

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

EL 19-003

IN THE MATTER OF THE
APPLICATION BY CROWN
RIDGE WIND, LLC FOR A
PERMIT OF A WIND ENERGY
FACILITY IN GRANT AND
CODINGTON COUNTIES

REPLY BRIEF OF
INTERVENORS TO SECOND
MOTION AND MOTION TO
TAKE JUDICIAL NOTICE

Intervenors respectfully submit this Reply Brief in Support of Intervenors' Second Motion to Deny and Dismiss, and Motion to Take Judicial Notice, by and through the undersigned counsel.

I. Background and Introduction

1. The Intervenors respectfully submit this Reply Brief in support of Intervenors' Second Motion to Deny and Dismiss, and in reply to the Response of Applicant to Intervenors' Second Motion to Deny and Dismiss. Reference in this Brief to "Intervenors" refers to those Intervenors named and identified in the Notice of Appearance of David L Ganje dated and filed in the case on April 16th, 2019. Reference to "Applicant" or "CRW" is a reference to the named wind energy facility applicant in the above entitled proceedings EL19-003. Reference to "Application" is a reference to the filed application of the Applicant in the above entitled proceedings. Reference to "Project" is a reference to the Applicant's proposed wind energy

facility. Reference to “Page” numbers in the Brief is a citation to page numbers found in the filed Application. References to “Commission” or “PUC” are references to the South Dakota Public Utilities Commission. Reference to “law” is a reference to statutory law, administrative rules, or case law. Applicant filed the above entitled Application in EL19-003 on January 30th, 2019. That date is an important date for the Commission to consider when ruling on Intervenor’s Motion to Deny and Dismiss. At the time of filing this Motion the Project application procedure is substantially and substantively well underway.

2. The Applicant has failed to follow the law. The Application should be dismissed and denied under the facts, circumstances and law provided in this Motion. The Applicant, among other errors at law, failed to file an application generally in the form and content required by South Dakota law and rules related to a proposed permit for a wind energy facility. SDCL § 49-41B-13 (“An application may be denied ... at the discretion of the [PUC] for ... [f]ailure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder.”) Fair notice and the requirements of timely disclosure should not allow an applicant to leave open the possibility that applicant might later establish required facts, impacts, or project analysis to comply with State-created directives for the original content of an application. The Application is the window through which the Intervenors may look at the proposed Project. Three preliminary things are mandated by South Dakota law: the form of the application, the content of the application, and the compliance of the application with state law. SDCL § 49-41B-13(2).

3. An application for a wind energy facility must provide disclosures. SDCL § 49-41B; ARSD § 20:10:22. Specifically, under 49-41B-13(2): “An application may be denied, returned, or amended at the discretion of the Public Utilities Commission for: . . . Failure to file an application generally in the form and content required by this chapter and the rules

promulgated thereunder.” The plain meaning of the rules requires that Applicant demonstrate compliance, that is disclosure and explanation, with each of the factors found in SDCL § 49-41B and ARSD § 20:10:22. Otherwise, the purpose of requiring that a wind energy facility permit application include an express description of any information is meaningless.

II. Factual Background

4. On January 29, 2019, Applicant submitted that Mr. Massey and Mr. Wilhelm had “coordinated with landowners” regarding turbines and collector line locations. *Direct Testimony and Exhibits of Tyler Wilhelm and Sam Massey* 1 ll.12 – 14 (Jan. 29, 2019); *Id.* at 6 ll. 4 – 8 (Jan. 29, 2019) (“Development activities for the Project commenced in 2008. Over the past 10 years the CRW has been actively engaging stakeholders by working closely with landowners, tribal and local governments, and federal and state agencies to design the Project. Stakeholders have been approached directly to address concerns with the proposed siting and placement of the Project's infrastructure.”). Applicant had not coordinated with the Thompsons. *Thompson Affidavit* (emphasis added); *Wilhelm Affidavit* (filed May 23, 2019). CRW does not deny this.

5. No one from NextEra or Crowned Ridge (including Mr. Wilhelm and Mr. Massey) engaged with or directly approached the Thompsons in 2017, 2018, or 2019. *Wilhelm Affidavit* at ¶¶ 2-3.

6. Mr. Wilhelm “asked the land team to contact” Cheryl Thompson in February 2019. *Wilhelm Affidavit* ¶ 3. There is no indication that the land team contacted her. *Wilhelm Affidavit* ¶ 3-4.

