

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

INTERVENORS' BRIEF

Intervenors respectfully submit this Brief by and through the undersigned counsel.

I. INTRODUCTION AND BACKGROUND

1. According to the North Dakota State Board of Registration for Professional Engineers & Land Surveyors (PELS), Jay S. Haley of Engineers-Architects, P.C. (EAPC) had a Professional Engineer (P.E.) License (# PE-3431), but it expired on December 31, 2016. EAPC holds a commercial license as a P.E. (License # 027C), and its date of expiration is December 31, 2019. Even though the EAPC is a registered Professional Engineer, Mr. Haley must also be registered to refer to himself as a P.E. in the state of South Dakota and North Dakota. SDCL § 36-18A-1.1; NDCC § 43-19.1-27(5). Mr. Haley's registration is expired, his license is inactive, so he is not authorized to refer to himself as a P.E. or practice professional engineering in South Dakota or North Dakota.

2. Mr. Haley is Partner at EAPC, a North Dakota business that is also licensed as a business entity in South Dakota (Business ID No. FB038276). *Direct Testimony of Jay Haley* 1-11, 1 ll.3-6 (Jan. 28, 2019); *Rebuttal Testimony and Exhibits of Jay Haley* 1-8, 1 ll.3-6 (May 24, 2019); *Engineers-Architects, P.C.: Business Information Search*, SOUTH DAKOTA SECRETARY OF STATE (n.d.). According to the North Dakota Board of Professional Engineers & Land Surveyors and the Minnesota Board of AELSLAGID, Jay S. Haley was registered as a P.E., but in both states his registration has expired (Minnesota expiration April 7, 1997 and June 30, 2016; North Dakota expiration December 31, 2016). *See also* Affidavit of Matt Kaehler, Investigator for the Minnesota Board of AELSLAGID.

II. STATUTORY ARGUMENT

A. Under the North Dakota Century Code and Administrative Code, Mr. Haley is not permitted to append a “P.E.” designation to his signature because his certificate of P.E. license registration is expired.

3. Under the North Dakota Century Code (NDCC) a person who “practices or offers to practice engineering” must be registered in accordance with the provisions of chapter 43-19.1. NDCC § 43-19.1-31. To practice engineering includes when a person in any way “represents that the person is an engineer and is able to practice engineering in [North Dakota].” 43-19.1-02(7). Further, it is a violation of law for a person to use “the words ‘engineer’, ‘engineering’, ‘professional engineer’” to imply he is a registered P.E. if the person is not thus under the laws and regulations of North Dakota. *Id.*

4. A person who holds an expired P.E. registration is not a “P.E.,” pursuant to NDCC § 43-19.1-02(9):

“Professional engineer” means an individual who by reason of special knowledge or use of the mathematical, physical, and engineering sciences and the principles and methods of engineering analysis and design, acquired by engineering education and engineering experience, is qualified to practice engineering, **and**

who has been registered and licensed by the state board of registration for professional engineers and land surveyors.

(Emphasis added.) A person whose license is expired is invalid, and the license holder is not considered “registered and licensed by the state board” to practice as a P.E. in North Dakota NDCC § 43-19.1-22. “A certificate of registration expires on December thirty-first of the year of issuance if registration is on an annual basis and of the year after issuance if issued on a biennial basis **and becomes invalid after that date unless renewed.**” *Id.* (emphasis added).

5. Mr. Haley has practiced engineering although he is not registered in accordance with the provisions of chapter 43-19.1. By appending the initials P.E. to his signature, he represented that he is an engineer and is able to practice engineering in North Dakota. However, Mr. Haley is not permitted by law to use “P.E.” to imply he is a actively registered P.E. He is not considered registered and licensed by the state board. His certificate of registration expired on December 31, 2016, three years ago.

6. In North Dakota, it is permissible to practice professional engineering as an “organization or as an individual operating under a trade name if the organization is registered under or exempt from the provisions of [] chapter [43].” 43-19.1-27(4). Thus, it would be permissible for EAPC to practice engineering in North Dakota because it is registered as a P.E. in the state. However, there are specific additional requirements:

[T]he practice of or offer to practice professional engineering or land surveying by an organization or by an individual operating under a trade name is permitted in this state if:

a. **All officers, employees, and agents** of such an organization or the individual operating under a trade name **who will perform the practice of engineering** or of land surveying within this state **are registered** under this chapter;

b. **Each person in responsible charge** of the activities of any organization or individual operating under a trade name which activities constitute the practice of professional engineering and land surveying, **is a professional engineer** or land

surveyor **registered in this state or an individual authorized to practice professional engineering** or land surveying as provided in this chapter;

c. Such organization or individual operating under a trade name has been issued a certificate of commercial practice by the board as provided by *subsection 6*;

d. Each organization or individual operating under a trade name is jointly and severally responsible with and for the conduct or acts of its agents, employees, officers, or managers in respect to any professional engineering or land surveying services performed or to be executed in this state. An individual practicing professional engineering or land surveying may not be relieved of the responsibility for the individual's conduct or acts performed by reason of the individual's employment by or relationship with such organization or individual operating under a trade name; and

e. **All final drawings, specifications, plans, reports, or other engineering or land surveying papers or documents** involving the practice of professional engineering or land surveying, **when presented** to a client, contractor, subconsultant, or any public agency, **must be dated and bear the seals and signatures of the professional engineers** or land surveyors **registered under this chapter** by whom or under whose responsible charge they were prepared. A working drawing or unfinished document must contain a statement to the effect the drawing or document is preliminary and not for construction, recording purposes, or implementation. It is unlawful for a registrant to affix or permit the registrant's seal and signature or facsimiles thereof to be affixed to any engineering drawing, specification, map, plat, report, or other document after the expiration or revocation or during the suspension of a certificate or for the purpose of aiding and abetting any other person to evade or attempt to evade any provision of this chapter.”

43-19.1-27(5) (emphases added). Subsection 6, referred to in 43-19.1-27(5)(c), provides that an organization or individual operating under a trade name that seeks to practice engineering in North Dakota must submit to the board, at a minimum, the names and addresses of all employees registered to practice professional engineering in North Dakota and who accept responsibility for any engineering practiced in the State by the organization or individual operating under a trade name.

7. Thus, even in the case that Mr. Haley signed his name as an individual operating under the name of EAPC, the designation of P.E. would still not be appropriate because Mr.

Haley is not considered to be registered under 43-19.1 and, thus, cannot practice P.E. in North Dakota, nor can he accept responsibility for any engineering practiced in the State by EAPC or another. He is the person in responsible charge, per his testimony in this proceeding; yet, he is not authorized to practice PE. *Direct Testimony of Jay Haley* 1 ll.3-6; *Rebuttal Testimony and Exhibits of Jay Haley* 1 ll.8-10 (May 24, 2019) (“My responsibility was to conduct the sound and shadow/flicker studies for Crowned Ridge Wind, LLC ("CRW").”).

8. Mr. Haley has not been issued a certificate of commercial practice by the board as provided by subsection 6 because, again, he is not registered to practice P.E. in North Dakota and cannot accept responsibility for any engineering practiced in the State. There is no statement that the studies he signed and submitted to the PUC on behalf of Applicant are preliminary and not for construction, recording purposes, or implementation. Mr. Haley did not date and bear his P.E. seal and signatures upon the documents—because he is not registered and cannot be the person under whose responsible charge the engineering documents were prepared. Indeed, it would have been unlawful for Mr. Haley to affix his seal and signature or facsimiles thereof to the documents because his certificate of registration has expired.

9. Even if EAPC submitted the names of individuals registered to practice PE, Mr. Haley’s name would not have been properly included insofar as his registration is expired. Thus, even in the case that Mr. Haley was purporting to act on behalf of EAPC when he signed his name with “PE,” the designation still would not be proper.

10. It is possible that Mr. Haley considers himself to be retired. North Dakota Administrative Code (NDAC) § 28-02.1-12-04 sets out the privileges afforded to retired PEs. They may: “Use the title professional engineer . . . provided that it is supplemented by the term ‘retired’, or the abbreviation ‘ret.’” NDAC § 28-02.1-12-04(2). They may: “Provide services as

a technical expert before a court, or in preparation for pending litigation, on matters directly related to engineering or land surveying work performed by the registrant **before the person was granted a retired registration.**” NDAC § 28-02.1-12-04(6) (emphasis added).

11. However, Mr. Haley did not supplement his P.E. designation with the term “retired” or “ret.” Records do not indicate that Mr. Haley was granted a retired registration, so reported matters cannot be related to engineering work Mr. Haley performed before he was granted such registration. Indeed, Mr. Haley has not asserted that he is retired to the PUC.

Direct Testimony of Jay Haley 1 ll.12-29.

