BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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

EL19-003

CERTIFICATE OF SERVICE

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I hereby certify that true and correct copies of the Reply Brief of Intervenors in Support of Motion to Deny and Dismiss were served electronically to the parties listed above on the 5 day of May, 2019.

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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 IN SUPPORT OF MOTION TO DENY AND DISMISS

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

BACKGROUND AND INTRODUCTION

1. The Intervenors respectfully submit this Reply Brief in support of Intervenors' Motion to Deny and Dismiss, and in reply to the Response of Applicant and to Staff's Response to 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.

Construction Cost

4. Staff's use of an estimated cost of construction to calculate a filing fee does not change the law. Staff's Response at paragraph 1. Applicant's Response argues it is in full compliance with state rule requirements. Response at paragraph 4. Pursuant to ARSD § 20:10:22:05, the language of which is clear, certain, and unambiguous, the Application must contain this disclosure under ARSD §20:10:22:09, which provides: "The applicant shall describe the estimated construction cost of the proposed facility." Construction is defined under SDCL § 49-41B-2(5), in pertinent part, as: "any clearing of land, excavation, or other action that would affect the environment of the site for each land or rights of way upon or over which a facility may be constructed or modified, *but not including activities incident to preliminary engineering or environmental studies*." (Emphasis added.) Thus, Applicant errs in its assertion that "[n]either the Commission's rules nor applicable statutes expressly specify the contents to be included in a description of the estimated construction costs." The language in both the rule and the statute is clear, certain, and unambiguous: An applicant is to provide a description of the costs of clearing the land, of excavating it, and of other actions that affect the environment where facilities may be constructed or modified, and that description of construction costs is not to include the cost of activities that are incident to preliminary engineering or environmental studies.

5. The Application does not provide or claim to provide an estimated construction cost of the proposed facility, in contravention of legal requirements, which expressly specify the contents

to be included in a description of the estimated construction costs, contrary to Applicant's claim. CRW Response 2 ¶4. The Application states: "The Project has an *estimated capital cost* of approximately $400 million" and goes on to detail how an estimate of capital costs was developed; it specifically asserts that activities incident to preliminary engineering or environmental studies, which as noted, are explicitly excluded from "construction costs" by law, were included in the capital costs estimate provided. In that it offered an *estimated capital cost*, Applicant does not even claim to fulfill the requirements of ARSD § 20:10:22:09.

6. The following discussion of the principles of law apply to the issues in this Motion. The discussion of the guide is a discussion of the Commission's policies. The purpose of a facility permit application is to protect the environment and the public. SDCL § 49-41B-1 ("Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state . . ."); see *also* SOUTH DAKOTA PUBLIC UTILITIES COMMISSION INFORMATION GUIDE TO SITING ENERGY CONVERSION & ELECTRIC TRANSMISSION FACILITIES [hereinafter "GUIDE"] 1 ("In considering applications, the commission's primary duty is to ensure the location, construction and operation of the facilities will produce minimal adverse effects on the environment and the citizens."). The Commission is tasked with making decisions "based on definitions, standards and references specified in South Dakota Codified Laws and Administrative Rules." GUIDE 1. Further, the Legislature has commanded: "Words used [in South Dakota Codified Law] are to be understood in their ordinary sense . . .". SDCL § 2-14-1; *Schroeder v. Dep't of Soc. Servs.*, 1996 S.D. 34, ¶ 9, 545 N.W.2d 223, 227-28 ("Administrative regulations are subject to the same rules of construction as are statutes. When regulatory language is clear, certain and unambiguous, our function is confined to declaring its meaning as clearly expressed."); *Citibank, NA v. Dept. of Revenue,* 2015

S.D. Supreme Court 868 NW 2d 381 ("When engaging in statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed."); *City of Rapid City v. Estes,* 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep't of Transp. V. Clark*, 2011 S.D. 20, ¶5, 798 N.W. 2d 160, 162.)