7. On the same day, March 5, 2019, James Thompson emailed Mr. Wilhelm to alert him to the fact that official CRW Project maps were wrong in that they showed the Thompsons as participants when they were not. (“I was reviewing your windmill planning map and it appears to

not be accurate, can you help clarify? . . . the map erroneously indicates that our family farm . . . is under a lease agreement for wind dev. This is not accurate. Secondly, the map currently shows a dashed line indicating plans for a collection line dissecting our property (via the creek). This is also not true. No agreement/lease/pass through access has been authorized by us, our family. Please advise, thanks.”) Mr. Wilhelm did not respond in writing. Wilhelm Affidavit ¶ 9.

8. On March 19, 2019, the day before the Commission Public Input Hearing, James Thompson wrote to Tyler Wilhelm to request a follow-up. He noted that the official map continued to indicate the Thompson properties in the Project Site and he shared that the Thompsons would not be present at the hearing to defend their rights; therefore, he requested “immediate attention” to the mapping error implicating their family farm because the hearing was the next day and “the remaining steps to begin executing the project are wrapping up in April.” Wilhelm Attachment at 3. A clear indication was made that no agreement had been made, official maps submitted to the PUC were wrong, and the Thompsons were eager to know that revisions to the maps would be made forthwith. Affidavit ¶ 9; Wilhelm Attachment 3.

9. On March 19, Mr. Wilhelm emailed John and James Thompson to confirm that the maps were not correct and that they were currently being revised to show that the Thompsons were not participants in the Project. Wilhelm Attachment 3 at 1. Mr. Wilhelm noted that his intention in writing the letter was to “provide[] piece of mind” to the Thompsons. Wilhelm Attachment 3 at 2.

10. In the same communication, Mr. Wilhelm wrote that if the Thompsons did want to participate in the Project in the future, they would have to positively communicate as much to CRW only after they “FIRST consider” a right of entry agreement, a wind farm easement agreement, and a collection easement. Wilhelm Attachment 3 at 1.

11. Therefore, even if it was Mr. Wilhelm's "understanding that the Thompsons were interested in continuing to discuss the potential to participate," the fact is that a land status change affecting the Thompson's participation was confirmed for Mr. Wilhelm on March 19, 2019. Wilhelm Attachment 3 ("After further due diligence, our team was able to confirm that there was a mapping error and that the Thompson properties are not contracted . . . the Project Site plan is not accurate . . . Site Plan revisions are in process now to relocate the underground collection off of the property.") (emphasis added).

12. Nonetheless, on March 20, 2019, Mr. Wilhelm told Commissioner Nelson "that there had been no land status changes from the map filed on February 7, 2019." Affidavit ¶ 10. Mr. Wilhelm simply said: "No, sir" in response to Commissioner Nelson's question. Transcript of Proceedings Condensed 81 ll. 2-6 (Mar. 20, 2019). He provided absolutely no indication that properties on the official Project Site map submitted February 7, 2019, were not actually part of the Project. Affidavit ¶ 10.

13. At the same hearing, Mr. Wilhelm testified: "Crowned Ridge Wind has completed the necessary field surveys and micrositing of project infrastructure and adopted changes to the project site plan to ensure compliance with [] newly codified codes. Land easements have been obtained for 99 percent of the project's proposed infrastructure." Transcript of Proceedings Condensed 11 ll. 13-18 (Mar. 20, 2019).

14. On April 4, 2019, Russell Lloyd wrote to John and James Thompson for the first time since March 6, 2019, to request a phone call ("John/James, Can either of you give me a quick shout? –Russ Lloyd"). John Thompson replied they were not busy and asked for the subject matter of the call. Mr. Lloyd simply repeated his request for a phone call.

15. Even though Mr. Wilhelm told the Thompsons on March 19, 2019, that Site Plan revisions were in process at that time to relocate the underground collector off of the property (see above ¶11), Mr. Wilhelm claims that he “started working with the Crowned Ridge Wind team to analyze where the proposed underground collection could be relocated off of the Thompson’s property” on April 4, 2019, “the same day” John Thompson wrote to Russell Lloyd “I don’t think we are interested and are busy. What did you need?” Wilhelm Affidavit ¶ 11; Wilhelm Attachment 4 at 1.

