LETTER OPINION
2008-L-03

April 2, 2008

The Honorable Susan E. Wefald
The Honorable Tony Clark
The Honorable Kevin Cramer
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioners Wefald, Clark and Cramer:

Thank you for your letter asking whether the Public Service Commission (PSC) has the authority under N.D.C.C. § 49-02-27 to adopt rules governing the decommissioning of commercial wind energy conversion facilities with a generating capacity of less than 100 megawatts (100,000 kilowatts). For the reasons explained below, it is my opinion that the PSC has the authority under N.D.C.C. § 49-02-27 to adopt rules governing the decommissioning of all commercial wind energy conversion facilities, whatever their generating capacity.

ANALYSIS

In 2007, the North Dakota Legislature passed House Bill 1317 ("H.B. 1317"), which gives the PSC authority to adopt rules governing the decommissioning of wind farms and individual wind turbines.[1] Codified as N.D.C.C. § 49-02-27, H.B. 1317 provides:

> **Power of commission to establish rules to decommission wind energy conversion facilities.** The commission may adopt rules governing the decommissioning of commercial wind energy conversion facilities. The rules may address:
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> 1. The anticipated life of the project;
>
> 2. The estimated decommissioning costs in current dollars;

[1] 2007 N.D. Sess. Laws ch. 505, § 1.

3. The method and schedule for updating the costs of the decommissioning and restoration;

4. The method of ensuring that funds will be available for decommissioning and restoration; and

5. The anticipated manner in which the project will be decommissioned and the site restored.

In November 2007, the PSC proposed rules implementing this statute. The proposed rules define "commercial wind energy conversion facility" as "a wind energy conversion facility of equal to or greater than five hundred kilowatts in total nameplate generating capacity."[2] Thus, if adopted in their current form, these rules would govern the decommissioning of all commercial wind farms and individual wind turbines with a generating capacity of at least 500 kilowatts (.5 megawatts).

Your question concerns the meaning of the phrase "commercial wind energy conversion facility." Part of that phrase, "energy conversion facility," is defined in N.D.C.C. ch. 49-22, the Energy Conversion and Transmission Facility Siting Act, as "any plant, addition, or combination of plant and addition, designed for or capable of . . . [g]eneration of one hundred thousand kilowatts or more of electricity."[3] You ask whether this definition applies to N.D.C.C. § 49-02-27, which does not define "energy conversion facility."

"Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears."[4] If a statutory definition "is limited by prefatory language such as 'in this title' or 'for the purposes of this title,' the legislature has expressly evidenced its intent that the definition have no application beyond that act."[5] For instance, the North Dakota Supreme Court held that, with the use of the prefatory phrase "in this chapter," the Legislature had expressly indicated its

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[2] Proposed N.D.A.C. § 69-09-10-01.
[3] N.D.C.C. § 49-22-03(5)(a).
[4] N.D.C.C. § 1-01-09.
[5] Edinger v. Governing Auth. of Stutsman County Corr. Ctr. & Law Enforcement Ctr., 695 N.W.2d 447, 452 (N.D. 2005); see also Northern X-Ray Co. v. State, 542 N.W.2d 733, 739 (N.D. 1996) (VandeWalle, C.J., concurring specially); State v. Pacheco, 506 N.W.2d 408, 410 (N.D. 1993); Ames v. Rose Twp. Bd. of Twp. Supervisors, 502 N.W.2d 845, 849 (N.D. 1993).

intent that the definition of "administrative agency" in N.D.C.C. § 28-32-01 only applies to N.D.C.C. ch. 28-32.[6]

Chapter 49-02, N.D.C.C., which provides the PSC with the authority to decommission wind farms, does not define "commercial wind energy conversion facility." The only definition of the last part of that phrase in the code is found in N.D.C.C. ch. 49-22. This definition, however, is preceded by the phrase "[i]n this chapter."[7] Thus, the definition of "energy conversion facility" in N.D.C.C. ch. 49-22 does not apply to N.D.C.C. ch. 49-02. Therefore, the meaning of the phrase as used in N.D.C.C. § 49-02-27 must be determined using the general rules of statutory construction.[8]