Local Review Committee

7. Under ARSD § 20:10:22:05: "The application for a permit for a facility shall contain the applicable information specified in §§ 20:10:22:06 to 20:10:22:25, inclusive, 20:10:22:36, and 20:10:22:39." This language is clear, certain, and unambiguous. The Application is for a permit for a facility. Therefore, it must contain the information specified in ARSD § 20:10:22:36 (as well as in §§ 20:10:22:06 – 20:10:22:25 and 20:10:22:39).

8. ARSD § 20:10:22:36 requires an applicant to submit in its application "information necessary for the local review committees to assess the effects of the proposed facility pursuant to SDCL 49-41B-7." SDCL 49-41B-7, in turn, confirms:

> *The local review committee shall meet* to assess the extent of the potential social and economic effect to be generated by the proposed facility, to assess the affected area's capacity to absorb those effects at various stages of construction, and formulate mitigation measures. The assessment of the local review committee shall include consideration of the temporary and permanent alternatives in the following areas:
>
> (1) Housing supplies;
> (2) Educational facilities and manpower;
> (3) Water supply and distribution;
> (4) Waste water treatment and collection;
> (5) Solid waste disposal and collection;
> (6) Law enforcement;
> (7) Transportation;
> (8) Fire protection;
> (9) Health;
> (10) Recreation;

(11) Government; and
(12) Energy.

SDCL § 49-41B-6 is inapplicable in the manner that Staff and CRW erroneously claim in their Responses. Further, the fact that a "wind energy facility" is not an "energy conversion facility" for the purposes of SDCL § 49-41B, as CRW asserts at ¶2, is irrelevant.

9. SDCL § 49-41B-6 provides an instruction to the Public Utilities Commission ("*the Public Utilities Commission shall* designate the affected area and a local review committee . . ."). It does not take the place of ARSD § 20:10:22:36, which is an instruction to the permit Applicant to provide mandatory information ("*The applicant shall* also submit as part of the application any additional information necessary for the local review committees to assess the effects of the proposed facility pursuant to SDCL 49-41B-7."). SDCL § 49-41B-7 provides instructions for local review committees ("the local review committee shall meet to assess the extent of the potential social and economic effect to be generated by the proposed facility, to assess the affected area's capacity to absorb those effects at various stages of construction, and formulate mitigation measures."). Thus, SDCL § 49-41B-6 is applicable only in that it provides a timeline and information for the appointment of local review committees. SDCL § 49-41B-6 states:

> Within thirty days after the filing of the notification of intent to apply for a permit for the construction of an energy conversion facility or AC/DC conversion facility, the Public Utilities Commission shall designate the affected area and a local review committee composed of:
> (1) The chair of the tribal council of each affected reservation;
> (2) The president of the board of education of each affected school district;
> (3) The chair of the county commissioners of each affected county;
> (4) The mayor of each affected municipality; and
> (5) A representative of the applicant utility designated by the utilities.

The statute does not state that the list of facilities described contains every facility that requires a local review committee. ARSD § 20:10:22:36 explicitly requires information from Applicant to assist local review committees to fulfill their charge to evaluate facility permit applications.

10. Applicant all but admits that local review committees are required when it notes: "*consistent with past practice* and out of abundance of caution to ensure its Application was complete, CRW complied with Commission Rule ARSD 20:10:22:36 through the submittal of its Application, maps, and appendices, all of which provide information that local review committees could use to assess the proposed CRW wind facility." However, that claim suggests that ARSD 20:10:22:36 requires only that a local review committee be provided a permit facility application, maps, and appendices to complete its charge; the claim fails to account for the specific reference in 20:10:22:36 that requires "local review committees to assess the effects of the proposed facility *pursuant to SDCL 49-41B-7*."

11. Applicant goes on to specify that "at pages 117-119 of the Application and in Appendix B, CRW provides information related to its interaction with and progress on obtaining approvals from federal, state, and local agencies." The information at pages 117 – 119 is required, for example, under SDAR § 20:10:22:05 ("The application for a permit for a facility shall contain a list of each permit that is known to be required from any other governmental entity at the time of the filing. . ."); under SDCL § 49-41B-11(11), which mandates that a facility permit application include information on "[e]nvironmental studies prepared relative to the facility"; and under 20:10:22:23(1), which calls for a "forecast of the impact on commercial and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities,

schools, transportation facilities, and other community and government facilities or services," among other things.

