

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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**IN THE MATTER OF LOOKOUT  
SOLAR PARK I, LLC’S PETITION  
FOR DECLARATORY RULING  
REGARDING WHETHER A PERMIT  
IS REQUIRED FOR AN ENERGY  
CONVERSION FACILITY**

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**STAFF’S RESPONSE TO  
DECLARATORY RULING**

**EL17-056**

COMES NOW, Commission Staff and hereby files this response to the Petition for Declaratory Ruling filed by Lookout Solar Park I, LLC (Lookout Solar).

As a preliminary matter, Staff notes that any opinions or argument expressed herein are limited to the discussion of siting jurisdiction and do not transfer to issues of jurisdiction where the physical boundaries are difficult or impossible to ascertain.

No energy facility may be constructed in South Dakota without first obtaining a permit from the Commission. SDCL 49-41B-1. A solar facility capable of generating one hundred megawatts or more of electricity is an energy conversion facility pursuant to the definition provided in SDCL 49-41B-2(6). Therefore, such a facility must obtain a permit as required by SDCL 49-41B-4 and file notification as required by SDCL 49-41B-5.

No party argues that this facility would not need a permit if it were located on non-tribal land. However, as this facility is located entirely on tribal land within the boundaries of the Pine Ridge Reservation, there is a question as to whether or not a permit is required.

**I. The Commission should decline to exercise jurisdiction**

The Commission does not have jurisdiction to require a siting permit for the construction of a facility located wholly within the boundaries of a Native American reservation. State regulatory jurisdiction is preempted by virtue of tribal sovereignty.

Indian tribes have regulatory authority over tribal members and nonmembers on Indian land. However, the existence of tribal regulatory authority does not itself preclude concurrent state exercise of jurisdiction. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 US 134 (1980). The determination of whether the state has regulatory jurisdiction over nonmembers on-reservation is a fact-specific determination made by engaging in a “particularized inquiry into the nature of the state, federal, and tribal interests at stake.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145. The examination is commonly referred to as the *Bracker* Balancing Test. In order to determine whether the state’s authority is pre-empted by tribal or federal jurisdiction, one must engage in an analysis to determine the degree to which the state regulation interferes with tribal interests, what interests the regulation seeks to promote.

Exercising state jurisdiction for a solar facility permit on a reservation does not advance a strong state interest. Examining the four factors the Commission must consider, provided by SDCL 49-41B-22, before issuing a permit, it is clear that the State’s interest is de minimus.

Any interest in promoting economic development within the reservation would be an interest most held by the tribe itself. Any interest in protecting or controlling land development and protection also lies with the tribe and federal government. Moreover, because this project is subject to the NEPA process, any argument that state regulatory authority is needed in order to protect the environment is diminished. The federal government, through the NEPA process and its other responsibilities as a trustee, is charged with ensuring threats of serious injury to the environment and to the social and economic condition of inhabitants on reservations do not occur.

Because the state does not have a strong interest in exercising siting authority over a solar project on the Pine Ridge Reservation, the Commission should find that the Lookout Solar facility does not require a siting permit pursuant to SDCL 49-41B.

As for the effect orderly development, pursuant to SDCL 49-41B-22(4), the land is owned by a tribal member, rather than the project developer. Thus, it is an issue of land use on the reservation by a tribal member. In that context, the tribe possesses authority to creating zoning ordinances and determine allowable use of the land. See, *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 US 408 (1989) (Supreme Court holding that tribe's zoning authority does not extend to non-members). The landowner can develop the land as he sees fit, provided it is in compliance with tribal laws and ordinances.

While there are cases establishing tests to determine whether the tribe has regulatory authority over this project, that question is not before the Commission. Therefore, Staff limits its discussion to whether this Commission should exercise jurisdiction.

## **II. Conclusion**

The Lookout Solar Project does not require a permit from the Commission. However, because state regulatory jurisdiction over nonmembers on-reservation is a fact-specific determination, any decision regarding Lookout Solar should not be considered precedent-setting or assumed in any way to apply to other situations of regulatory authority on-reservation. Staff takes this position strictly and exclusively with respect to this particular project.

Staff particularly notes that in the case of siting, solar farms are significantly different from wind farms in terms of their visibility and potential impacts on surrounding landowners.

Therefore, it is particularly important, even in the context of siting, to emphasize that this is case by case and not precedential in any way.

In conclusion, Staff recommends the Commission find that Lookout Solar need not apply for a siting permit on the grounds that the Lookout Solar project will have minimal impacts on state interests and any potential interests are further mitigated by the fact that this project will go through a NEPA process.

Staff recommends the Commission not reach the question posed as to whether the Commission has jurisdiction on the Pine Ridge Reservation, as the general question is unnecessary because this issue can be more appropriately handled on a case-by-case basis.

Further, after review of the letter submitted by Lookout Solar regarding the 34.5kV electric transmission line, it is clear that the electric line does not require a permit. Staff agrees that Lookout Solar does have the option to apply for a permit when one is not required by law. However, Staff notes that a great deal of time and resources must be dedicated to processing any application and would, therefore, hope that Lookout Solar would reconsider its decision to seek a permit from the Commission. While we appreciate Lookout Solar's dedication to the process, the application would unnecessarily divert Staff time from required filings, the quantity of which promises to be large in the coming year.

Dated this 29th day of December 2017.

  
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