Under the general rules of statutory construction, "[i]f no definition to a word contained in a certain section is given, the word is to be understood in its ordinary sense, construed according to the context in which it lies, and interpreted to give a reasonable result."[9] But if the language of the statute is ambiguous or adherence to the strict letter would lead to an absurd result, a court may use extrinsic aids to interpret the statute.[10] "A statute is ambiguous if it is susceptible to meanings that are different, but rational."[11] When the meaning of a word used in a statute is doubtful, related legislation may be reviewed to determine the sense in which the word is used in that statute.[12]

The meaning of "energy conversion facility," as used in the phrase "commercial wind energy conversion facility," is unambiguous. The usual and accepted meaning of "facility," as found in The American Heritage Dictionary, is "[s]omething created to serve a particular function: *hospitals and other health care facilities.*"[13] Thus, a "commercial wind energy conversion facility" would be something created to convert wind energy for

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[6] Edinger v. Governing Auth. of Stutsman County Corr. Ctr. & Law Enforcement Ctr., at 452.
[7] N.D.C.C. § 49-22-03.
[8] Northern X-Ray Co., at 739 (VandeWalle, C.J., concurring specially) (applying usual rules of statutory construction after concluding that statutory definition of term limited to that title by prefatory language); Ames, at 849-50 (same).
[9] Ames, at 850; see N.D.C.C. §§ 1-02-02 and 1-02-03.
[10] State v. Fasteen, 740 N.W.2d 60, 63 (N.D. 2007); see N.D.C.C. § 1-02-39 (extrinsic aids include the object sought to be obtained, legislative history, and administrative construction); N.D.A.G. 2004-L-12 (reasonable construction of statute by administrative agency charged with its execution entitled to deference by the courts, unless it contradicts clear and unambiguous statutory language).
[11] Amerada Hess Corp. v. State ex rel. Tax Comm'r, 704 N.W.2d 8, 13 (N.D. 2005).
[12] Northern X-Ray Co., at 739 (VandeWalle, C.J., concurring specially).
[13] The American Heritage Dictionary 633 (4th ed. 2000); see Curtis v. Hyland Hills Park & Recreation Dist., No. 05CA2520, 2007 WL 686081 (Colo. App.) (concluding the term "swimming facility" is not ambiguous).

commercial use. This is generally referred to as a commercial wind farm or wind turbine. Ordinarily, the term is not understood to include only facilities capable of generating a certain amount of energy. Therefore, according to the plain language of the statute, the PSC has the authority to adopt rules governing all commercial wind farms and individual wind turbines, whatever their generating capacity. Thus, it is not necessary to look beyond the words of the statute to determine the Legislature's intent.[14]

Even if the meaning of the words "energy conversion facility" as used in N.D.C.C. § 49-02-27 in the phrase "commercial wind energy conversion facility" is considered ambiguous, the definition of "energy conversion facility" in the Energy Conversion and Transmission Facility Siting Act[15] would not control its meaning because N.D.C.C. chs. 49-02 and 49-22 were enacted for distinct purposes.[16] Chapter 49-22, N.D.C.C., regulates the siting of all different types of energy conversion facilities, so that they are sited "in an orderly manner compatible with environmental preservation and the efficient use of resources."[17] Section 49-02-27, N.D.C.C., on the other hand, seeks to prevent nonfunctioning or decommissioned wind turbines from cluttering the landscape, and returning the land on which they are sited to its original or other use. Although siting concerns may be less important for facilities with a relatively low generating capacity, all commercial wind generation facilities have the potential to contribute to the problem if not properly decommissioned. Applying the definition in N.D.C.C. § 49-22-03 to N.D.C.C. § 49-02-27 would mean that the PSC's rules would not apply to wind farms and individual wind turbines rated at less than 100 megawatts, even though they are at least as likely to be abandoned as are larger facilities. Such a result was likely not the Legislature's intent.[18]

This determination is also supported by the legislative history, which indicates that the Legislature intended to give the PSC broad discretion to determine how and when to regulate decommissioning wind farms and individual wind turbines. The conference committee's minutes indicate that the Legislature's objective was to prevent "ghost towns of wind generators" from tarnishing the landscape.[19] Testimony and data were