12. Therefore, providing the information in pages 117-119 of the Application and in Appendix B serves a different legal purpose than that of the local review committee, the goal of which is to assess the extent of potential social and economic effects generated by the proposed facility as well as the affected area's capacity to absorb those effects at various stages of construction in order to formulate mitigation measures. A committee's assessment also "shall include consideration of the temporary and permanent alternatives" in the specific areas of housing supplies, educational facilities and manpower, solid waste disposal and collection, and the others listed.

13. Applicant asserts that "CRW's submittal of information to address Commission Rule ARSD 20:10:22:36 is similar to information provided in recent wind applications that have been approved by the Commission." Any contents, or the lack thereof, of previous wind farm applications do not address the requirements set out in ARSD § 20:10:22:36, which require this Applicant submit as part of its Application all information necessary for a local review committee to assess the effects of the proposed facility pursuant to SDCL § 49-41B-7. Applicant identifies non-related wind energy facilities in South Dakota. This is an indirect way of implying, 'well those facilities were good so you should consider ours good also.' Other wind energy facilities do not provide precedent addressing the legal issues and objections raised by these Intervenors concerning this Application, and concerning this Motion. Because my grandfather was a state legislator and a sheriff is little argument in favor of assuming I should be a state legislator and a sheriff. In order to achieve those positions, I, like the pending Application, must stand on my own merits. As Benjamin Franklin once said, "A man who boasts of his ancestors doth but advertise

his own insignificance." The content of previous applications do not negate the legal requirements set out in ARSD § 20:10:22:36, which requires the Applicant to submit as part of its application all information necessary for a local review committee to assess the effects of the proposed facility pursuant to SDCL § 49-41B-7.

14. Applicant must provide information adequate for the local review committee to assess and consider temporary and permanent alternatives in the specific areas listed in SDCL § 49-41B-7 and set out above. It would be an extraordinary injustice of historical proportion to approve a permit without a required local review committee on a project involving more than 53,000 acres of South Dakota land.

Disclosure of Facility Structures

15. Under ARSD § 20:10:22:05, if an application is "for a permit for a wind energy facility, it shall also contain the information in §§ 20:10:22:33.01 and 20:10:22:33.02." Section 20:10:22:33.02(1) requires information regarding: "Configuration of the wind turbines, including the distance measured from ground level to the blade extended at its highest point, distance between the wind turbines, type of material, and color." Applicant did not disclose information concerning the highest point of blade extension. *See* Application §§ 22 – 23

16. Further, the distance between turbines cannot be ascertained from the figures provided with the Application. Figures provided include: "Figure 4a – Typical Wind Turbine Diagram" and "Figure 4b – Typical Wind Turbine Diagram." The "typical" specifications do not lend themselves to ready public comprehension, which undermines the statutory purpose of protecting the public and involving the community in the application process. Further, the description noting "turbines shall be spaced no closer than three (3) rotor diameters (RD) (measurement of blades tip to tip) within a straight line" but that "up to ten (10) percent of the towers may be

sited closer" does not suffice. The failure to set out the configuration of the wind turbines, including the distance measured from ground level to the blade extended at its highest point as required, in legible terms, leaves Section 20:10:22:33.02(1) unfulfilled. Applicant in its Response refers to its own representations on page 76 of the Application. As stated Applicant represents that up to ten (10) percent of the towers may be sited closer than the 'distance' the Application represents it will use for turbine spacing. Application page 76 This statement is reported to be based on micro-siting. The Application at page 26 states that micro-siting of the Project was completed. Nevertheless the Application fails to disclose how many of the towers will be sited closer than the Application-proposed distance.

