BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY DAKOTA RANGE I, LLC AND DAKOTA RANGE II, LLC FOR A PERMIT OF A WIND ENERGY FACILITY IN GRANT COUNTY AND CODINGTON COUNTY, SOUTH DAKOTA, FOR THE DAKOTA RANGE WIND PROJECT	* * * * * * *	**STAFF'S POST-HEARING BRIEF** **EL18-0003**

COMES NOW Commission Staff by and through its attorneys of record and hereby files this post-hearing brief in the above-captioned siting proceeding.

I. Preliminary Statement

For purposes of this brief, the South Dakota Public Utilities Commission is referred to as "Commission"; Commission Staff is referred to as "Staff"; Dakota Range I, LLC and Dakota Range II, LLC are referred to jointly throughout this brief and are referred to as "Dakota Range" or "Applicant". Reference to the transcript of the Evidentiary Hearing will be "EH", followed by the appropriate page number. Prefiled testimony that was accepted into the record will be referred to by the exhibit number.

II. Jurisdictional Statement

The Applicant filed for a permit to construct a wind energy facility. The Commission has jurisdiction over siting permits for wind facilities greater than one hundred megawatts pursuant to SDCL Chapter 49-41B. SDCL 49-41B-25 requires the Commission to make complete

findings in rendering a decision on whether the permit should be granted, denied, or granted with conditions within six months of the filing of an application for a wind energy facility permit.

III. Statement of the Case and Facts

On January 24, 2018, the Commission received an Application for a Facility Permit for a wind energy facility (Application) from Dakota Range I, LLC, and Dakota Range II, LLC. Applicant proposes to construct a wind energy facility to be located in Grant County and Codington County, South Dakota, known as the Dakota Range Wind Project (Project). The Project would be situated within an approximately 44,500-acre project area, ten miles northeast of Watertown, South Dakota (Project Area). The total installed capacity of the Project would not exceed 302.4MW nameplate capacity. The proposed Project, expected to be completed in 2021, includes up to 72 wind turbine generators, access roads to turbines and associated facilities, underground 34.5-kilovolt (kV) electrical collector lines connecting the turbines to the collection substation, underground fiber-optic cable for turbine communications co-located with the collector lines, a 34.5-kV to 345-kV collection substation, up to five permanent meteorological towers, and an operations and maintenance facility. The Project would interconnect to the high-voltage transmission grid via the Big Stone South to Ellendale 345-kV transmission line which crosses the Project Area. Applicant estimates the total construction cost to be $380 million. Parties filed prefiled testimony pursuant to a procedural schedule set by the Commission.

Pursuant to ARSD 20:10:22:40, the Commission established a deadline of March 26, 2018, for submission of applications for party status.

IV. Statement of the Issues

The issue to be decided in this matter is whether pursuant to SDCL 49-41B and ARSD 20:10:22, the permits requested by the Applicant for a wind energy facility and a transmission facility should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation or maintenance as the Commission finds appropriate. Specifically, the Commission must determine whether the Applicant met its burden of proof with respect to each element of SDCL 49-41B-22 for each of the two requested permits. If the Commission finds that the Applicant has met its burden and the permits is granted, the next issue the Commission must address is what, if any, conditions should be added to the permits.

V. Burden of Proof

Pursuant to SDCL 49-41B-22 provides that the Applicant has the burden of proof to establish that:

> (1) The proposed facility will comply with all applicable laws and rules;
> (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

In addition, the administrative rules state that the Applicant "has the burden of going forward with presentation of evidence…" ARSD 20:10:01:15.01.

Therefore, the next question is: What standard shall be applied to determine if the Applicant has met the burden of proof? The general standard of proof for administrative

hearings is by preponderance, or the greater weight of the evidence. *In re Setliff*, 2002 SD 58, ¶13, 645 NW2d 601, 605. It is erroneous to require a showing by clear and convincing evidence. *Dillinghan v. North Carolina Dept. of Human Resources,* 132 N.C. App. 704, 513 S.E.2d 823 (1999). "Preponderance of the evidence is defined as the greater weight of evidence." *Pieper v. Pieper*, 2013 SD 98, ¶22, 841 NW2d 787 (citation omitted). Black's Law Dictionary defines preponderance of the evidence as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black's Law Dictionary (10th ed. 2014).

Each element must be established by reliable, probative, and substantial evidence of such sufficient quality and quantity that a reasonable administrative law judge could conclude that the existence of facts supporting the claim are more probable than their nonexistence. *U.S. Steel Min. Co., Inc. v. Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor,* 187 F. 3d 384 (4th Cir. 1999).