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[14] See N.D.C.C. § 1-02-05 ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").
[15] N.D.C.C. § 49-22-03(5).
[16] See Thornton v. N.D. State Highway Comm'r, 399 N.W.2d 861, 863 (N.D. 1987) (definition of "intoxicating liquor" in N.D.C.C. titles 5 and 19 does not control meaning of the term as used in N.D.C.C. § 39-08-01 because statutes have different purposes).
[17] N.D.C.C. § 49-22-02.
[18] Edinger, at 453 (statutes are construed to avoid absurd results).
[19] Hearing on H.B. 1317 Before the House Comm. on Finance and Taxation, 2007 N.D. Leg. (Mar. 29) (Statement of Sen. Anderson).

presented earlier regarding the cost of removing nonfunctioning wind turbines – a cost the landowner may not be able to afford after a wind turbine is abandoned by a utility company.[20]

Your letter mentions one committee member's statement that he was concerned North Dakota would not be competitive with South Dakota if wind farms rated at less than 100 megawatts "came under the strings of the Public Service Commission (PSC)."[21] This statement was made while the conference committee was discussing an earlier version of H.B. 1317 that included the same definition of "commercial wind energy conversion facility" that is in the PSC's proposed rules.[22] The conference committee eventually decided to examine how other jurisdictions regulate decommissioning. After reviewing information from other jurisdictions, a committee member noted that decommissioning is generally governed by "rules that have been set up by the PSC's, PUC's, or Energy Divisions of the states that address these issues."[23] Section 49-02-27, N.D.C.C., is actually based on a Minnesota Public Utilities Commission rule,[24] which, by statute, applies to wind farms with a capacity of at least 5,000 kilowatts (5 megawatts).[25] The one statement mentioning South Dakota is of little value in determining the entire Legislature's intent, even assuming that the statute is ambiguous, and cannot outweigh

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[20] Hearing on H.B. 1317 Before the House Comm. on Finance and Taxation, 2007 N.D. Leg. (Feb. 7).

[21] Hearing on H.B. 1317 Before the House Comm. on Finance and Taxation, 2007 N.D. Leg. (Apr. 2) (Statement of Rep. Brandenburg).

[22] Your letter also mentions that this prior version of H.B. 1317 contained Senate amendments with a definition of "commercial wind energy conversion facility" identical to the definition in the proposed rules but that the Senate later receded from these amendments. This implicitly raises the question of whether the Legislature intended to reject the definition. However:

> [A]s a matter of law, courts generally do not determine legislative intent based on the Legislature's failure to act on a measure. "[T]he defeat of legislation is not indicative of legislative intent, for public policy is declared by the Legislature's action, not by its failure to act." Warner and Company v. Solberg, 634 N.W.2d 65, 71 (N.D. 2001) (citing James v. Young, 43 N.W.2d 692 (N.D. 1950)). See also Coles v. Glenburn Public School District No. 26, 436 N.W.2d 262, 265, n.2 (N.D. 1989).

N.D.A.G. 2004-L-43 (quoting N.D.A.G. 2003-L-32).

Thus, the fact that the definition was not included in the final bill does not determine the validity of the identical definition in the proposed rules.

[23] Hearing on H.B. 1317 Before the House Comm. on Finance and Taxation, 2007 N.D. Leg. (Apr. 9) (Statement of Rep. Brandenburg).

[24] Hearing on H.B. 1317 Before the House Comm. on Finance and Taxation, 2007 N.D. Leg. (Apr. 11) (Statement of Rep. Brandenburg); Minn. R. 7836.0500 (2007).

[25] See Minn. Stat. § 216F.01 (2007).

the bulk of the legislative history indicating that the Legislature intended to give the PSC broad authority to adopt decommissioning rules for commercial wind energy conversion facilities, whatever their generating capacity.[26] No other statements were made to support the idea that North Dakota's statute should mimic South Dakota's and apply only to wind farms and individual wind turbines with a generating capacity of at least 100 megawatts.

In conclusion, the definition of "energy conversion facility" in N.D.C.C. § 49-22-03 does not apply to the term as used in N.D.C.C. § 49-02-27. A "commercial wind energy conversion facility" means a commercial wind farm or individual wind turbine capable of generating any amount of electricity. Therefore, the PSC has the authority to adopt rules governing the decommissioning of commercial wind energy conversion facilities with a generating capacity of less than 100 megawatts.

Sincerely,

Wayne Stenehjem
Attorney General

mio/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[27]

[26] See Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993) ("Random statements by legislative committee members, while possibly useful if they are consistent with the statutory language and other legislative history, are of little value in fixing legislative intent.").
[27] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).