Underground Facilities

17. Although Crowned Ridge has already received a permit for the transmission line from the collector substation to the Big Stone South Substation, the requirements of §§ 20:10:22:33.02(11) (**"***Configuration of towers and poles* for any electric interconnection facilities, including material, overall height, and width"), 20:10:22:33.02(12) ("*Conductor configuration and size, length of span between structures, and number of circuits per pole or tower* for any electric interconnection facilities"), and 20:10:22:33.02(13) ("If any electric interconnection facilities are placed underground, *the depth of burial, distance between access points, conductor configuration and size, and number of circuits*") have not been met. Although, as Staff asserts, EL17-050 does provide some of the information required under 20:10:22:33.02(13), neither EL17-050 nor EL18-019 were filed in this matter. Even if the documents had been filed, information required pursuant to 20:10:22:33.02(11) and 20:10:22:33.02(12) remains altogether absent. EL17-050 and EL18-019 do not provide information about the configuration of towers and poles or

information about conductor configuration and size, length of span between structures, and number of circuits per pole or tower as related to the separately permitted interconnection facilities.

Ownership

18. ARSD § 20:10:22:07 requires: "The application shall contain a complete description of the current and proposed rights of ownership of the proposed facility. It shall also contain the name of the project manager of the proposed facility." The publicly filed "Memorandum of Leases and Easements" (May 21, 2015; Document # 229485 with the Grant County South Dakota Register of Deeds) associated with Applicant's proposed Project confirms that Boulevard Associates, LLC, is the lessee and "Owner and Operator" of the publicly filed wind farm agreement associated with the Application. The Intervenors object to the possibility that the real estate owner and lessor, Boulevard Associates, LLC, may host turbines or related activities under the described, and acknowledged, publicly filed Memorandum of Leases and Easements for Applicant's proposed Project; the Application does not identify Boulevard Associates, LLC, as an owner or operator of property or owner of legal rights related to the Project. The claimed sole owner and manager of the Project is reported as Crowned Ridge Wind, LLC.

19. The Memorandum of Leases and Easements for Applicant's proposed Project proves that true and correct information is and was missing in the Application, though it certainly should have been. Failure to disclose information providing a "complete description" at the earliest possible time is a violation of the Applicant's continuing duty to "immediately notify the commission of any changes of fact or applicable law materially affecting the application" as required by ARSD § 20:10:22:04(5). Applicant has acknowledged that Boulevard Associates, LLC owns a wind lease related to the subject project, and that, in the future, "[a]ll easements entered into by Boulevard Associates that are needed to support the construction and operation of

the proposed wind facility will be assigned to CRW when and if the Commission issues a facility permit for the proposed CRW wind facility." Applicant Response ¶12.

20. Thus, Boulevard owns current legal rights to access property, use property and to take legal action regarding the development of a facility. Boulevard is the legal party on the lease with the landowner until or unless Boulevard might 'assign' the agreement as the Applicant has suggested. Boulevard's legal rights, as of the date of the filing of the Application and as of the date of this Reply Brief, are "current rights of ownership of the proposed facility" Boulevard is an existing keystone to the Applicant's "current and proposed rights of ownership" which allows Applicant to place turbines on private land for this Project. The Application did not provide a complete description of the current rights of ownership in the Application. Applicant has violated the law of wind farm siting in this matter.

Applicant's Analysis

21. Under ARSD § 20:10:22:23, an applicant is required to provide an identification and analysis of the effects of constructing, operating, and maintaining a proposed facility on the anticipated affected area, including: "A forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance. The information shall include the applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility." ARSD § 20:10:22:23(6).

22. The Application provides that information required under ARSD § 20:10:22:23(6) is in section 18, which set out in subsection 6 a discussion of cultural resources and mitigation strategies to protect them. However, no discussion of landmarks of natural significance is present in section 18 or elsewhere in the Application. Applicant asserts that Application "pages 105-108

explains that record searches of historical databases were conducted." Even so, the historical bridges, churches, structures, cemeteries, and Native American landmarks discussed there do not constitute natural landmarks. There are also no plans anywhere in the Application to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility, as required by the Rule. Neither Staff nor Applicant address this lack.

23. Staff asserts that information about landmarks of natural significance is provided in Figure 13 of the Application, but no such landmarks are mentioned in Figure 13. Staff contradicts its assertion when it states that "Staff is not aware of designated landmarks of natural significance within the project area that warrant an impact analysis beyond those identified in Figure 13 of the Application." Staff is not aware of designated landmarks of natural significance within the project area because such landmarks were not considered in the analysis provided.