12. Even if it were an oversight on the part of Mr. Haley and EAPC, and Mr. Haley is retired but they failed to apply for a retired registration, a retired registrant may not: “Act as the designated engineer or the engineer in responsible charge for a North Dakota engineering organization.” 28-02.1-12-05(2). In addition, retired P.E.s may not perform “any engineering or land surveying activity unless said activity is under the direct supervision of a North Dakota registered professional engineer or registered professional land surveyor who has a valid or active registration in the records of the board.” 28-02.1-12-05(1). There is no mention of a direct supervisor, and it is clear that Mr. Haley himself performed the studies. *Direct Testimony of Jay Haley* 1 ll.3-6; *Rebuttal Testimony and Exhibits of Jay Haley* 1 ll.8-10 (May 24, 2019).

13. To renew P.E. license registrations, the North Dakota Administrative Code requires P.E.s to participate and submit proof of participation in continuing education courses to “reinforce the need for lifelong learning in order to stay current with everchanging technology, equipment, procedures, processes, tools, and established standards.” § 28-04-01. The North Dakota Rules of Professional Conduct Code of Ethics for P.E.s & Land Surveying (PELS Code of Ethics) further requires registrants to “take into account all applicable federal, state, and local

laws and regulations” when providing services, and stipulates that they are not to “knowingly provide services resulting in violation of such laws and regulations.” § 28-03.1-01-08(3).

Registrants are bound to comply with the PELS Code of Ethics. § 28-03.1-01-17(3). And they are specifically “charged with having knowledge of the existence of [the PELS Code of Ethics] as an engineer or land surveyor, and also must be deemed to be familiar with the provisions and to understand them.” § 28-03.1-01-01.

14. What’s more, P.E. registrants are held to “the highest standards of integrity” and must “include all relevant and pertinent information in . . . reports, statements, or testimony” in order to ensure they are being completely “truthful in professional reports, statements, or testimony.” § 28-03.1-01-03. A registrant must guard against material misrepresentations of fact and against “omitting a material fact necessary to keep statements from being misleading or statements intended or likely to create an unjustified expectation.” § 28-03.1-01-03(8).

15. Mr. Haley has not fulfilled requirements for renewing his P.E. registration in North Dakota. He failed to take into account applicable state laws and regulations when he appended his name with P.E., and he provided services in violation of such laws and regulations. He cannot claim ignorance as an excuse, particularly given that P.E. registrants are held to the highest standards of integrity.

B. Under South Dakota Codified Law and Administrative Regulation, Mr. Haley is not permitted to append a “P.E.” designation to his signature because his certificate of P.E. registration is expired.

16. Even in the case Mr. Haley were duly registered and authorized to practice professional engineering in North Dakota, he would not be automatically authorized to practice engineering in South Dakota; the laws of comity require P.E.s to apply for permission to practice in South Dakota from the Department of Labor & Regulation Board of Technical Professions

(SDBTP). The SDBTP is clear: “Before providing or offering to provide any engineering services on projects located in South Dakota, [P.E.s] must be licensed in South Dakota. In order to apply for licensure, [P.E.s] need to complete and submit [] forms [].” *Information for Professional Engineers*, S.D. DEPT. OF LABOR & REGULATIONS: S.D. BD. OF TECH. PROFESSIONS (2016), <https://dlr.sd.gov/btp/engineers.aspx>. It published the Blue Book, which covers SDCL Chapter 36-18A and ARSD Article 20:38 and outlines comity and licensing obligations in South Dakota, among other things.

17. According to the Blue Book, a “P.E.” is “a person licensed in good standing and legally authorized to practice engineering in [South Dakota].” SDCL § 36-18A-1(24). However, a person is not eligible for licensure if the P.E. registration upon which they seek to gain licensure by comity is expired. SDCL § 36-18A-1(24); 36-18A-35. Under SDCL § 36-18A-35:

The [SDBTP] may give comity consideration to any person who holds a **current** and **valid** license issued to that person for **active** practice by the proper authority in any state or territory of the United States, the District of Columbia, or any foreign country, based on requirements that do not conflict with the provisions of this chapter and were of a standard not lower than that specified in the applicable licensure act in effect in this state at the time such license was issued.

(Emphases added).

18. Mr. Haley is not a P.E. in South Dakota as that term is defined by statute and regulation. Mr. Haley is not eligible for comity consideration in South Dakota because he does not hold a current and valid license issued to him for active practice by the North Dakota PELS (or any other state technical board of record, according to the SDBTP Licensee Roster). As such, Mr. Haley is not a person licensed in good standing and legally authorized to practice engineering in South Dakota.