16. No further communication was had until May 9, 2019, when John Thompson submitted an Affidavit to the PUC in these proceedings. Thompson Affidavit and Correspondence at 1 (“[NextEra] offered us a lease and we declined. They then told us they could not proceed without our Permission, and they would update the information and maps to show we were not participators. It has come to our attention that those maps have not been changed, nor has the Public Utilities Commission been informed of the error in the map or the lack of our participation.”)

17. On May 17, 2019, Intervenors submitted the Second Motion to Deny and Dismiss the Application.

18. On May 23, 2019, for the first time since filing its Application, Applicant submitted an updated parcel map. The map now shows that the Thompson property is inside the Project Boundary, though the color of the parcel has been changed from green to clear to indicate that the parcel is within the Project Boundary, that no lease agreement has been signed, and no lease is “pending approval.” Revised Figure 3: Project Map (May 23, 2019).

19. Despite testifying that “land easements have been obtained for 99 percent of the project’s proposed infrastructure” on March 20, 2019, Mr. Wilhelm submits that on April 4, 2019,

he found “six easement options had expired, and, therefore, the updated map shows those properties as pending rather than as participating.” Wilhelm Affidavit ¶ 11. There is no statement about when these leases will be obtained or whether the property owners are aware that they are in negotiations with CRW over expired leases. There is no explanation for why the Thompson easement matter and the other leases with pending expiration dates were not disclosed sooner.¹

20. The Commission and the Intervenors are now only learning of Applicant’s grave leasing and easement shortcomings because of Intervenors’ filed Second Motion, which forced Applicant to create a response in its attempt to explain Applicant’s failure to disclose. And in the response of Applicant we now learn of substantive, material, and inexcusable further examples of missing easements and non-existent agreements. Applicant’s Response to Intervenor’s Second Data Request §§ 2-1 – 2-3. None were disclosed to the Commission and Intervenors until May 23 and 24, 2019.

21. On May 10, 2019, Intervenors filed the Affidavit of John Thompson and Correspondence with the Commission. It is available as part of the *Pre-filed Testimonies and Exhibits; Supplemental Testimonies and Exhibits and Rebuttal Testimonies and Exhibits*, which is part of the official EL 19-003 docket, *In the Matter of the Application by Crowned Ridge Wind, LLC for a Permit of a Wind Energy Facility in Grant and Codington Counties*, as are many other documents cited in Motions, Replies, and Responses in EL 19-003.

22. The Affidavit of Lynch and references to the docketed testimony of Thompson are relevant, material, and not hearsay. Does the Lynch Affidavit address the issues raised in the Intervenor’s Second Motion? Yes. Are there facts from the Commission’s records and documents

¹ It will also be observed from Applicant’s latest submitted project map 3a2, concerning real estate identified as the Papio parcel, that a necessary collector line agreement accessing 18 proposed turbines in the northwest portion of the proposed Project is not legally established.

identified in the Affidavit to support the Motion? Yes. The Commission may take judicial notice and consider written, sworn testimony filed by Intervenors which were included in the docket on May 10, 2019. The Applicant's Response and Affidavit opposing the Second Motion to Deny and Dismiss admit the facts found in the testimony of Mr. Thompson filed by the Intervenors on May 10, 2019, and admit that those recited in the Lynch Affidavit in these proceedings are true.

23. The Applicant does not deny the facts. First, the issue of noncompliance with the continuing disclosure requirements of the siting rules are admitted in the Affidavit of Mr. Wilhelm. See above ¶¶ 1-17. And, further, Applicant's failure to comply is the very reason Mr. Wilhelm goes through word machinations to attempt to justify why the Applicant mislead the Intervenors and the Commission while acting in bad faith in this matter.

24. The assertion that Applicant "may" readjust the collector line based on pending easements, at this late date, is not made in good faith, nor it does provide the type of factual information necessary to support permitting the siting of a wind farm. The same is true for Applicant's statement that it "may" have a different collector line location for 25 turbines with a new landowner. Neither assertion discloses to the PUC or public that Applicant actually has the legal property rights it needs, or what configuration the Project will take—information which is essential to the PUC, the Intervenors, and community to determine whether laws have been followed and health and safety protections are firmly in place. There is no viable Application at this date.

25. Easement agreement statuses disclosed on May 23, 2019, were not previously disclosed. The list of recently submitted pending, unapproved landowner agreements is completely different than the list submitted with the original Application with the updated map.