Threat of Serious Injury and Safety Plans

24. Staff asserts that Applicant met its heavy burden, under ARSD § 20:10:22:23(6), with the information in Application §§ 18.3.3 and 22.2 in that it proves the facility will not pose a threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area and that it will not substantially impair the health, safety or welfare of the inhabitants. In Application § 18.3.3, Applicant, according to no specific timeline, promises that it has future plans to coordinate with first responders and develop a safety plan for construction and operation personnel, which will be shared with them on an as needed basis. In § 22.2, the Applicant asserts that it predicts minimal impacts on the security and safety of the local population and claims that a safety plan will be developed after construction begins. Promises to take action in a vague and uncertain future does not protect the environment or the social and

economic condition of inhabitants in the siting area and does not ensure that the facility will not substantially impair the health, safety, or welfare of inhabitants.

25. In its Response, Applicant claims that Application "pages 41 – 42, 45, 90, and 100 sets forth CRW's plans." Pages 41 – 42 and 45 are related to hydrology under 20:10:22:15; page 90 provides generally: "Any spills of petroleum products or other hazardous our toxic materials will be remediated, and the land restored to pre-construction conditions as much as possible." Page 100 assures readers that "there is the possibility that the improper use, storage, and/or disposal of hazardous materials such as fuels, oils, and maintenance fluids could result in a release that could cause contamination and exposure during construction, operation, and maintenance activities associated with the Project. Direct effects of a release will include contaminating soil and water resources; indirect effects could include exposing humans, wildlife, and vegetation to the contamination." The mitigation plan provided consists of prevention, on the one hand, and "ensure[ing] that necessary resources are available to respond to a release," on the other. The information does not include how or what necessary resources Applicant could utilize to respond if preventative measures do not operate as planned due to unexpected human or other error, and noxious fuels, oils, or maintenance fluids accidentally contaminate the soil or water. Further, the information does not include the plans required under ARSD § 20:10:22:23(6) "to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility." The Application does not include a required Spill Prevention, Control, and Countermeasure Plan contrary to 40 CFR, Part 112.7. And ARSD § 20:10:22:23(6)

Mammal Inventory

26. The Applicant is correct that ARSD § 20:10:22:15 "requires a map of the planned water uses of wildlife that could be effected [sic] by the proposed wind facility," and that ARSD § 20:10:22:13 "requires environmental impacts to be assessed for animal communities." Specifically, ARSD § 20:10:22:13 requires that applicants "provide [1] a description of the existing environment at the time of the submission of the application, [2] estimates of changes in the existing environment which are anticipated to result from construction and operation of the proposed facility, and [3] identification of irreversible changes which are anticipated to remain beyond the operating lifetime of the facility." Further, ARSD § 20:10:22:16 mandates that applicants:

> provide information on the effect of the proposed facility on the terrestrial ecosystems, including existing *information resulting from biological surveys conducted to identify and quantify* the terrestrial fauna and flora potentially affected within the transmission site, wind energy site, or siting area; an analysis of the impact of construction and operation of the proposed facility on the terrestrial biotic environment, including breeding times and places and pathways of migration; *important species*; *and planned measures to ameliorate negative biological impacts as a result of construction and operation of the proposed facility*.

(Emphasis added.) That is, Applicant is required to provide information resulting from biological surveys conducted to identify and quantify important species and detail planned measures to ameliorate negative biological impacts as a result of construction and operation of the proposed facility.

27. Thus, Applicant is wrong to claim that "[a]n inventory of mammals is not required by applicable commission rules or statutes." Applicant seems to realize its potential for misapplying the law when it notes that "at pages 53-69 and Appendices G and F [the Application] identifies the animals and avian mammals (i.e., bats) in the vicinity of the proposed project and also assesses the impact of the construction and operation of the wind facility on these mammals." Applicant also offers reference

to pages 41 – 69. A review of all pages cited confirms Applicant's statement: "Mammal inventories have not been completed for the project." Application at 52.

