STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF CODINGTON | THIRD JUDICIAL DISTRICT

TIMOTHY LINDGREN and LINDA LINDGREN, *Plaintiffs*, vs. CODINGTON COUNTY, *a political subdivision of the State of South Dakota*, CODINGTON COUNTY BOARD OF ADJUSTMENT, *an agency of Codington County, having issued a certain Conditional Use Permit, # CU018-007,* CROWNED RIDGE WIND, LLC, CROWNED RIDGE WIND II, LLC, BOULEVARD ASSOCIATES, LLC, *all other Persons having present or future interests in #CU018-007, and* SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, *having issued a certain Facility Siting Permit, Docket EL19-003, and all other Persons having present or future interest in a certain Energy Facility Permit issued by the South Dakota Public Utilities Commission in Docket EL19-003,* *Defendants*.	Case No. 14CIV19000303 **MOTION TO DISMISS AND MOTION FOR AWARD OF COSTS PURSUANT TO SDCL 21-24-11**

Defendant, South Dakota Public Utilities Commission by and through its attorneys of record, Kristen N. Edwards and Amanda M. Reiss, hereby respectfully submit this Motion to Dismiss for failure to state a claim upon which relief can be granted, failure to exhaust administrative remedies, and other grounds as discussed below. In addition, Defendant moves for an award of costs pursuant to SDCL 21-24-11.

STATEMENT OF THE FACTS

Pursuant to SDCL 49-41B-4, anyone wanting to build a wind generation facility greater than one hundred megawatts must first obtain a facility permit from the South Dakota Public Utilities Commission (Commission). This permit is separate and distinct from any permit that may be required at the local level.

On January 30, 2019, Crowned Ridge Wind, LLC (Crowned Ridge) filed with the Commission an application, pursuant to SDCL Chapter 49-41B, for a permit to construct a wind energy conversion facility to be located in the counties of Grant and Codington in South Dakota (CRW I Project). The application was docketed as Docket No. EL19-003 in the Commission docket filings. The CRW I Project is situated on approximately 53,186 acres in the townships of Waverly, Rauville, Leola, Germantown, Troy, Stockholm, Twin Brooks, and Mazeppa, South Dakota.[1] The CRW I Project, expected to be completed in 2020, includes up to 130 wind turbine generators.

Pursuant to ARSD 20:10:22:40, any interested persons had sixty days from the date the application was filed to intervene in the proceeding. The intervention deadline in this docket was April 1, 2019. An evidentiary hearing was held on June 6, 2019 and June 11-12, 2019. Plaintiffs reside within the project area of the CRW I Project but did not petition for intervention prior to the April 1 deadline. In fact, Plaintiffs did not petition for intervention until after the conclusion of the evidentiary hearing. On June 26, 2019, the Commission issued an order denying Plaintiffs' petition for intervention as untimely, finding the late intervention would unduly prejudice the rights of the other parties to the proceeding or be detrimental to the public interest.

[1] Crowned Ridge filed a letter in Docket No. EL19-003 on September 12, 2019, notifying the Commission that due to interconnection issues, the size of the CRWI and CRWII Projects will be decreased by 100 MW each. For this reason, the number of turbines and acres affected may be less than stated in this Motion.

Plaintiffs did not appeal from this denial. Therefore, Plaintiffs are not a party to the docket and cannot appeal the Commission's decision.

After considering all testimony and evidence on the matter, the Commission ultimately determined that, with the permit conditions, the CRW I Project did not pose a significant health risk to the inhabitants of the project area. A permit was issued on July 26, 2019. An appeal of this permit is pending in Codington County Circuit Court.

On July 9, 2019, Crowned Ridge Wind II, LLC (CRW II), a subsidiary of NextEra Energy Resources, LLC and a Defendant in this case, filed with the Commission an application to construct the Crowned Ridge II Wind Farm (CRW II Project). This application is pending before the Commission with a decision estimated for March 2020. CRW II's application is for a wind energy facility to be located in Codington, Deuel and Grant counties, South Dakota. The CRW II Project would be situated within an approximately 60,996-acre project area, located east of the city of Watertown. It includes up to 132 wind turbine generators and is expected to be completed in 2020.

When the CRW II application was filed, an intervention deadline of September 9, 2019 was established pursuant to ARSD 20:10:22:40. Again, Plaintiffs chose not to intervene.

