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. 14CIV1-000303 **DEFENDANT'S RESPONSE TO REPLY TO MOTION TO DISMISS**

Defendant South Dakota Public Utilities Commission (Commission), by and through its attorneys of record, hereby submits this Response to Reply to Motion to Dismiss.

This Defendant objects to the inclusion of the various attachments included within Plaintiffs' Reply. A motion to dismiss under SDCL 15–6–12(b) tests the legal sufficiency of the

pleading, not the facts which support it. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496. Therefore, it is improper to turn this motions practice into a trial of the facts, and, for that reason this Defendant strived to limit its Motion to Dismiss to the four corners of the Complaint. Because the Motions relate to the legal sufficiency of the Complaint, any facts outside of the Complaint should be discounted at this time.[1]

Plaintiffs' Reply does nothing to promote a dispassionate analysis of the pending Motions to Dismiss. Plaintiffs' Reply and nearly seventy pages of briefing are filled with broad dispositive statements largely lacking supporting authority. This has contributed significantly to the amount of work and length of time that was required to respond.

1. Plaintiffs failed to timely intervene in Docket No. EL19-003.

Plaintiffs' contend that they were unable to intervene in the Commission's siting docket due to language in their easement agreement. Plaintiffs' argument is essentially that they were precluded from opposing the Project until after the expiration of their lease option which, according to Plaintiffs, expired June 10, 2019. This contention is without merit. As demonstrated in the attached Affidavit of Eric Paulson, Plaintiffs publicly opposed the Project prior to the expiration of the option and even prior to the deadline for intervention. A comment submitted by the Lindgrens prior to the expiration of the intervention deadline is also attached to this Response as Exhibit A.[2]

Thus, it is disingenuous to say that Plaintiffs relied so heavily on the contract language that they were unable to participate. If opposition to the Project were a breach, it was

[1] This Defendant nonetheless concedes that it is forced to submit an affidavit containing minimal facts in order to respond to Plaintiffs' contention that intervention in the Commission docket was not available to them.

accomplished by their statements at the public input meeting, and intervention was of no consequence.

In addition, Plaintiffs state that this Defendant incorrectly relies on the fact that Plaintiffs did not appeal the Commission's decision. Plaintiffs misunderstand this Defendant's argument. It is true that one who is not a party may not appeal a final decision. However, there is plenty of precedent to demonstrate that one can appeal denial of intervention. Plaintiffs did not file such an appeal.

Even if the Court were to agree that Plaintiffs risked a breach of contract lawsuit by timely intervening in the Commission docket, the fact that Plaintiffs chose to adhere to the contract rather than exercise their rights before the Commission does not create a collateral cause of action unique to Plaintiffs or avail them of the ability to essentially force the Commission to retry the docket. If that were the case, every permit issued by the Commission could be entirely relitigated under the guise of a declaratory ruling and there would never be finality until all unused easement options expired. This situation underscores the incredible importance of landowners understanding contract language and what they are agreeing to before they sign.

Plaintiffs allege that they lacked "true standing to complain" prior to the June 10, 2019 expiration date of their option. To the contrary, as landowners, Plaintiffs always had standing before the Commission pursuant to SDCL 49-41B-17. That statute provides who may intervene in a siting docket. Nowhere in SDCL 49-41B-17 is intervention limited to those who are not parties to a contract with an applicant. Plaintiffs cite no authority for their contention that a separate legal theory exists for "true standing" versus standing. Plaintiffs always had standing, they merely chose not to exercise it. Therefore, a remedy by appeal was available and an action

for declaratory judgment is not available. *See*, *Dan Nelson Automotive, Inc. v. Viken*, 2005 S.D. 109, FN 9, 706 N.W.2d 175.