If the Applicant meets its burden of proof, South Dakota code does not give the Commission any discretion regarding whether to grant a permit. The siting chapter provides no authority for the Commission to search outside of the four elements listed in SDCL 49-41B-22 for additional burdens of proof in deciding whether to grant or deny an application.

However, the Legislature has clearly indicated that it intended for the Commission to very carefully and thoroughly scrutinize applications for siting permits. This is evidenced by its

passage of SDCL 49-41B-12, which provides for a deposit and a filing fee to investigate, review, process, and notice the application. Because the Legislature established a fee to support the investigation into permit applications, it is apparent that the Legislature intended for an extensive and complete review of the application. It would not have done so if it did not expect this to be a high bar. Such a high bar protects the land and the citizens of this state, as well as adds legitimacy to all applications that are granted.

VI. Argument

Staff and Applicant were able to agree on the majority of the conditions appropriate for a permit, if granted. Therefore, Staff limits its post-hearing brief discussions to remaining issues.

A. Environment

Staff has agreed to five proposed conditions to the permit to address some environmental concerns, including Conditions 10, 15, 16, 34 and 35. Exhibit A18. However, Staff remains concerned about the impact this proposed Project would have on grasslands and the wildlife dependent on that grassland habitat. As noted in the Direct Testimony of Tom Kirschenmann, there are potential direct and indirect impacts to wildlife and wildlife habitat within and near the project area. Exhibit S2 Page 5. Mr. Kirschenmann indicated that there are academic studies such as the Loesch and Shaffer and Buhl studies which indicate that wildlife avoids the area around wind turbines. Exhibit S2 Page 12. This avoidance can occur by up to 300 meters from a turbine. EH 101:16. Such an avoidance is extremely concerning as numerous turbines within the proposed Project would be located within 1,000 feet of the property of non-participating landowners. Exhibit A-27. Based on this, it seems apparent that

the construction and operation of turbines as proposed could cause negative impacts to wildlife that would otherwise reside on the property neighboring the turbines and owned by non-participating landowners. Staff continues to have concerns that the Applicant refuses to implement measures to mitigate these effects. However, based on the Commission's recent decision to not impose a mitigation condition in Docket EL17-055, Staff does not propose a condition on mitigation at this time.

B. Cultural Effects

At the evidentiary hearing in this proceeding, Staff witness Ms. Olson agreed to three proposed conditions regarding cultural resources, including Conditions 11, 12 and 12 which addressed the concerns indicated in Paige Olson's direct testimony. Exhibit A-18. Ms. Olson and Staff remain in agreement that these conditions alleviate the concerns Ms. Olson raised concerning cultural resources within the scope of her expertise. However, it is imperative to note that Ms. Olson's testimony and Staff's agreement to the conditions do not include a review of the significance of any cultural resources with Tribal significance in the Project area. As indicated by Ms. Olson, a review of the significance a cultural resource may have to a Tribe is not within the scope of Ms. Olson's expertise and position with SHPO. As such, Ms. Olson recommended that the Applicant consult a THPO who could provide a review of the resources in the area to determine whether cultural resources in the areas have Tribal significance and make recommendations as to how to protect that resource. Exhibit S3-Page 4 lines 2-6.

C. Turbine shifts

During the evidentiary hearing on this matter, the Applicant requested a number of turbine shifts from the initial turbine map be approved by the Commission as a part of this

proceeding. Staff has no objection to the shifts of turbines 34a, 60a and A12a as described in Exhibit A15-3. Staff has reviewed the shifts and agree that these shifts do comply with the applicable statutes and rules as well as the conditions proposed by the Parties. Staff believes it is appropriate for the requested shifts to be addressed in this proceeding.

ARSD 20:10:22:04 (7) states that "any amendments to the application shall be filed in the same format required of the applications." This provision appears to contemplate that changes to the initial application may be necessary during a proceeding. The request for these turbine shifts was made during a full contested case proceeding where all participating Parties had the opportunity to review the shifts and cross-examine the Applicant. The participating Parties also had the opportunity to address the shifts in a post hearing brief while members of the public have had the opportunity to submit comments on the matter in the docket. In this case, Staff believes it is appropriate to treat the requested turbine shifts as an amendment to the initial Application.