ARGUMENT

A. Declaratory Judgment is improper pursuant to SDCL 21-24.

SDCL 21-24-1 provides that:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection

> on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

SDCL 21-24-10 provides that:

> The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Here, a plausible claim for relief under SDCL 21-24 does not exist since the requested judgment will not terminate the controversy surrounding Plaintiffs' property right claim with respect to the Commission.

The Commission has no jurisdiction over property rights. The Commission does not have the authority to appropriate land, rule on easements, or grant eminent domain. Because the Commission has no jurisdiction over property rights, the Commission is not an appropriate party to this Complaint for purposes of claims involving property rights.

Furthermore, the Supreme Court of the United States has held that

> A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297, 298, 63 S.Ct. 1070, 1072, 1073, 87 L.Ed. 1407; H.R.Rep. No. 1264, 73rd Cong., 2d Sess., p. 2; Borchard, *Declaratory Judgments* (2d ed. 1941) pp. 312—14. It is always the duty of a court of

> equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

Eccles v. Peoples Bank, 333 U.S. 426, 431, 68 S.Ct. 641, 92 L.Ed. 784 (1948).

Here, even if Plaintiffs had the option of a declaratory judgment, the action is not ripe. What Plaintiffs are alleging is that if the CRW I and CRW II projects are built and the noise and shadow flicker are as predicted by a computer model, then at some future time Plaintiffs might suffer damages. These claims are completely speculative in nature. At this point in time, it is impossible for the court or any of the parties to know whether the two projects will be built, if both are built, whether any noise and shadow flicker will actually cause damages and to what extent. The Complaint is simply too anticipatory and is not ripe enough to go forward.

The entire Complaint is premised on the assumption that an event will occur in the future and that not only will Plaintiffs be damaged, but so damaged as to require the halting of entire projects. This is an extreme remedy for a perceived and unknown problem.

There are four jurisdictional prerequisites for declaratory relief.

> (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and

(4) the issue involved in the controversy must be ripe for judicial determination.

Boever v. South Dakota Bd. Of Accountancy, 526 N.W.2d 747, 750 (S.D. 1995) (quoting *Danforth v. City of Yankton,* 25 N.W.2d 50, 53 (S.D.1946)).

"Ripeness involves the timing of judicial review and the principle that judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." *Id*. (citations omitted). "Even if a court has jurisdiction to decide the constitutionality of the law, it should decline to do so if the issue is so premature that the court would have to speculate as to the presence of a real injury." *Id*. (citing *Meadows of West Memphis v. City of West Memphis,* 800 F.2d 212, 214 (8th Cir.1986)).

Plaintiffs' claims are a perfect example of an attempt to have the court speculate as to the presence of a real injury. Plaintiffs would have the court speculate that not only will there be shadow flicker and noise but that those things will exist in such an amount as to cause actual damage to Plaintiffs.

Because the claims are not ripe, the court lacks jurisdiction to issue a declaratory judgment. Therefore, the Complaint should be dismissed.

B. Plaintiffs' claims against the PUC must be dismissed because they failed to exhaust their administrative remedies.

"When a remedy by appeal is available following an administrative action, an action for declaratory judgment is not available." *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, FN 9, 706 N.W.2d 175. The Plaintiffs' failure to exhaust administrative remedies precludes

them from sustaining their complaint seeking declaratory relief against the PUC. Because the proper forum for contesting a permit issued by the Commission is an appeal to the circuit court, jurisdiction lies solely with the appellate court, and the court lacks jurisdiction to hear this Complaint.

Parties in a PUC permitting proceeding who are aggrieved by the PUC's decision have the right to appeal to the Circuit Court. SDCL 49-41B.30. A person seeking to intervene in a PUC facility permitting docket, must file for party status within sixty days of the filing of the application for a facility siting permit. ARSD 20:10:22:40.

Plaintiffs failed to timely intervene in Docket No. EL19-003 and did not seek intervention in Docket No. EL19-027.

At this time, after the statutory deadline to appeal the order in Docket No. EL19-003 has expired, Plaintiffs attempt through the Complaint to bring an appeal of the Commission's order under the guise of a declaratory ruling.

Plaintiffs' claim against the Commission seeks a remedy against the issuance of a permit. The appropriate remedy against issuance of a permit is an appeal of the Commission's grant of that permit. That appeal is pending, but because Plaintiffs were not parties in the docket, they lack standing to appeal. With respect to the CRW II permit, the appropriate remedy is to petition the Commission for intervention in the docket and participate as a party.

Because the court lacks jurisdiction to hear the Complaint, it should be dismissed.