2. Commission is not a proper party to this proceeding.

Plaintiffs explain in their Reply Brief that injunctive relief is not being sought against this Defendant, but only those who will be operating the Crowned Ridge Wind Farm. If no relief is sought against this Defendant, why then is the Commission a party to this proceeding? Plaintiffs themselves seem to have conceded that there is no claim upon which relief can be granted with respect to the Commission. Therefore, the Commission should be dismissed from this proceeding.

3. The sound and shadow flicker computer models do not equate to a ripe cause of action.

In their Reply Brief, Plaintiffs allege that this Defendant "besmirches or questions" the computer models for noise and shadow flicker because of the argument that damages from noise and shadow flicker are speculative. Plaintiffs misunderstand this Defendant's argument. It is because of confidence in those models that the damages are speculative. The models, by design, are conservative and meant to depict a worst-case scenario. Therefore, one can have faith that the actual amounts will most likely be somewhat lower.

In addition, the modeling assumes that not only will the Project get built, but all turbines will get built. Throughout construction, a permittee has a certain amount of flexibility to adjust and remove turbines from the layout as needed. Until a turbine has been constructed, its location is speculative to an extent and it is not uncommon for turbines to be removed from the layout after construction has begun.

Because the turbine locations are not set in stone, construction has not been completed, and the computer models are conservative by design, an allegation that the Project will result in damaging sound and shadow flicker is speculative and not ripe for consideration.[3] At this point in time, based off the modeling, all we know is a maximum, not an actual amount.

4. Plaintiffs' reliance on the *Knick* case is misplaced.

Plaintiffs cite to the recent U.S. Supreme Court decision, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2164 (June 21, 2019). The *Knick* case has no bearing on or relevance to this proceeding. *Knick* merely overruled the state litigation requirement of *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The case merely opened the federal courthouse door; it did not create a new form of takings.

Plaintiffs cite to the *Penn Central* case, seemingly acknowledging that *Penn Central* is the seminal case regarding takings claims. Plaintiffs go on to acknowledge the same four types of takings described in this Defendant's Motion to Dismiss. However, Plaintiffs fail to establish that their claim falls under any of the four, at least as it relates to a claim against the Commission.

5. This Defendant cannot stipulate to judicial notice as requested by Plaintiffs.

In their Reply Brief, Plaintiffs "propose that all counsel further stipulate the Court may take judicial notice of [the 182-page on-line NARUC document]." Reply at 65. Defendant Commission declines to so stipulate. As previously discussed, a motion to dismiss under SDCL

[3] While not relevant to the ripeness of the Complaint, the Commission notes that as a part of the permitting process, SDCL 4-41B-22 requires an analysis of threat of injury. Therefore, the concept of injury has been addressed and the Commission has found that no threat of serious injury or substantial impairment to the health and welfare of inhabitants of the area exists. We note this to emphasize that we do not waive or concede that point.

15–6–12(b) tests the legal sufficiency of the pleading, not the facts which support it. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496.

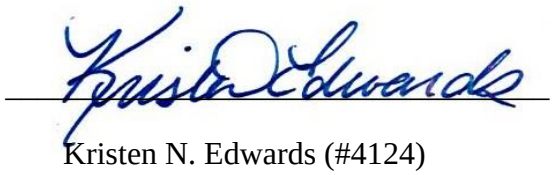
This Defendant's Motion to Dismiss was properly a facial challenge to the Complaint. Plaintiffs now seek to extend the discussion to a factual challenge by, among other things, entering into the record the NARUC document. Such an action is improper at this time.

CONCLUSION

The Complaint should be dismissed for lack of jurisdiction, as well as all other grounds set forth in the Motion to Dismiss. Nothing in Plaintiffs' Reply supplied a legal basis upon which the Complaint could go forward. Further, it is improper to supplant facts in a response to the facial attack on the Complaint, thus the facts Plaintiffs attempt to include through their Reply should be discounted.

This Defendant respectfully requests the Complaint be dismissed with prejudice and for such other and further relief as the Court deems just and equitable.

Dated this 27th day of November 2019.



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