However, no description for an alternative project is available to explain the considerable revisions to the map. Applicant has provided only that:

Landowner support of the project has been present for over 10 years and is showcased by the Applicant's ability to obtain the necessary wind leases to adequately host the Project. Many of the Project's landowners have been wind lease holders since development commenced in 2006 and elected to renew their leases multiple times over the course of development. Within the approximately 53,186-acre Project Area leases have been obtained for 374 parcels totaling approximately 45,935 acres of land or approximately 99% of the total Project Area.

CRWind Application § 7.1.

26. Moreover, Applicant has consistently and persistently changed the dates of when it would have complete landowner agreements in place and in reports to PUC Staff. Applicant's response to Staff's first data request. (Question 1-12): March 31, 2019; Applicant's response to Staff's second data request. (Question 2-41): March 31, 2019; Applicant's response to Staff's third data request. (Question 3-1): May 17, 2019; Applicant's response to Staff's fifth data request. (Question 5-4): June 20, 2019 The constant changes clearly show that the Application was not complete when it was initially submitted and is still not complete. Assertions in the most recent submission that Applicant "may" complete its responsibilities at some point in the future do not serve to complete the Application. Thus, the Application is not in a form that can be understood, much less approved. If the Commission goes forward at this late date with the incomplete Application, it would be a failure of the due processes of law as well as a failure to comply with statute and siting rules.

27. The Applicant knew at the time of filing the Application on Jan. 30, 2019. The Affidavit of Wilhelm does not deny this fact. The Applicant knew at the time of filing an updated official landowner map on Feb. 7, 2019. The Affidavit of Wilhelm does not deny this fact. The Applicant knew at the time of filing updated maps on Feb. 19, 2019. The Affidavit of Wilhelm

does not deny this fact. The Applicant knew at the time of filing for a CUP permit with Grant County on Feb. 18, 2019. The Affidavit of Wilhelm does not deny this fact. The Applicant knew at the time of filing an amended application for a CUP permit with Grant County on Mar. 15, 2019. The Affidavit of Wilhelm does not deny this fact. The Applicant knew at the time Applicant made representations to the Commission on Mar. 20, 2019. The Affidavit of Wilhelm does not deny this fact. The Applicant knew at the time Applicant submitted responses to Intervenors' Data Requests on Mar. 22, 2019. The Affidavit of Wilhelm does not deny this fact. The Applicant knew at the time Applicant submitted supplemental testimony to the PUC on Apr. 9, 2019. The Affidavit of Wilhelm does not deny this fact. And the Applicant knew thereafter—during all these times Applicant knew, but failed to disclose, that an important, relevant, and material easement agreement with the Thompsons did not exist. The Affidavit of Wilhelm does not deny this fact.

28. As of May 23, 2019, Applicant still has not disclosed all information regarding property rights or easements necessary to support underground collection and temporary construction access, underground collection, and to support alternate turbine locations and associated facilities, as they still do not exist—five months after Applicant first requested the permit and two weeks before an evidentiary hearing on the matter of the Application.

29. Applicant proposes to begin major construction activities for the proposed Project in August 2019. CRWind Application § 13.3.2.1.

III. The Application is Still Incomplete and Should be Denied and Dismissed

30. SDCL § 49-41B-11 sets out the requirements of an application for a wind facility permit. It specifies, in pertinent part: “All applications for a permit *shall be filed* with the Public Utilities Commission *not less than six months prior* to the planned date of commencement of construction of a facility in such form as prescribed by rules.” The initial application must contain,

among other things, a “[d]escription of the nature and location of the facility.” SDCL § 49-41B-11(2). When an application is filed “pursuant to SDCL 49-41B-11, an applicant shall also file all data, exhibits, and related testimony which the applicant intends to submit in support of its application.” ARSD 20:10:22:39. In this case, construction is set to begin August 2019. It is May, almost June 2019.

