everyone with the information.

In response to a question from Representative Kaldor, Representative Mueller said the new law on confidentiality clauses was a compromise.

Representative Kaldor said there may be unintended consequences to coffee shop conversations that occur many years from the time of the conversation because the confidentiality clause is continuously in effect. He said a person should be allowed to sign a confidentiality clause if that person

agrees to it. He said there are some things some landowners want to keep secret.

Mr. Randy Richards, Chairman, Steele County Board of County Commissioners, presented information to the committee. He said the main complaint he receives about wind development is the damage to infrastructure. He said the roads are damaged by the many trucks it takes to build and maintain wind towers. He said some townships do not have zoning regulations, bonds, or exit strategies for wind facilities, and the townships should address these areas. He said there should be a blueprint available of what political subdivisions should do in response to wind development. He said wind developers are not as conscientious about driving on muddy roads and ruining the roads as local inhabitants. He said landowners without turbines complain more about roads than landowners with turbines. He said there is a great impact on the infrastructure and the amount of property taxes is not enough to deal with the damage, especially considering the high price of road construction.

In response to a question from Senator Andrist, Mr. Richards said if the Legislative Assembly cuts property taxes for wind energy facilities, the Legislative Assembly needs to replace that money so counties can fix roads. He said the local area likes the economic development of wind tower construction and operation.

Senator Andrist said when the Legislative Assembly gives a property tax exemption, the Legislative Assembly takes local political subdivision funding sources.

In response to a question from Senator Andrist, Mr. Richards said there should not be tax relief given to wind power developers if the wind power developers will come to this state regardless of the incentive.

Senator Nodland said he was a county commissioner and the same conversations relating to wind were held in relation to the oil industry. He said the wind industry needs to be a good citizen and contribute to the roads the wind industry needs for wind development.

Representative Brandenburg said in his area the wind farm pays \$300,000 in property tax, of which \$125,000 goes to the county for roads. He said roads are bad during the construction phase but get better after that phase of wind development is complete.

In response to a question from Senator Horne, Mr. Richards said he would support a wind impact fund. He said when wind has explosive growth in this state there is going to be an even larger impact. He said not all of the traffic from construction will go away, especially as to traffic to control stations.

ALLOCATION OF WIND RIGHTS STUDY

At the request of Chairman Wardner, committee council distributed a background memorandum entitled [Allocation of Wind Rights - Background Memorandum](#).

Mr. Kevin Cramer, Commissioner, Public Service Commission, presented information on recent activities of the commission and the studies relating to wind energy. He provided handouts ([Appendix B](#)) on Public Service Commission siting regulation for energy conversion facilities and for transmission facilities, on wind turbine decommissioning rules, and any energy conversion facility siting criteria. He said he was asked to provide the commission's views on wind rights and setbacks. He said the siting policy for wind towers is being developed over time. He said in the beginning there were 1,000-foot setbacks from residences and now the setback is 1,400 feet or more. He said this change came because of information on noise and keeping noise under 50 decibels. He said there is an occasional exception to the setbacks because a landowner may want an exception. He said flexibility is important for unique circumstances. He said for the siting of an energy conversion facility, the commission cannot override a local jurisdiction. He said the commission can extend a setback over a local jurisdiction setback. He said the commission has precedent and this precedent is set on science. He said the commission is required to have a hearing at the place of the wind farm. He said the commission's hearings are evidentiary in nature. He said at these hearings the commission is not a policymaker, but is judge and jury. He said if someone brings in a document without making the author available for cross-examination, this could be hearsay and there may be an objection. He said the rules of evidence apply to the hearing and make it difficult for laymen to testify. He said the commission has waived the rules of evidence because the commission members are able to apply the rules to the testimony after it has been received. He said six years ago there were five megawatts of wind power in this state and by the end of this year there will be 100 megawatts. He said the commission is updating rules on decommissioning and, in particular, as to wind farms near coal mines.

In response to a question from Senator Wardner, Mr. Cramer said there are 5,000 megawatts of wind development in the queue in North Dakota.

In response to a question from Senator Wardner, Mr. Cramer said not all wind development companies are equal. He said the Public Service Commission authority is as to siting and does not apply to land companies or merchants that collect leases for wind developers. He said the review by the Public Service Commission for siting is not an economics review.

In response to a question from Senator Andrist, Mr. Cramer said mineral leases and surface rights are separate. He said mineral rights supersede the surface rights. He said there are negotiations taking place between the coal and wind industries as to the issue of collocation. He said there are large transmission lines in coal country and coal country is windy. He said the wind developers and coal companies should be able to work out their differences.

In response to a question from Representative Brandenburg, Mr. Cramer said there is cultural confusion by people that want wind power but object to having other electricity on the line that provides the wind power. He said it is not economically feasible to build transmission solely for wind. He said the collaboration between wind and coal is good for the development of both energy sources. He said the withdrawal of Ottetail Power Company from the Big Stone II project is the result of that policy. He said investment was scared away by uncertain federal legislation. He said Big Stone II would have shored up transmission, given transmission to areas that want wind power, and given wind power to those areas.