19. South Dakota law is clear. “No inactive licensee may practice or offer to practice professional services in South Dakota unless otherwise exempted in this chapter.” SDCL § 36-18A-1.1. Further:

Any person or business entity practicing or offering to practice architecture, engineering, land surveying, landscape architecture, or petroleum release assessment or remediation shall submit evidence of qualifications to the board and be licensed in accordance with the provisions of this chapter. **No person or business entity may practice or offer to practice any of these professions, or to use in connection with that person's or business entity's name or otherwise assume, use, or advertise any title or description that may falsely convey the impression that the person is duly licensed under the provisions of this chapter unless the person is so licensed.**

SDCL § 36-18A-8 (emphases added). A person is “practicing engineering” if he or she makes “a verbal claim, sign, advertisement . . . or in any other way represents himself or herself to be a professional engineer,” including by the use of a title that “implies that the person is a professional engineer or that the person is licensed under these provisions.” 36-18A-3.

20. SDCL § 36-18A-9 exempts certain persons from the provisions of chapter 36, such as employees who prepare technical submissions for a person or organization lawfully engaged in the practice of engineering, “if the employee is under the direct supervision of a registered professional engineer.” 36-18A-9(4). However, that exemption does not suddenly grant the employee P.E. status. “No person exempted may use the title of professional engineer, architect, landscape architect, or land surveyor, or any other word, words, letters, or signs in connection with the person's name that may falsely convey the impression that the person is a licensed professional engineer, architect, landscape architect, or land surveyor.” *Id.* (8)(g).

21. Mr. Haley is not listed in the South Dakota on the SDBTP Licensee Roster. As in North Dakota, in South Dakota Mr. Haley is an inactive licensee and may not practice or offer to practice professional services though he has represented himself to be a P.E. by using the title

P.E., which implies that he is a professional engineer. He is also not exempt from the provisions of chapter 36. He cannot be considered to be an employee who prepared technical submissions for EAPC, which is lawfully engaged in the practice of engineering, because he was not under the direct supervision of a registered professional engineer. Even if he were exempted, he would not suddenly gain P.E. status and would not be permitted to title himself P.E. and falsely convey the impression that he is a licensed professional engineer. Mr. Haley has falsely claimed that he is a P.E.

22. As in North Dakota, in South Dakota it is a prohibited act to imply that one is a P.E. if that person does not hold a valid and unexpired license. SDCL § 36-18A-65 provides:

No person may:

(1) **Practice, or offer to practice, the professions of engineering**, architecture, land surveying, landscape architecture, petroleum release assessment, or petroleum release remediation in this state **without being licensed or exempt** in accordance with the provisions of this chapter;

(2) **Use or employ the title of** architect, landscape architect, land surveyor, **professional engineer**, petroleum release assessor, or petroleum release remediator with or without qualifying adjectives **without being licensed** in accordance with the provisions of this chapter;

(3) **Use any other words, letters, or figures indicating or intending to imply that the person is a professional engineer**, architect, land surveyor, landscape architect, petroleum release assessor, or petroleum release remediator **without being licensed** in accordance with the provision of this chapter;

(7) **Attempt to use an expired, suspended, or revoked license;**

(9) By act of commission or omission, violate any of the provisions of this chapter.

23. Mr. Haley is not permitted to use an expired license to practice engineering in South Dakota, nor is he permitted to claim that he is a P.E. He is not licensed, despite his direct and false assertions to the contrary to the Commission. TRANSCRIPT OF EL 19-003 PUBLIC INPUT

HEARING, S.D. PUBLIC UTILITIES COMMISSION 28 ll.23-25 (Mar. 20, 2019); Jay Haley, *Final Report Crowned Ridge Wind Far, Shadow Flicker Study Codington and Grant Counties, SD* (Jan. 22, 2019) (“**Submitted by:** Jay Haley, P.E., Partner” (emphasis in original) and “Author: Jay Haley, P.E. Partner”).

C. In foreign jurisdictions, Mr. Haley would also not be permitted to append a “P.E.” designation to his signature because his certificate of P.E. license registration is expired.

24. The matter of asserting a false credential of P.E. has not been considered by South Dakota courts. However, the South Dakota Supreme Court has held that when such is the case, the court may find persuasive authority in foreign jurisdictions. *Hayes v. Northern Hills General Hosp.*, 1999 SD 28, 246 – 254, 248 (Mar. 10, 1999) (“We have not previously addressed this element of the cause of action in detail. However, we find persuasive authority in other jurisdictions.”).