31. It is an applicant’s duty to verify the truth and accuracy of its initial application, which is “a continuing application, and the applicant must *immediately* notify the commission of *any changes of facts* or applicable law *materially affecting the application*. This duty continues up to and includes the date on which the permit is issued or denied.” 20:10:22:04(5). Black’s Law Dictionary defines material as: “Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. . . . Evidence offered in a cause . . . is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.” BLACK’S LAW DICTIONARY (2nd ed.; n.d.), <https://thelawdictionary.org/material/>. In this proceeding, Applicant seeks to place the burden of proof on Intervenor, and in so doing admits failing to follow its continuing duty to update the application, immediately, under the law. See *Response to Intervenor’s Second Motion to Deny and Dismiss* ¶ 5 (“Intervenor’s first set of discovery did not request an update to Map. [sic] 3. Instead, it was Staff in its Data Request 5-5 served on May 13, 2019 that first requested an updated Map 3.”). Intervenor is not obligated to request updates; Applicant is obligated to provide updates, immediately, by Rule.

32. The missing information is important, necessary, relevant, and goes to substantial matters in dispute; it also has a legitimate and effective influence on the Commission’s decision. Indeed, the fact that the Thompsons were never participating required Applicant to update its

project and map, a task which took a month-and-a-half, and which revealed that Applicant had failed to complete due diligence previous to submitting its initial application, two updates, and numerous supplements. *Id.* at ¶ 4. It was not until April that Applicant claims it discovered six expired easements, five months after submitting its initial application. *Id.* at ¶8; Thompson Affidavit and Correspondence at 1.

33. Under SDCL § 49-41B-25, the Commission is required to render a decision within six months of receiving an initial application for a permit to construct a wind energy facility, which must contain “complete findings” including a finding that “the construction of the facility meets all requirements of this chapter.” In order to make such a finding, Applicant must provide up-to-date information, including: “An evaluation of alternative sites considered by the applicant for the facility.” ARSD § 20:10:22:12(2).

34. Applicant has, to date, not provided an evaluation of alternate sites considered. Weak assertions that it was not aware of expired easements and wanted to ensure that it completed its due diligence, in May 2019, after failing to correct or update information in the Application for five months, are not adequate and do not serve to complete the Application.

IV. This Proceeding Denies Intervenors Due Process of Law

35. Pursuant to SDCL § 49-41B-5.2, an applicant is required “to notify, in writing, the owner of record of any land that is located within one-half mile of the proposed site where the facility is to be constructed. The notice is to contain a description of the location of the facility, and “the second published notice shall be made no later than twenty days prior to the date of the public hearing.” The PUC and public had a right to a complete application before the public hearing, in order to determine whether they should attend the hearing or intervene. In this case, it was not possible for Applicant to provide the notice required given that the proposed Project Site

plan was not yet final twenty days before the public hearing, March 20, 2019, and is still not final to date. See Response to Intervenor's Second Motion to Deny and Dismiss 3 ¶ 4 ("CRW completed the updating of the CRW Maps 18 days prior to the start of the evidentiary hearing on June 11, 2019. Therefore, CRW updating of the CRW Maps was timely."). Despite unsupported assertions to the contrary, submitting the "final" Project map, which indicates unresolved easement matters, two months after the public hearing is not timely and does not comport with timelines set forth in the law. This proceeding denies Intervenor's due process of law.

36. Parties cannot benefit from the opportunity to appear, present evidence, cross-examine the other parties' witnesses, and exercise the other rights afforded under SDCL Chapters 1-26, 49-1, 49-41B, and ARSD Chapters 20:10:01 and 20:10:22, if Applicant refuses to finish its Application. See Order for and Notice of Evidentiary Hearing 2. Filing a "still pending" map on May 23, 2019, is a violation of Intervenor's due process rights. It is also a violation of SDCL Chapters 1-26, 49-1, 49-41B, and ARSD Chapters 20:10:01 and 20:10:22.

37. Despite Applicant's inability to gain instruction from *In Application of Midwest Sec. Transfer, Inc.*, the fact remains: the case stands for the proposition that procedure adopted by an agency pursuant to the Administrative Procedures Act acquires the force and effect of law. 354 N. W.2d 728, 730 (S.D. 1984). As previously noted, in rejecting the argument, the *Midwest* Court reiterated that procedure adopted by an agency pursuant to the Administrative Procedures Act acquires the force and effect of law, even though it determined the procedure followed by the Commission in that case afforded the Intervenor adequate process. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelley*, 397 U.S. 254 (1970)).