C. Plaintiffs fail to state a claim upon which relief can be granted.

SDCL 15-6-12(b) provides that certain defenses may at the option of the pleader be made by motion. One such defense is "Failure to state a claim upon which relief can be granted." SDCL 15-6-12(b)(5). SDCL 15–6–12(b)(5) is the equivalent to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In construing a rule equivalent to a Federal Rule of Civil Procedure, the decisions of the federal courts and other states with the Federal Rules are looked to for analytical assistance in interpreting the South Dakota rule. *Moore v. Michelin Tire Co., Inc.*, 1999 S.D. 152, ¶ 24, 603 N.W.2d 513, 520.

This rule was further recognized in *Mordhorst v. Dakota Truck Underwriters*, 2016 S.D. 70, 886 N.W.2d 322, when the Court cited to *Wiles v. Capitol Indem. Corp*., 280 F.3d 868, 870 (8th Cir. 2002) in relation to a motion to dismiss for failure to state a claim, for the maxim that "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences[,] and sweeping legal conclusions cast in the form of factual allegations." *Mordhorst v. Dakota Truck Underwriters*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 323.

To survive a motion to dismiss under Rule 12(b)(6) [SDCL 15-6-12(b)(5)], "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A complaint states a plausible claim for relief if its "factual content ... allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678.

Several principles guide the Court in determining whether a complaint meets this standard. First, the court must take the plaintiff's factual allegations as true. *Ashcroft*, 556 U.S. at 678-780. This tenet does not apply, however, to legal conclusions or "formulaic recitation of the

elements of a cause of action"; such allegations may properly be set aside. *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). In addition, some factual allegations may be so indeterminate that they require "further factual enhancement" in order to state a claim. *Ashcroft*, 556 U.S. at 678. (quoting *Twombly*, 550 U.S. at 557).

In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Ashcroft*, 556 U.S. at 679 (2009).

Ultimately, evaluation of a complaint upon a motion to dismiss is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft*, 556 U.S. at 679.

The Complaint is completely devoid of well-pleaded factual allegations. Not only do Plaintiffs fail to include any citations to statute to support the claims in the Complaint, but the Complaint fails to state a claim upon which relief can be granted as to the Commission. At best, the Complaint is an unclear attempt at asserting an unconstitutional taking and a request for an injunction, though it leaves the reader to speculate as to the exact issue. Therefore, the Complaint should be dismissed pursuant to SDCL 15-6-12(b)(5).

D. Plaintiffs fail to state a claim entitling to injunctive relief.

The relief Plaintiffs seek with respect to the Commission appears to be an order enjoining the Commission from issuing a facility siting permit in Docket No. EL19-003. Such relief is an unavailable remedy for a number of reasons.

First, the Commission cannot be enjoined from issuing a permit that has already been issued. The permit was issued on July 26, 2019, over a month before the Complaint was filed. "Relief by injunction operates in futuro…" *Fauske v. Dean*, 78 S.D. 310, 101 N.W.2d 769, 772 (citations omitted). Because an injunction is a future-oriented remedy, it is unavailable to Plaintiffs with respect to a permit already issue by the Commission.

Second, under SDCL 21-8-14(1), an injunction "may be granted to prevent the breach of an obligation existing in favor of the applicant ... [w]here pecuniary compensation would not afford adequate relief." The statute explicitly states that its purpose is to "prevent" a breach of an obligation. The Commission cannot be prevented from taking an action that has already been completed. The Commission cannot be prevented from issuing a permit for CRW I, because it has already done so. Therefore, an injunction to prevent the Commission from acting is not a remedy available under the law. While the Commission has not ruled on whether to issue a permit for the CRW II project, an injunction is not a remedy with respect to that project for the numerous other reason discussed in this Motion.

Third, a prerequisite to injunctive relief is the lack of an adequate remedy at law. *Anderson v. Kennedy*, 264 N.W.2d 714, 717 (S.D. 1978). Plaintiffs had an adequate remedy available through intervention in the permitting process pursuant to SDCL 49-41B-17. Because they had an adequate remedy with respect to the issuance of a permit, injunctive relief is not

available. Plaintiffs cannot claim that there is no remedy when, by their own actions, they chose not to take advantage of the remedy available.