28. Even so, Applicant provides the following inventory of the site area: "Richardson's ground squirrel (*Urocitellus richardsonii*), mink (*Mustela vison*), common raccoon (*Procyon lotor*), white-tailed deer (*Odocoileus virginianus*), least weasel (*M. nivalis*), and coyote (*Canis latrans*)." Applicant also found the "Northern River Otter (State Threatened)" in the site area, noting the "Project Area contains lakes and streams which have the potential to support northern river otters (Section 11.2). However, it is unknown whether northern river otters frequently utilize these tributaries in Codington County (SDGFP 2012)." Foxes are not mentioned at all.

29. In 2018, the South Dakota Department of Game, Fish and Parks added the northern river otter (and the swift fox), under ARSD § 41:10:02:04, to the list of State threatened mammals. SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS, STATE T& E SPECIES STATUS REVIEWS APPROVED BY SDGFP COMMISSION APRIL 5, 2018, 122, https://gfp.sd.gov/UserDocs/nav/status-reviews.pdf. The northern river otter is currently monitored by the South Dakota Natural Heritage Program and has been classified at State Heritage rank S2 (imperiled species) and "included as a Species of Greatest Conservation Need in the South Dakota Wildlife Action Plan." *Id.* at 122. Applicant cites outdated information despite that the data was updated, at least three times, in 2014 (SOUTH DAKOTA WILDLIFE ACTION PLAN), 2015 (DETERMINATION OF RIVER OTTER (*LONTRA CANADENSIS*) DISTRIBUTION AND EVALUATION OF POTENTIAL SITES FOR POPULATION EXPANSION IN SOUTH DAKOTA), and 2018, as noted. Applicant failed to coordinate with the SDGFP Natural Heritage Program to ensure that the proposed Project has established measures to ameliorate negative biological impacts on the northern river otter as a result of construction and operation of the proposed facility. And the Application does not quantify, analyze the impact and discuss planned measures based on the current information as provided in this paragraph. ARSD § 20:10:22:16

30. As Intervenors previously noted, the "biotic environment" referenced in ARSD § 20:10:22:16 comprises fauna such as foxes, beavers, and burrowing animals as well as otters. The Application does not provide an analysis of the impact of the construction and operation of the facility on these South Dakota animals. Therefore, Applicant has not demonstrated that the proposed Project incorporates plans to ameliorate negative biological impacts on affected fauna as a result of construction and operation of the proposed facility, in violation of South Dakota requirements.

31. Staff, in its response at paragraph 8, seeks to place the burden of proof on Intervenors: "Should the intervenors present expert testimony and evidence on the need for a mammal inventory to properly assess project impacts, Staff will address this in rebuttal testimony or at the evidentiary hearing." However, the law places the burden of proof on the Applicant. SDCL § 49-41B-22(2) – (3) ("The applicant has the burden of proof to establish that: . . . (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area; (3) The facility will not substantially impair the health, safety or welfare of the inhabitants."). The legal requirement is clear: Applicant must provide a description of the existing environment at the time of submission of the application, estimates of changes in the existing environment which are anticipated to result from construction and operation of the proposed facility, and identification of irreversible changes anticipated to remain beyond the operating lifetime of the facility as well as information from biological surveys conducted to identify and quantify important species and detailed measures intended to ameliorate negative biological impacts as a result of construction and operation of the proposed facility, among other requirements. ARSD §§ 20:10:22:13 and 20:10:22:16. This information should have been included in the Application. ARSD 22:10:22:05.

Easement and Leases

32. Applicant asserts at page 11 of its Response that, "The plain language of the cited statutes and Commission rules does not require the submission or representation of the material terms of easements and leases." The Application should provide the Intervenors and the Commission with representations about impeded or unimpeded access to use of property by the Applicant during the life of the contemplated Project. Wind lease or easement agreements can span a term of up to 50 years. Will terms of an easement which allow a developer to maximize the productivity of a turbine conflict with the environmental provisions of the law including noise control? The Applicant dismisses this issue and describes it as "generalized concerns and questions." Page 11 of Applicant's Response.

