

**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
IN SUPPORT OF MOTION TO
DENY AND DISMISS

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

BACKGROUND AND INTRODUCTION

The Intervenors respectfully submit this Brief in support of Intervenors' 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" is a reference to the named wind energy facility applicant in the above entitled proceedings EL19-003. Reference to "Application" is a reference 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.

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 Intervenor 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)

THE LAW OF DENIAL AND DISMISSAL- LEGAL STANDARD

1. This Motion to Deny and Dismiss is not based upon SDCL § 15-6-12(b) The civil rule 12(b) addresses civil pleadings and civil procedure, not the substantive law related to the Application. A “pleading” under the civil rules requires only, “A short and plain statement

of the claim showing that the pleader is entitled to relief;” 15-6-8(a)(1) A civil pleading may only consist of a couple of pages. This Motion is based upon the South Dakota energy conversion and transmission facilities law and rules. The dismissal statute allows the Commissions to deny and dismiss an application which does not 1.) generally conform to the rules of form regarding the presentation of an application; 2.) an application which does not provide relevant legal content; 3.) and an application which does not comply with South Dakota energy facility statutes and rules related to a wind energy facility. An application for a wind energy facility requires considerable more content and legal compliance than a pleading. An application for a wind energy facility must provide a multitude of disclosure and content information. An application’s numerous legal requirements are cited (but not correctly followed) in the two left hand columns found on pages 2 through 9 of the Application. Intervenors’ Motion is based on the failure of the Applicant to fulfill the legal requirements described in this Brief.

APPLICANT’S FAILURE TO COMPLY – ESTIMATED CONSTRUCTION COST

2. The wind energy facility application before the PUC must disclose the estimated construction cost of a project. ARSD 20:10:22:09 Estimated construction cost of the project is content that should have been included in the Application. ARSD 20:10:22:05. The Dictionary of Architecture by McGraw-Hill defines construction cost: “The cost of all the construction portions of a project, generally based upon the sum of the construction contracts and other direct construction costs. Not included is compensation for professional services, land, rights-of-way or other cost, specified as the responsibilities of the owner outlined in the contract.” The estimated construction cost, required by South Dakota statute and rule, is not in the Application. ARSD 20:10:22:09 SDCL § 49-41B-11 (11) The

Application at page 17 provides a word salad of data about capital costs, and attempts to integrate construction cost within that convoluted word salad. The Applicant's description also conflates things not relevant to construction cost, for example, ". . . also includes lease acquisition, permitting, engineering, procurement, and construction of turbines, access roads. . ." Page 17 The content requirement is not a fill-in-the-blanks-later rule. This information must be placed in the Application. ARSD 20:10:22:05 And, while the Applicant included much non-relevant data, state law *excludes*, "activities incident to preliminary engineering or environmental studies" from the term "construction." SDCL § 49-41B-2. Capital cost, lease acquisition, permitting, engineering, access roads, supervisory control, data acquisition and project financing – all of which are found in Applicant's description - do not disclose the estimated construction cost of the Project. ARSD 20:10:22:09 SDCL § 49-41B-13 (2)

APPLICANT'S FAILURE TO COMPLY – LOCAL REVIEW COMMITTEE

3. The term "facility" under South Dakota energy law includes "wind energy facility." 49-41B-2 Applicant describes the Project as a "facility" over one hundred times and further describes the Project as an "energy conversion facility" in the Application. The relevant rule for a facility application mandates a local review committee which information must be included in an application: "20:10:22:05. Application contents. The application for a permit for *a facility* shall contain the applicable information specified in. . . 20:10:22:36. . ." (Italics added) Material requirements in a wind energy application for a local review committee are: "20:10:22:36. Additional information in application. 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.” The Applicant did not provide information necessary for a local review committee to assess the effects of the proposed facility. No local review committee was formed contrary to the law. ARSD 20:10:22:05. A commentator on utility projects, although discussing general utility siting, stated it aptly, “Open planning—A planning process is considered “open” or “transparent” when it solicits the views of interested parties regarding ways to address a specific transmission need. Parties other than utilities are more likely to feel that such a process has respected their interests; it also gives the utility the opportunity to make changes to a plan before committing to it as a formal proposal.”