In response to a question from Senator Andrist, Mr. Cramer said the amount of wind in the queue and the limited amount of transmission is a big concern. He said there must be decisions made by the Federal Energy Regulatory Commission on cost recovery. He said before the transmission is constructed there needs to be regulatory certainty. He said transmission lines are one of the few areas in which the federal government should have oversight because of the multijurisdictional nature of transmission lines.

In response to a question from Senator Horne, Mr. Cramer said presently there is not a problem with the location of wind and coal. He said the issue was elevated due to NextEra's intent to build 1,000 megawatts of wind towers in coal country.

In response to a question from Senator Horne, Mr. Cramer said the wind industry generally brags about productivity and how much energy is produced by wind farms and towers. He said although the information is not required to be reported, the information is available.

Mr. Scovill and Mr. Factor made a presentation ([Appendix C](#)) on wind turbine setbacks. Mr. Factor said the hardest thing about negotiations with landowners is telling the landowner that is not going to get a wind turbine.

In response to a question from Representative Klein, Mr. Factor said the slide showing beam paths shows paths from microwave communication towers that can be interrupted by the improper placement of wind towers. He said these beam paths must be avoided under Federal Communications Commission rules.

In response to a question from Senator Horne, Mr. Factor said NextEra models the entire site for night and for day. He said multiple turbines can have an additive effect on sound level. He said in modeling the site, NextEra looks at the worst possible scenario and makes setbacks based on that scenario. He said people hear the wind towers more clearly at night because there is no background noise masking the sound.

In response to a question from Senator Andrist, Mr. Factor said the decibel levels are measured at the edge of the residence.

In response to a question from Senator Andrist, Mr. Factor said for example, the sound from a wind tower would be 60 to 70 decibels at a wind speed of 25 to 30 miles per hour. However, he said, the wind would mask most of the sound. He said the perfect storm for the sound to be heard is if there is a house in a low area without any trees and with no insulation or poor insulation. He said just because a person can hear the sound does not mean the person is disturbed by the sound. He said different people have different sensitivities to the sound. He said the standard for shadow flicker of less than 1 percent of daylight per year equals approximately 30 hours per year. He said wind wakes are a two-way street and placing a wind tower in another wind tower's wind wake will affect both towers approximately equal because the wind blows in both directions.

In response to a question from Senator Wardner, Mr. Factor said NextEra has placed a wind tower on a property line and had the landowners share the compensation. He said wind towers have been placed closer than the 1.1 x height fall down setback from a property line and NextEra has offered to share compensation.

In response to a question from Representative Brandenburg, Mr. Factor said the perfect section of land could have four to five turbines. He said with a setback of five rotor links, a section can have only one turbine. He said this would run up the cost because the project would be spread out over a large space.

In response to a question from Representative Kaldor, Mr. Factor said shadow flicker is usually not a big issue because it is fairly infrequent.

In response to a question from Representative Kaldor, Mr. Factor said wind wake will dissipate over distance. He said if the air is turbulent, it reduces the wind wake. He said high speed wind corrects the wind wake quicker than stable air. He said a wind wake can travel up to two miles away. He said NextEra accepts a little loss due to wind wake of 1 percent to 2 percent.

In response to a question from Representative Brandenburg, Mr. Factor said although the wind blows from the northwest or southeast 75 percent of the time, it does not mean that wind towers may be placed closer east to west than north to south because of terrain considerations.

Mr. Jim and Ms. Mary Ann Miller, Luverne, provided testimony on the impact of wind facilities. Mr. Miller said NextEra never worked with him before construction. He said there three towers are close to his farm, which he purchased in 2004. He said he built a log house, barn, and road so that he could manufacture dog sleds and raise sled dogs. He said the wind farm has been divisive in his community because of landowners who want the project and landowners who do not want the project. He said the wind farm took away the major reason for moving to the Sheyenne River Valley--the peacefulness and the view. He said the construction and operation of the wind farm has produced power outages for his

manufacturing. He said he is not notified of when the power outages will happen. He said the wind facility is not a considerate neighbor. He said the wind facility did provide a generator but it is still difficult to plan around power outages in manufacturing. He said NextEra agreed to plant trees to mitigate shadow flicker and then did not. He said the noise wakes him in the middle of the night.

In response to a question from Representative Klein, Mr. Miller said green energy has a downside. He said he uses a phase converter to create three-phase power for his manufacturing. He said intermittent wind is not a good power source.

In response to a question from Representative Wardner, Ms. Miller said NextEra did not have a community dialogue for a cooperative relationship with neighbors and landowners as stated in NextEra's literature. She said NextEra came on her property without notice. She said NextEra is a poor neighbor.

In response to a question from Representative Brandenburg, Mr. Miller said he owns 32 acres. He said NextEra bought the generator and did not charge him for the generator. Ms. Miller said of many issues, the generator is one issue in which NextEra has worked with them.

In response to a question from Representative Brandenburg, Mr. Miller said a landowner has a right to have a wind tower, but a person should have a right not to live next to a wind tower. Ms. Miller said the wind tower brought only negative impact. She said she asked NextEra to move the towers, use different types of towers, or provide a property value protection plan. She said NextEra refused to do any of the three.