E. Plaintiffs' property has not been damaged in the constitutional sense.

The issue at the crux of this case is whether Plaintiffs' property has been damaged "in the constitutional sense." The Complaint is wholly unclear as to what type of taking Plaintiffs claim arise under, or how, in particular, the Commission's Facility Permit affected Plaintiffs' property. As the discussion relates to the Commission, it is important to note that the Commission has no role in obtaining easements and other land rights. That is entirely the responsibility of the developer. In fact, the Commission is prohibited by law from designating or mandating the location of a wind energy facility. See SDCL 49-41B-36.

"Under the Federal Constitution, a plaintiff must assert one of four types of takings: (1) a *per se* physical taking…; (2) a *per se* regulatory taking which deprives landowner of all economically viable use of his property…; (3) a regulatory taking under *Penn Central Transportation Co., v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); or (4) a land-use exaction…" *Krier v. Dell Rapids Tp.*, 2006 S.D. 10, ¶ 22, 709 N.W.2d 841, 846 (internal citations omitted). The first two types are clearly inapplicable, as the Complaint alleges no physical appropriation or invasion of Plaintiffs' property. Similarly, there is no claim that an exaction has taken place, therefore, the fourth taking is also inapplicable. A regulatory taking under *Penn Central* is also inapplicable to the Complaint.

A regulatory taking under *Penn Central* occurs when the government's regulatory action is the "cause-in-fact of that damage as opposed to an indirect or consequential" appropriation. *Benson v. State*, 2006 S.D. 8, ¶ 60, 710 N.W.2d 131, 154. In its analysis of a regulatory taking,

the Court relied on an Iowa case in which the Iowa Supreme Court found that a taking had not occurred when the municipality rezoned land adjacent to plaintiffs, allowing for the construction of a cement plant, which cause noise and lights to be shown into the plaintiffs' home. *Id*. citing *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005). In that case, the Iowa Court ruled that there was no regulatory takings, because the municipality did not operate the cement plant, thus the governmental action was an indirect cause of the noise and light. Similarly, Plaintiffs do not allege that the Commission is constructing or operating a wind farm. Therefore, even if damage were to exist, it would, at best, be indirect with respect to the Commission.

South Dakota courts recognize a fifth type of taking which is derived from the damage clause of the State Constitution. *Krier* at ¶ 22. The Court has summarized this unique form of taking as follows:

> [I]t is a basic rule of this jurisdiction governing compensation for consequential damages that where no part of an owner's land is taken but because of the taking and use of other property so located as to cause damage to an owner's land, such damage is compensable if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole.

Id. at ¶ 23 (citations omitted). In order to avail themselves of this unique fifth taking, a plaintiff must be able to prove that the "injury is peculiar to their land and not a kind suffered by the public as a whole." *Id*. at ¶ 26.

Even if we assume, *arguendo*, that noise and shadow flicker cause damage, Plaintiffs do "not claim the injury to [their] property is unique from that suffered by other landowners." *Id*. at ¶ 28. Therefore, they have no claim arising from a damages taking.

The undisputed facts show that Plaintiffs' Complaint is based on alleged anticipatory injuries to his property flowing from the proximity of towers to their property. These injuries are

not unique to Plaintiffs; rather, they are common to the public at large and do not constitute damage "in the constitutional sense." Therefore, Plaintiffs' Complaint must be dismissed.

F. Plaintiffs' claims are barred by the doctrine of waiver.

In addition, Plaintiffs' Claim is barred by the doctrine of waiver. Waiver is a volitional relinquishment, by act or word, of a known, existing right conferred in law or contract.

> A waiver exists where one in possession of any right, whether conferred by law or contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his or her intention to rely upon it.

Granite Buick GMC, Inc. v. Ray, 2015 S.D. 93, ¶ 11, 872 N.W.26 810, 815. (internal citations omitted)

SDCL 49-41B-17(3) afforded Plaintiffs the right to participate fully as a party in the Commission's permitting process in both docket Nos. EL19-003 and EL19-027. That statute provides that parties to the proceeding include "[a]ny person residing in the area where the facility is proposed to be sited…if timely application therefore is made as determined by the commission pursuant to rule."[2] As Plaintiffs state in the Complaint, Plaintiffs reside within the area where the projects are or will be located. Thus, for the sixty-day period after the Application was filed, Plaintiffs were entitled to intervene as a matter of right bring their allegations of harm from noise and shadow flicker before the Commission and to provide evidence thereon in either of the Crowned Ridge dockets.

[2] This statute was amended effective July 1, 2019, therefore the statute as amended applied to the CRW II application, as that was filed after July 1, 2019. However, the amendment to the statute did not affect the ability of Plaintiffs to become parties to the docket.