Transmission Siting and Permitting by David Meyer The Application does not include an assessment by a local review committee. SDCL § 49-41B-7.

APPLICANT'S FAILURE TO COMPLY – DISCLOSURE OF FACILITY

STRUCTURES

4. An applicant is required to disclose the distances between wind turbines in the Project pursuant to subsection (1) of the following Rule. ARSD 20:10:22:33:02 (Rule) The Applicant has not included this information. The “distances between turbines” is not disclosed in the Application as required under subsection (1) of the Rule. Additionally, a meteorological tower is identified in the Application. Page 22 The Applicant has not included information required concerning the tower. The Application did not provide for the width of the tower or disclose the material to be used in the tower pursuant to subsection (11) of the Rule. The Application did not disclose the conductor configuration and size, length of span between structures, and number of circuits per pole or tower for any electric interconnection facilities pursuant to subsection (12) of the Rule. For underground facilities the rule requires a designation of distance between access points, conductor configuration and size, and number

of circuits. The Application did not disclose this information contrary to subsection (13) of the Rule. See Section 22 and 23 of the Application. The foregoing contents must be disclosed in the Application. ARSD 20:10:22:05

APPLICANT'S FAILURE TO COMPLY – UNDERGROUND FACILITIES

5. The administrative rules require the Applicant disclose interconnection facilities placed underground including the distance between access points, conductor configuration in size, and number of circuits. ARSD 20:10:22:33:02 (13) The Applicant has provided information on depth only. Page 21 The foregoing information must be disclosed in the Application. ARSD 20:10:22:05

APPLICANT'S FAILURE TO COMPLY – SETBACK DISTANCES

6. The administrative rules require the Applicant provide setback distances from off-site buildings, right-of-ways of public roads, and property lines. ARSD 20:10:22:33:02 (4) The Applicant has not provided this information. The language of the administrative rule provides that information is required of an applicant when filing for a wind siting permit. The foregoing Application information must be disclosed in the Application. ARSD 20:10:22:05

APPLICANT'S FAILURE TO COMPLY – OWNERSHIP

7. South Dakota statutes and rules require, "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." ARSD 20:10:22:07. See also SDCL § 49-41B-11 (7) A "complete description"

is a full and definite identification of the “rights of ownership.” A document related to this Project entitled a “Memorandum of Leases and Easements” was publically filed on 5.21.2015 at Document number 229485 with the Grant County South Dakota Register of Deeds. The document describes a company called Boulevard Associates, LLC as the lessee and also as the “Owner and Operator” of this publically filed wind farm agreement. The Intervenors believe the real estate owner and lessor under this Memorandum of Leases and Easements will allow the owner’s property to host turbines or related activities for the Applicant’s proposed Project. The Application does not identify Boulevard Associates, LLC. Boulevard Associates, LLC is not described in the Application as an owner or operator of property or owner of legal rights related to the Project. The owner and manager of the Project is reported as Crowned Ridge Wind, LLC. Page 14

South Dakota law requires “a complete description of the current and proposed rights of ownership of the proposed facility.” ARSD 20:10:22:07 This content must be included in the Application. ARSD 20:10:22:05 Naming an “owner and manager” alone would be inadequate under the law if there were other rights of ownership. South Dakota siting law demands a “complete description“ of *current and proposed rights of ownership*. The law requires more than naming an owner with legal title to a project, or naming a parent company holding a so-called “indirect” ownership interest. Additionally, giving a general list of so-called affiliated companies without a complete description of current and proposed rights of ownership does not comply with the law. ARSD 20:10:22:07 Under facts in which different companies own the underlying land leases and easements, or different companies own parts of a proposed facility, or if an affiliated company or a subsidiary possess rights of ownership ascribed in an application to the “named owner”, then, these examples do not comply with South Dakota law. A facility application requires “a complete description of the current and proposed rights of ownership of the proposed facility.” ARSD 20:10:22:07

APPLICANT'S FAILURE TO COMPLY – ABSENCE OF APPLICANT'S ANALYSIS

8. South Dakota rules require the Applicant provide a description of the Project's impact on identified subjects. The Applicant did not follow state rules in the Application. ARSD 20:10:22:23.(6) requires a forecast of the impact on landmarks of natural significance. Required information is to include an 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. The Application is void of discussion of landmarks.