Additionally, allowing the Applicant to request a turbine shift during the proceeding for an initial application for a permit promotes judicial efficiency by preventing additional proceedings before the Commission. In the most recent Commission order granting a permit for a wind energy facility, the Commission included a provision that permits the Applicant to move each turbine up to 325 feet in any direction without further Commission approval as long as all other permit conditions are met.[1] In the Order, the Commission also approved a procedure for an Applicant to file a request before the Commission for approval of ay turbine

[1] See EL17-055-Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry

shifts of 325 feet or more.[2] Similar conditions have been proposed in this docket.[3] If the Commission were to impose these conditions on a permit issued in this proceeding, but the turbine shifts requested in this proceeding were not approved, the result would likely be an additional filing for a turbine shift. As such, Staff supports the Commission approving the requested turbine shifts as described in Exhibit A15-3 in any permit the Commission may issue in this docket.

D. [BEGIN CONFIDENTIAL]

[2] See EL17-055-Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry
[3] See Exhibit A15-3.

[END CONFIDENTIAL]

E. Aircraft Detection Lighting System

Staff recommends the permit, if granted, contain a condition requiring installation of an aircraft detection lighting system (ADLS). Recent precedent exists for this requirement, as it was order in Docket No. EL17-055. Both Ms. Mogen and Ms. Kaaz requested ADLS. See Exhibit S1 pages 176 and 179.

As discussed in greater detail in the decommissioning section of this brief, Xcel Energy will own the Project. Xcel Energy currently owns and operates five wind farms in Minnesota and North Dakota. If the wind farms in North Dakota do not already have light-mitigating technology installed, Xcel will be required to install, operate, and maintain light mitigating technology by North Dakota law for these wind farms by December 31, 2021.[4]

One option Xcel Energy has to fulfill this requirement is to install an advanced detection lighting system, and Xcel Energy will likely request to recover this investment from Xcel Energy customers in each jurisdiction. As demonstrated by the testimony of Staff witness Jon

[4] North Dakota law requires that all wind energy projects approved after June 5, 2016, must have systems in place by December 31, 2019, and projects approved before that date must have systems in place by December 31, 2021. See NDCC 49-22-16.4.

Thurber, Xcel Energy is a public utility subject to the regulatory authority of this Commission. EH 300:25 – 301:2. Therefore, South Dakota ratepayers would be asked to pay for a portion of the costs to install light mitigation systems on Xcel Energy's wind farms in North Dakota. If South Dakota customers are requested to pay for this technology to minimize viewshed impacts to North Dakota residents around company-owned wind facilities, it is fair and reasonable to provide similar viewshed benefits to South Dakota residents near company-owned wind facilities in South Dakota.

F. Decommissioning

Several concepts for decommissioning have been discussed or eluded to. The record demonstrates that the Project will ultimately be owned and operated by Xcel Energy, a public utility subject to the regulatory requirements of this Commission.[5] Therefore, decommissioning in this circumstance may differ from most recent wind siting dockets. Four methods of decommissioning have been discussed recently. Those are: 1) a decommissioning bond, 2) the decommissioning process typically followed by rate regulated utilities, 3) a letter of credit, and 4) an escrow account. Each is discussed below, and for the reasons discussed below, Staff recommends decommissioning be handled through Xcel Energy's rate proceedings.

1) Decommissioning Bond

Staff notes that Staff sent intervenors a data request to determine what mitigation measures they would suggest. Intervenor Kristi Mogen suggested a decommissioning "bond of $200,000 per turbine, with periodic increases for inflation, decommissioning, and reclamation."

[5] See Exhibit A21

See Exhibit_JT-2 Page 3 of 5 to Exhibit S1. Staff merely notes this data request response to acknowledge that this recommendation was made.

2) IOU Standard Asset Process (Staff's Recommended Method)

It is Staff's understanding that the Project will be wholly owned by Xcel Energy prior to the start of construction. Thus, no work will be done or facilities erected until Xcel Energy has assumed ownership. Reasonable and necessary decommissioning expenses are included in a regulated utilities cost of service that is used to determine the companies' retail rates. Xcel Energy's retail customers will ultimately fund the decommissioning of the Project throughout the useful life of the Project. The Commission has the ability to review updated decommissioning cost estimates and the decommissioning funds collected through rates at the time of each rate proceeding. If Xcel Energy does not have a rate case within a reasonable period of time, the commission may initiate a proceeding to review the Project's decommissioning cost study and financial assurance plan. Xcel's high credit rating suggests Xcel Energy has the financial means to fulfil its obligations.[6]

Pursuant to SDCL 49-41B-29, the transfer of the permit to Xcel requires Commission approval. If for any reason, at the time approval for said transfer is sought, the Commission wishes to revisit the decommissioning issue, the Commission could approve of the transfer contingent upon such decommissioning assurance the Commission feels appropriate under the circumstances at that time.