25. The Oregon Court of Appeals considered the matter in *Topaz v. State Board of Examiners for Engineering and Land Surveying*, where petitioner appealed the state engineer licensing board’s finding that “he practiced engineering without a license by signing a complaint letter to the board with the designation ‘P.E.,’ which is an abbreviation for ‘professional engineer,’ after his name.” 297 P.3d 498, 255 Or. App 138 (2013). Petitioner was actively licensed in Maryland from 1961 – 1986, when his license expired; it was reinstated in 2010, but he sent the letter to the board in 2009, when his license was inactive. Despite an Administrative Law Judge who “reasoned that petitioner had appended P.E. to his name in error and out of force of habit after several decades of being an engineer in Maryland,” *id.* at 501, the Court of Appeals affirmed the state board’s finding after considering the plain meaning of the statutes in question. *Id.* at 502 (“When reviewing an agency’s interpretation of a statute, our first task is ‘to discern

the legislature's intent, looking primarily to the text of the statutes in context.’’). The Court found that “[b]y using that [P.E.] designation, petitioner implied that he was a professional engineer and purported that he could perform engineering work,” and petitioner admitted that, given only an expired Maryland license, “he did not have a license to practice engineering in Oregon.” *Id.* at 503. After declining to find a First Amendment violation founded on arguments submitted, the Court of Appeals affirmed the board’s finding that petitioner had practiced engineering without a license by signing his letter to the board with the designation P.E. after his name.

26. The similarities to this proceeding are notable. Mr. Haley not only practiced engineering without a license by signing letters to the board with the designation P.E. after his name, he was also, like petitioner, not actively licensed when he signed the letter to the board. Even if the addition was made in error and out of force of habit after being an engineer in North Dakota or Minnesota, the plain meaning of the statutes is clear. By law, by using the P.E. designation, Mr. Haley practiced engineering and also implied that he was a professional engineer, but he does not have an active license to practice engineering in any state.

III. CONCLUSION

A. The Application should be denied and dismissed in light of the Mr. Hayley’s use of the P.E. designation in violation of South Dakota law.

27. Under SDCL § 49-41B-13, “[a]n application may be denied, returned, or amended at the discretion of the Public Utilities Commission for: (1) Any deliberate misstatement of a material fact in the application or in accompanying statements or studies required of the applicant.” Black’s Law Dictionary defines “material” as: “Important; . . . going to the merits. . . . Evidence offered in a cause, or a question propounded, 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.”

28. Mr. Haley deliberately misstated his qualifications as a P.E. in statements accompanying the Application and studies required of Applicant. At the public input hearing, in response to a direct question from Mr. Lynch—“Jay, Jay, are you a P-E, a professional engineer? Are you certified?”—Mr. Haley answered in no uncertain terms: “I’m a professional engineer.” TRANSCRIPT OF EL 19-003 PUBLIC INPUT HEARING, S.D. PUBLIC UTILITIES COMMISSION 28 II.23-25 (Mar. 20, 2019). Mr. Haley also provided with his name the designation of “P.E.” on reports submitted to Applicant, which form the basis of the Application. Jay Haley, *Final Report Crowned Ridge Wind Far, Shadow Flicker Study Codington and Grant Counties, SD* (Jan. 22, 2019). The information he submitted and the fact of whether he is a licensed engineer who is registered and eligible to practice is important and goes to the merits of whether Applicant should be granted a permit based on the studies provided by Mr. Haley. It is relevant and goes to substantial matters in dispute, whether granting a permit will harm the health or well-being of the public, based on alleged scientific studies submitted by one who has falsely claimed he is licensed to practice engineering.

29. P.E. is a designation that Mr. Haley, as the holder of an expired certificate of registration, does not have the right to use under South Dakota or North Dakota law or regulation. Asserting that one has a credential one does not have does not support unbiased expertise or reliable opinions. *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1385 (11th Cir. 1988) (noting that one who falsifies his credentials creates doubt as to his suitability to testify as an expert in a proceeding). Mr. Haley has violated § 36-18A-65 by falsely claiming that he is a P.E., and his testimony as well as the reports and documents created under his

supervision should not be admitted, as his suitability as an expert witness in this matter must be rejected because of his willingness to deliberately assert false information to the PUC. Please refer to the signed reports and papers submitted by Mr. Haley, signed as a P.E. in the docket proceedings in this matter. And see, TRANSCRIPT OF EL 19-003 PUBLIC INPUT HEARING, S.D. PUBLIC UTILITIES COMMISSION 28 11.23-25 (Mar. 20, 2019). Jay Haley provided material facts and opinions that are required to approve the pending Application.

Dated this ____ day of June, 2019.

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