The fact that Plaintiffs had full knowledge of the proceedings cannot be disputed. Not only were Plaintiffs served with notice of the CRW I proceeding pursuant to SDCL 49-41B-5.2, but Plaintiffs offered comments at the public input meeting for the CRW I Project.[3]

Plaintiffs, therefore, waived their right to raise the claims they now assert against the Commission. Now, after a final decision has been reached, an administrative record of more than twenty thousand pages amassed, construction begun, and an appeal filed, Plaintiffs attempt to assert a claim, which would force the Commission, at its own expense, to relitigate the issues of noise and shadow flicker. Plaintiffs' decision to sit on their rights should not at this late time force the Commission and other parties to go through the time and expense of relitigating past issues. Such an outcome would effectively reopen this and all other permits issued by the Commission, rendering meaningless the procedural deadlines adhered to and effort expended by all parties to the permit proceeding.

CONCLUSION

Plaintiffs sat on their rights as they relate to actions taken by the Commission and cannot be allowed to remedy their own error by initiating a lawsuit against the Commission in substitute of an appeal of the Commission's order. The Complaint is nothing more than a poorly disguised attempt to appeal the permit issued by the Commission. Plaintiffs failed to state any claim upon which relief could be granted or any justiciable issues with respect to the Commission. Moreover, because the administrative process and its subsequent appeal have not been exhausted, the court is without jurisdiction to act on the Complaint.

[3] A recording of the public input meeting is available on the Commission's website at: https://puc.sd.gov/commission/media/2019/el19-003/1005.mp3. The written comments from Plaintiffs are also available on the Commission's website at https://puc.sd.gov/Dockets/Electric/2019/el19-003comments.aspx.

WHEREFORE, Defendant respectfully moves this honorable court to dismiss the Complaint or, in the alternative, to dismiss the Complaint as it relates to this Defendant.

WHEREFORE, Defendant also moves this honorable court to award costs to compensate the Commission for the costs incurred in bringing this Motion.

Dated this 24th day of September 2019.

Kristen N. Edwards, 4124
Amanda M. Reiss, 4212
Special Assistant Attorneys General
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us

CERTIFICATE OF SERVICE

The undersigned, attorney for Defendant, hereby certifies that on the 24th day of September 2019, she served via electronic mail and first class mail a true and correct copy of the foregoing **Motion to Dismiss and Motion for Award of Costs Pursuant to SDCL 21-24-11** in the above-entitled matter upon the following:

Miles Schumacher
Lynn, Jackson, Shultz and Lebrun, PC
Attorney for Crowned Ridge Wind, LLC; Crowned Ridge Wind II, LLC;
and Boulevard Associates, LLC
110 N. Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
mschumacher@lynnjackson.com
(605) 332-5999 - voice
(605) 332-4249 - fax

A.J. Swanson
Attorney for Plaintiffs
Arvid J. Swanson, P.C.
27452 482nd Ave.
Canton, SD 57013
aj@ajswanson.com
(605) 743-2070 - voice

Ms. Rebecca Morlock Reeves - Representing: Codington County and
Codington County Board of Adjustments
Codington County State's Attorney
14 First Ave. SE
Watertown, SD 57201
rreeves@codington.org
(605) 882-6276

Mr. Charlie Waterman
Codington County Commission
14 First Ave. SE
Watertown, SD 57201
cwaterman@codington.org

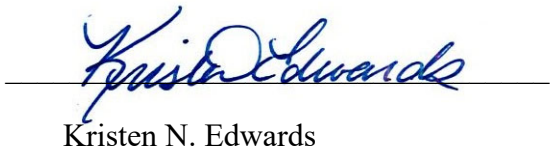
Mr. Troy VanDusen
Codington County Commission
14 First Ave. SE
Watertown, SD 57201
tvandusen@codington.org

Mr. Lee Gabel
Codington County Commission
14 First Ave. SE
Watertown, SD 57201
dleegabel@codington.org

Mr. Myron Johson
Codington County Commission
14 First Ave. SE
Watertown, SD 57201
mjohnson@codington.org

Ms. Brenda Hanten
Codington County Commission
14 First Ave. SE
Watertown, SD 57201
bhanten@codington.org

Codington County Board of Adjustment
c/o Ms. Cindy Brugman
Auditor
Codington County
14 First Ave. SE
Watertown, SD 57201



Kristen N. Edwards
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us