In response to a question from Senator Nodland, Mr. Miller said he had stable power until the construction of the wind farm. He said he has not been notified by his power company of the outages as well.

In response to a question from Representative Kaldor, Ms. Miller said she and her husband had three weeks to prepare information for the Public Service Commission and learn the procedures before testifying before the commission. She said this was not enough time to prepare information. She said many people are fearful to speak up against wind farms. She said people are afraid of the negative feelings that will be created by neighbors with wind turbines. She said she chose to live in North Dakota over Alaska. Mr. Miller said the towers are being placed at high points that will ruin the tourist value of the North Dakota countryside. Ms. Miller said the sound changes all the time. She said it sounds like living next to the ocean. Mr. Miller said it sounds like three semitrucks idling. Ms. Miller said she and her husband live in a log cabin that is not well-insulated and the noise travels through their home. Ms. Miller said if there are good rules, it will help NextEra as well as residents near the wind farm. She said there should be a one-mile setback from homes. She said

people who can hear the towers should be compensated.

Ms. Kathy Stillings, Valley City, provided information on the impact of wind facilities. She said she and her husband purchased a farmstead two years ago. She said the farmstead is seven acres. She said she and her husband purchased the farmstead because it was a quiet place. She said the wind towers create a relentless noise. She said the sound from the wind towers is a rhythmic pulsing sound. She said she has to wear earplugs at night.

In response to a question from Senator Horne, Ms. Stillings said she does not expect any changes in her circumstances. She said she was testifying because if she cannot be a good example, she can be a horrible warning.

Mr. Dennis Stillings, Valley City, provided testimony ([Appendix D](#)) for the committee. He said he moved here from Hawaii in 2006 because he liked the great silence. He said he had no knowledge of the wind farm when he purchased his land and did not find out about the wind farm until contacted by NextEra to put in collector lines across his property. He said NextEra destroyed his road. He said the wind farm created noise that is heard at a greater volume in the evening and night. He said the sound appears to be loudest from the third week in August to the third week in September. He said it was difficult to get a good night's sleep during this time. He said it is louder at night and he thinks it has to do with inversion layers caused by nighttime lows in the 30-degree to 40-degree range and highs during the day of 70 degrees. He said studies show there can be a 15-decibel increase at night. He said there is no scientific methodology to measure compliance, but the best measurement is the human ear.

In response to a question from Senator Wardner, Mr. Stillings said the sound is a health factor because he cannot sleep. He said it is difficult to develop scientific conclusions relating to public health as they relate to sound from wind towers because of many variables. He said this was the case with electromagnetic fields for which standards were raised over time as health effects were discovered. He said the pulse low frequency sound wave exposure to people that is constant, necessarily must have an effect on the people. He said wind farms create a divisiveness in the communities they are located. He has seen families and friendships broken over wind farms. He said the most negative impact is not greed and envy but the negative impacts that are caused to people that receive no compensation. He said one reason there are not many complaints made over the wind towers is due to North Dakota values.

Mr. Brad Crabtree, Spring Valley Township, provided written testimony ([Appendix E](#)) on correlated rights in wind energy development. He said he supports a unitization method and not allocating wind rights based on water law. He said western water law is a fiasco. He said there should be formula compensation based on the wind footprint. He said

states should have nothing to say about the compensation but should make the formula for the distribution of compensation. He said as wind turbines get larger and spread farther apart there will be more people affected by wind turbines do not receive compensation. He said formula compensation solves this problem. He said the problems created by not providing formula compensation will last for many generations. He said developers would be helped by not having to tell someone who is not getting a turbine but who is in the project area.

In response to a question from Senator Wardner, Mr. Crabtree said zoning is a least-favorite option. He said it is difficult for political subdivisions to have the resources and expertise to zone wind towers. He said different regulations by different political subdivisions create difficulties for wind development. He said the policy should be created by the state.

In response to a question from Representative Klein, Mr. Crabtree said providing 25 percent of the compensation to the landowner with the turbine is a mere starting point. He said the person with the turbine has a disproportionate burden. He said the person with the wind turbine will probably have most of the wind resources. He said the formula would come into play if there were a shared wind resource.

In response to a question from Representative Weiler, Mr. Crabtree said if a person with 320 acres had a turbine and the payment was \$4,000, \$1,000 would go to the landowner for the turbine. He said the

landowner would receive a good portion of the \$3,000 distributed under the formula.

In response to a question from Representative Kaldor, Mr. Crabtree said a person with a small parcel could have a higher impact than the proportion of the footprint. He said one proposal is to proportion based on acres in the project with 25 percent to the landowner.

In response to a question from Representative Nodland, Mr. Crabtree said the oil model of unitization is not perfect but is a useful model.

Ms. JoAnne Wold, Luverne, provided testimony to the committee on the impact of wind facilities. She said wind development ruined roads. She said she owns a quarter section and can count 52 towers from her farm. She said she does not like the way wind towers look. She said she does not like the lights on top of wind towers. She said she had to purchase new drapes to block the lights. She said she will have to build a berm and plant trees on it to block the view.

No further business appearing, Chairman Wardner adjourned the meeting at 3:50 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:5