38. Applicant does not deny that Intervenor and the PUC have a right to a timely application that is complete. *South Dakota v. U.S. Dept. of Interior*, 787 F.Supp.2d 981, 996. Nor does it deny that an agency that affirms an incomplete application precludes an interested party from

presenting certain colorable arguments to the ultimate decision maker. *Id.* (citing *Gerber v. Norton*, 294 F.3d 173, 182-185 (O.C. Cir. 2002) (declining to find harmless error where agency's violation of procedural rule prevented plaintiffs from commenting on certain evidence and plaintiffs specified three arguments they would have made if provided with the evidence in a timely manner) (citations omitted). The nature of the information withheld, the importance of the information relative to the entire file, how the information is used, and the additional arguments that would have been available had the information been obtained earlier are the grounds upon which the Court will make its decision. *Id.* (citation omitted). In this proceeding, it is difficult to determine the nature of the information withheld because it is still not forthcoming. By way of example, even though Applicant responded months ago that its land agreements were 99% complete, Applicant now tells the Commission it won't know if it has the necessary legal agreements until June 20, 2019. The information has direct bearing on whether the Commission should affirm the Application in that it consists of information relating to the Project Site configuration, a matter that goes to the heart of whether to permit construction to go forward under 20:10:22 and 49-41B.

39. Applicant does not deny that licensing hearings require notice and opportunity to be heard because they are contested cases. *Application of Union Carbide Corp.*, 308 N.W.2d 753, 756-57 (S.D. 1981) (holding that "contested case," as used in SDCL 1-26-1 (2), means an adjudicatory hearing). Nor does Applicant deny that the constitutional guaranty of due process of law applies to administrative proceedings, particularly where such proceedings are specifically classified as judicial or quasi-judicial in nature, as in this case. *Id.* (citing 2 Am.Jur.2d Administrative Law s 351 (1962)). Applicant does not deny that *Mathews v. Eldridge* stands for the Supreme Court holding that three factors must be considered and balanced when determining the constitutional sufficiency of procedures used to deprive an individual of their protected interest (the private interest implicated, the risk of an erroneous deprivation and value, if any, of additional

procedural safeguards; and the government's interest). And Applicant does not deny that Intervenors' property rights are a protected interest, that this is a contested administrative hearing, and that Intervenors have been deprived of the truth necessary to analyze and contest the Application. The reliance on the final evidentiary hearing to protect Intervenors' due process and property rights is misplaced.

40. In sum, the Applicant is here arguing against its own Application record. The Applicant is arguing against the fact that the Affidavit of Mr. Wilhelm and Applicant's Response to the Second Motion do not deny the failure of the Applicant to duly and timely advise the Commission and the Intervenors of the falsehood it perpetuated since March 19, 2019, until it needed to respond to Intervenors' Second Motion. And the Affidavit and records in the PUC docket show that Applicant admittedly does not yet have access to the 25 turbines that were to be connected with the Thompson connector line. That legal access is not in place. We are short weeks away from the hearing on the Application and the Application Project maps do not show any legal agreement in place. Such absence of substantial, timely-required information about the Project leaves Intervenors without relevant and project-based fundamentals and is a denial of due process of the law.

V. The Motion to Strike the Thompson Affidavit & Lynch Affidavit Should be Denied

41. The motion to strike the Thompson Affidavit and Lynch Affidavit should be denied. A sworn affidavit found in the proceeding docket of the Commission may be considered by the Commission, even if its consideration may contradict other rules of evidence. SDCL 1-26-19. The Thompson Affidavit has been filed as testimony in this proceeding.

42. Intervenor's filed written testimony including the Thompson Affidavit filed on May 10, 2019 was filed pursuant to the Commission's Order that Intervenor testimony be filed in this proceeding by that date. Under 20:10:01:22.06:

When ordered by the commission in a particular proceeding, testimony and exhibits shall be prepared in written form, filed with the commission, and served on all parties prior to the commencement of hearing on such dates as the commission prescribes by order. The front page of all prefiled testimony shall show the docket number, docket name, and name of the witness.

The Affidavit of Thompson referenced and incorporated in Intervenor's Second Motion was prepared in written form, filed with the commission, and served on all parties prior to the commencement of the hearing pursuant to the Commission's Order.

43. Under 19-19-901: "To satisfy the requirement of authenticating . . . an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Examples include: "Evidence that: A document was recorded or filed in a public office as authorized by law." 19-19-901(7). The Thompson Affidavit was filed with the Public Utilities Commission; it is authentic.

44. Applicant seeks to strike the Thompson Affidavit, and reference to it in the Motion. Yet, Applicant in its Responding Wilhelm Affidavit does not dispute the statements therein. After all, they are facts which relate to the immediate parties involved—the who, what, when, where and why as between the parties.