[6] http://investors.xcelenergy.com/Credit-Ratings - S&P A-, Moody's A2.

Staff recommends that because the Project will be owned and operated at all times by an investor-owned utility regulated by the Commission, the Commission follow the standard process for decommissioning of a utility asset. However, Staff takes no position and makes no representation at this time as to any future prudency determination which might be made in a future proceeding involving the investor-owned utility that is not a party to this proceeding.

3) Letter of Credit

A standby letter of credit (SLOC), also known as a guaranty letter of credit, is a tool whereby the issuing bank agrees to pay the beneficiary if the bank customer defaults on its obligation. Black's Law Dictionary (10th ed. 2014). A SLOC is typically used when there is reason to transfer the credit-worthiness from the customer to the bank. It is an excellent way to guarantee payment when dealing with a company with whom the Commission is relatively unfamiliar. The greatest advantage over an escrow account is that a letter of credit is typically not at risk for bankruptcy proceedings where the company, in the case the wind farm, is the debtor. In a bankruptcy proceeding, the greatest risk would be the court determining that fees paid by the company to the bank were preferential payments. However, courts have historically been loath to take that position.

It is typical for the SLOC to have an associated annual fee, which is generally 1-10% of the amount of the SLOC. This is a potential drawback of utilizing a SLOC if that cost were to be borne by ratepayers. Thus, it is necessary to engage in a risk versus benefit analysis in order to determine whether the risk of Xcel defaulting on its obligation is too minimal to justify the added cost.

Another potential disadvantage to requiring a SLOC is the need to ensure the annual fee for the SLOC is paid by the company so that the SLOC does not expire or terminate. Therefore, if the Commission were to require the company to obtain a SLOC, it would be necessary to require annual proof be submitted to the Commission to ensure the SLOC remained current and in effect.

Because of the high fees associated with obtaining and maintaining a SLOC, Staff does not recommend this method of security in this circumstance.

4) Escrow Account

An escrow account is "an account held in trust or as security." Black's Law Dictionary (10th ed. 2014). If the Commission were to order an escrow account be set up, the following items should be taken into consideration.

Who will own the account? It is important to know what party or entity will be named on the account, whether it is the Commission, Dakota Range, Xcel Energy, the State of South Dakota, or some other entity. This is an essential determination, because the person that owns the account will incur certain rights and responsibilities. One important consideration is that depending on who is named on the account, it could be subject to liens and bankruptcy proceedings. Unfortunately, no party can waive or otherwise effect bankruptcy short of an act of Congress. In drafting the bankruptcy code, Congress expressly stated that the bankruptcy discharge voids judgments and operates as an injunction against the continuation of any action against a debtor personally, "whether or not discharge of such debt is waived." See 11 U.S.C. § 524(a)(1) and (2). Congress has determined that so-called "bankruptcy waivers" are against public policy. Bankruptcy courts have held that bankruptcy waivers are "unenforceable as

being in conflict with the purposes of Bankruptcy laws." See example, *Bisbach v. Bisbach,* 36 B.R. 350, 352 (Bankr.W.D.Wis.1984). Because an escrow account is a tangible asset with actual value at any given time, it has potential to be taken in a bankruptcy proceeding. This is not the case with a decommissioning bond, which does not have value until a condition precedent occurs.

Other considerations include where to establish the escrow account and what to do with surplus, if any, when decommissioning occurs. Theoretically, if Xcel ratepayers were responsible for the payments into the escrow account, the ratepayers would get any surplus after decommissioning. This also leads to the question of who will pay taxes on any gains. Concerning where the account will be held, it is important to note that the Federal Deposit Insurance Corporation (FDIC) only insures up to $250,000 in bank deposits.[7]

Therefore, if the Commission were to order an escrow account be set up, Staff recommends Applicant be required to submit a plan addressing the above-mentioned concerns for Commission review and approval prior to construction.

VII. Conclusion

Staff recommends that if the Commission grants the permit for the Project, it do so subject to the conditions set forth in Exhibit A18, subject to any grammatical or clerical corrections the Commission might have, as well as the additional conditions recommended by Staff and those agreed to by Staff and Applicant.

[7] www.fdic.gov

Dated this 2nd day of July 2018.

Amanda M. Reiss

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