APPLICANT'S FAILURE TO COMPLY – APPLICANT'S BURDEN OF PROOF

9. At the time of filing this Motion, the Project application procedure is substantially and substantively well underway. We are not in the beginning stages of the Application proceedings. The Applicant has not, and has shown it cannot, meet its burden of proof in order to gain approval or go forward with the Application. SDCL § 49-41B-22 By way of illustration the Application states, "Mammal inventories have not been completed for the project." Page 53 This provides no analysis of the impact of construction and operation of the facility on the terrestrial biotic environment. An absence of a mammal inventory fails to comply with ARSD 20:10:22:16 The Applicant must provide information on the effect of the proposed facility on terrestrial ecosystems as well as provide an analysis of the impact of the construction and operation of the facility. ARSD 20:10:22:16 SDCL § 49-41B-11(11) The "biotic environment" as that phrase is used in the above-cited South Dakota rule comprises of living things which interact with each other. The term includes fauna such as foxes, beavers and burrowing animals. The Application does not provide an analysis of the impact

of the construction and operation of the facility on these South Dakota animals. Applicant included various letters and communications with government agencies discussing flora and fauna. Providing such information in an Application does not however satisfy Applicant's burden (not a government agency's burden) of showing the "effect of the proposed facility" and, further, it does not satisfy the Applicant's regulatory burden to provide an "analysis of the impact." ARSD 20:10:22:16 The foregoing information must be disclosed in the Application. ARSD 20:10:22:05

SDCL 49-41B-22 describes Applicant's burden of proof. Applicant expressly represents that its Application "establishes that" the Application itself has met that burden. Page 117 For an applicant to possibly submit required data later, or even submit it at the current stage in the process, denies the Intervenor's due process of the law and violates Intervenor's South Dakota and United States rights to due process of the law.

An applicant negotiates turbine leases and easements when dealing with non-government real property. An applicant by negotiating strategy would want as much flexibility as possible concerning use of any leased land or land to be placed under easement. An applicant by negotiating strategy would want to minimize the extent to which it will be required to obtain approvals. 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 specific terms and conditions of participating agreements on the Project, the Applicant has not met its Application burden in this matter. And has not provided information necessary for an application. The terms and conditions in turbine leases and easements signed by participating landowners should be in the Application to meet the Applicant's burden on the issues of any 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. SDCL 49-41B-22.(2) and (3) 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. This information should have been in the contents of the Application. ARSD 20:10:22:13 ARSD 20:10:22:14 ARSD 20:10:22:19 ARSD 20:10:22:5.

APPLICANT'S FAILURE TO COMPLY –NO DUE PROCESS OF THE LAW

10. Intervenors, by statute and following the PUC's order granting them party status, are parties to this proceeding. SDCL § 49-41 B-17. As parties, Intervenors "are accorded procedural rights that are consonant with due process." *Application of Union Carbide Corp.*, 308 N.W.2d 753, 758 (S.D. 1981). "The constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings, particularly where such proceedings are specifically classified as judicial or quasi-judicial in nature." *Id.* "Due process requires notice and the right to be heard in a meaningful time and manner." *State v. Fifteen Impounded Cats*, 785 N.W.2d 272,282. To be heard in a meaningful matter requires a fair hearing such that "even the probability of unfairness" should be avoided. *Strain v. Rapid City School Bd.*, 447 N.W.2d 332,336 (S.D. 1989). It is respectfully submitted that based upon this Brief and the law cited, the PUC should deny the Application. 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.")

CONCLUSION

11. Intervenors respectfully move that the PUC deny and dismiss the Application in this matter based upon the law and argument presented in this 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 to allow the Applicant to amend significant content requirements, as well as substantive legal requirements, because of Applicant's own failures in filing an application would misapply the purpose of the statute permitting amendment. The Application on its face 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 the 25 day of April, 2019.


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