45. Applicant objects to portions of the Lynch Affidavit that reference the previously filed Thompson Affidavit. The Thompson Affidavit was duly filed with the Commission as testimony and has been filed in the Commission docket since May 10, 2019. Applicant in its Response and in Wilhelm's Responsive Affidavit to Intervenor's Second Motion to Deny and Dismiss do not deny the facts or allegations of the Thompson Affidavit. In fact, as this Reply Brief

shows, Applicant acknowledges the facts and is now attempting to change its assertion that a legal easement existed on the Thompson land, which would have allowed Applicant access to 25 turbines that are part of the proposed Project. These Affidavits are part of the Commission's own docket in EL 19-003; therefore, a formal request for judicial notice is unnecessary. However, the Commission may properly take judicial notice of its own records. *Negrete v. PetSmart Inc.*, No. 2:13-cv-01218-MCE-AC, 2013 WL 4853995, at 1 n2 (E.D. Cal. Sep 9, 2013) ("Defendants request that the Court take judicial notice of certain documents submitted in support of Defendants' Motion. (ECF No. 6-2.) These documents include Plaintiff's First Amended Class Action Complaint and Defendants' Notice of Removal filed in the present case. (*Id.*) These documents are part of the Court's own docket in this matter, and therefore a formal request for judicial notice is unnecessary. However, the Court may properly take judicial notice of court records.")

VI. Motion for Notice to be Taken

46. While the Commission may take judicial notice on its own in this matter, Intervenor's request and move that judicial notice be taken of the Thompson Affidavit pursuant to SDCL § 1-26-19 and SDCL § 19-19-201. SDCL § 19-19-201 provides that a court "[m]ust take judicial notice if a party requests it and the court is supplied with the necessary information." The Thompson Affidavit is subject to judicial notice. The Commission may take judicial notice of pleadings and filings in the proceedings before it. *See Owen v. State*, 272 Ind. 122, 129, 396 N.E.2d 376, 381 (1979); *Sanders v. State*, 782 N.E.2d 1036, 1038 (Ind.Ct.App. 2003). The Commission may take judicial notice of a fact, or of the contents of the pleadings and filings in the case before it, and a rebuttable presumption arises, which requires the opposing party to come forward with evidence to dispute. The Applicant has been provided an opportunity to rebut and deny the statements in the Thompson Affidavit. The Applicant filed a responsive

Affidavit in opposition to Intervenor's Second Motion. Applicant's Affidavit does not dispute the facts asserted in the Thompson Affidavit about the absence of a collector easement agreement. And equally as important, Applicant does not seek to strike paragraph 14 of the Affidavit of Lynch, which states:

The Applicant knew at the time of filing the Application on Jan. 30, 2019; at the time of filing an updated official landowner map on Feb. 7, 2019; at the time of filing updated maps on Feb. 19, 2019; at the time of filing for a CUP permit with Grant County on Feb. 18, 2019; at the time of filing an amended application for a CUP permit with Grant County on Mar. 15, 2019; at the time Applicant made representations to the Commission on Mar. 20, 2019; at the time Applicant submitted responses to Intervenor's Data Requests on Mar. 22, 2019; at the time Applicant submitted supplemental testimony to the PUC on Apr. 9, 2019; and thereafter—during all these times Applicant knew, but failed to disclose, that an important, relevant, and material easement agreement with the Thompsons did not exist.

VII. Conclusion

47. Intervenor respectfully move that the PUC deny and dismiss the Application in this matter based upon the law, constitutional grounds, and arguments presented in this Reply Brief, the Prior Brief, the Intervenor's Affidavits, and this Second Motion to Deny and Dismiss. Intervenor further move that the Commission take judicial notice of the filed testimony of Thompson filed with the docket on May 10th, 2019. To allow the Applicant, at this time, to amend or add significant and legally required Applicant content requirements, as well as substantive legal requirements, because of Applicant's own failures in filing an Application would misapply the purpose of any statute permitting amendment. The Application fails to comply with applicable laws and rules. Further, the Applicant is not able to carry its burden of proof, including proving that the Project will not pose a threat of serious injury to the environment. Finally, the Application fails to comply with required application form and content and fails to comply with South Dakota law as well as the rules of the Commission.

Dated this 27 day of May, 2019

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