33. The purpose of a facility permit application is to protect the environment and the public. SDCL § 49-41B-1 ("Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state . . ."); see also GUIDE 1 ("In considering applications, the commission's primary duty is to ensure the location, construction and operation of the facilities will produce minimal adverse effects on the environment and the citizens."). In EL 19-003 the Application failed to include material representations regarding the terms and conditions of private landowner turbine easements or leases and related landowner construction easements or leases. Such Applicant representations need not reveal "confidential" information, but rather without Applicant's representations on the impact of the material terms and conditions of participating agreements on the Project, the Applicant has not provided an analysis on this issue, and, importantly, has not provided information necessary for an application. ARSD 20:10:22:18 (3) and (4)

34. Applicant's representations of the terms and conditions contained in turbine leases and easements executed by participating landowners must be in the Application to meet the Applicant's burden on issues of possible injury to the environment, and to determine potential harm to social and economic conditions of participating landowners as well as to the affected Project area. The Application should show that the construction, operations and use terms and conditions contained in agreements do not waive local use ordinances, or cause the risks described. The Applicant was required to represent whether any of the lease or easement terms "preempt local controls" pursuant to ARSD 20:10:22:19. Applicant's disclosure requirements are not "generalized concerns and questions" as the Applicant argues; this information should have been included in the contents of the filed Application. ARSD 20:10:22:13; ARSD 20:10:22:14; ARSD 20:10:22:19; ARSD 20:10:22:5.

Denial of Due Process

35. Applicant failed to file an application 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. Fair notice and the requirements of timely disclosure should not allow an applicant to leave open the possibility it might later establish required facts, impacts, or project analysis to comply with State-created directives for the original content of an application. 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). Applicant did not provide the content required, as has been noted at length.

36. As parties, Intervenors have procedural rights consonant with due process. SDCL § 49-41B-17; *Application of Union Carbide Corp.*, 308 N.W.2d 753, 758 (S.D. 1981). It is the principle of due process in the *Union Carbide* case that applies to the matter before the

Commission. Applicant does not and cannot argue that the constitutional guaranty of due process for which purpose the case is cited does not apply to administrative as well as judicial proceedings, particularly where proceedings are specifically classified as judicial or quasi-judicial in nature. Nor does Applicant endeavor to argue that due process does not require notice and the right to be heard in a meaningful time and manner.

37. Due process requires adequate notice. S.D. Const. Art. VI, §2. Notice in these proceedings includes the disclosure of required information in the Application. The Application does not provide adequate timely notice of required information sufficient to obtain a fair hearing.

38. Applicant did not comply with the form and content requirements of the law, the timely disclosure requirements of the law and the obligations and analysis required in the law, regardless of whether Intervenors were granted party status and issued a procedural schedule leading up to an expensive multiple-day evidentiary hearing, or whether the Commission procedural schedule follows the South Dakota Administrative Procedural Act, SDCL Ch. l-26.

39. Under SDCL § 49-41B-13, the PUC may deny an application for failure to file an application in the form and content required by SDCL 49-41B and the rules promulgated thereunder.

40. The Intervenors have property interests affected by the proposed Project which provide them due process protections. Failure to disclose information in the Application, when required, failure to analyze information in the Application, when required, failure to provide information on the effect of the proposed facility in the Application, when required, failure to provide plans to ameliorate impacts in the Application, when required, are a denial of due process of the law under the South Dakota Constitution and under the Constitution of the United States. U. S.

Const. amend XIV; S.D. Const. Art. VI, §2. "[D]ue process is flexible, and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471.

CONCLUSION

41. Intervenors respectfully move that the PUC deny and dismiss the Application in this matter based upon the law and argument presented in this Reply Brief, Intervenors' Brief and the Motion. The Commission has an established and orderly course of rules to be followed in the application process. It would be error to not follow the process and the law required as a part of that process. Further, to allow the Applicant, at this time, to amend or add significant and legally required 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 establish its burden of proof including the fact that the Project will not pose a threat of serious injury to the environment. Further, 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 all as addressed in this Brief.

Dated this 5 day of May, 2019

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