BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF COMMISSION STAFF'S REQUEST FOR AN ORDER TO SHOW CAUSE REGARDING CROWNED RIDGE WIND, LLC	* * * * *	**STAFF'S BRIEF IN SUPPORT OF PETITION FOR ORDER TO SHOW CAUSE** **EL20-002**

The Staff of the Public Utilities Commission (Staff), by and through its attorneys of record, hereby files this Brief in Support of its Petition for Order to Show Cause Regarding Crowned Ridge Wind, LLC (Crowned Ridge).

I. Background

On January 13, 2020, Staff filed with the Commission a Petition for Order to Show Cause (Petition) regarding Crowned Ridge's operation of the Crowned Ridge Wind Farm without an equipped Aircraft Detection Lighting System (ADLS). As a bit of background, the Commission issued Crowned Ridge a Permit to construct the Crowned Ridge Wind Project (Permit) on July 26, 2019, after a full evidentiary hearing on the matter. A full history of the application and proceeding can be found in PUC Docket EL19-003. The Commission imposed a number of conditions on the Permit, including Condition 33, which specifically states "Applicant shall utilize an Aircraft Detection Lighting System approved by the Federal Aviation Administration." Significantly, on July 1, 2019, just prior to the date the Permit was granted, a new state law, SDCL 49-41B-25.2, went into effect requiring any facility receiving a permit after July 1, 2019 to be "equipped with an aircraft detection lighting system."

On January 3, 2020, Crowned Ridge identified in footnote eight imbedded in its Response to Intervenor Complaints that "CRW will submit its application to the FAA in January of 2020 and expects to install and operate the ADLS by June 2020." Further, at the January 7, 2020 Commission meeting, public comments to the Commission indicated that Crowned Ridge was not utilizing an ADLS. On January 10, 2020, in response to a Staff inquiry on the ADLS

(hereinafter "January 20th Letter"), Crowned Ridge filed a letter confirming that Crowned Ridge Wind Farm did not have an operational ADLS, but indicated that Crowned Ridge "is in compliance with both Condition 33 of the Final Order and SDCL 49-41B-25.2, because CRW is in the process of obtaining Federal Aviation Administration ("FAA") approval of a ADLS and will comply with its commitment to have the ADLS installed within one year of FAA approval."

At previous hearings and meetings, the Commission has indicated that the ADLS requirement was important and something that would benefit residents near the project. This past interest in ADLS systems from the Commission and the fact that ADLS systems are now required by law compelled Staff to bring this issue before the Commission.

It is important to note that the decision the Commission makes as to whether to issue an Order to Show Cause does not equate to a final decision on this matter. An Order to Show Cause would not find Crowned Ridge to be in violation, rather, it would establish that there is reason to go forward and compel Crowned Ridge to make its case as to why it is in compliance. No penalty or final determination is to be made at this juncture.

II. Legal Analysis

The question at hand is whether the operation of the Crowned Ridge Wind Farm without an equipped ADLS is in violation of SDCL 49-41B-25.2 or Condition 33 of the Permit. Upon initial review, the statute and condition may appear somewhat vague or ambiguous. However, the applicable guidance outlined below, leads Staff to believe a violation has in fact occurred.

a. Condition 33 of the Permit Requires an ADLS.

Condition 33 of the Permit states "Applicant **shall utilize** an Aircraft Detection Lighting System approved by the Federal Aviation Administration." (*emphasis added)*. Since the Commission first required a project to utilize an ADLS in docket EL17-055, Staff has worked with permit Applicants to include the use of an ADLS in a list of proposed conditions for Commission consideration. In this case, the condition was agreed to and proposed jointly by

Crowned Ridge and Staff and was subsequently incorporated as a Condition of the Permit granted by the Commission.

In its January 20th Letter, Crowned Ridge identified that they are incompliance with Condition 33 because they are in the process of obtaining FAA approval and will comply with its commitment to the ADLS installed within one year of receiving FAA approval. The commitment Crowned Ridge refers to stems from the Application. (See Evidentiary Hearing Exhibit A1 at 87). However, Condition 33 did not simply accept Crowned Ridge's proposed timeline in the Application, but instead required applicant to "utilize" an ADLS. This is an important distinction because Condition 2 of the Permit requires the Project be constructed, operated and maintained in a manner consistent with the descriptions in the Application, commitments made by the Applicant and the conditions of the Permit. Staff reads these conditions together as a requirement that an ADLS must actually be in use to comply with the condition. If there was no intent to hold Crowned Ridge to a different standard regarding the timeline for the use of an ADLS, then Condition 33 would not have been necessary.

As mentioned, this condition is something routine in recent wind permits issued by the Commission. However, the language was modified when a permit was issued in Docket No. EL18-053. (See Attachment 1). When the decision was made in that docket, the Commission modified the language in the condition proposed by the Applicant and Staff in order to make the condition more definitive, requiring the permit holder to come before the Commission for a waiver if an ADLS was not used. While Staff acknowledges that it was a different Applicant in that docket, the discussion on the record at that time demonstrates that there was an understanding when that condition was written as it now reads that if the ADLS system was delayed or not installed for any reason, the permit holder would need to come back before the Commission for relief.

Staff does recognize that a Permit holder has no control over whether the FAA will approve a Project's request to utilize an ADLS or the FAA's timeline for reviewing and approving such a request. Staff also understands that unexpected delays and unforeseen circumstances do arise over the process of constructing a utility scale wind farm, potentially

impacting a Permit holder's ability to comply with Condition 33. When unforeseen events occur beyond the Permit holder's control, the proper process is for the Permit holder to request the Commission grant a temporary waiver of the condition. If such a request were filed, Staff would likely support a request from a Permit holder for some amount of flexibility or a temporary waiver of Permit Condition 33 if good cause were shown. However, such a request was not received by Staff in this case and the newly enacts SDCL 49-41B-25.2 further complicates this matter.

b. SDCL 49-41B-25.2 Requires an ADLS.

On July 1, 2019, SDCL 49-41B-25.2 went into effect. This statute was enacted by the Legislature during the 2019 Legislative Session and required wind facilities permitted after July 1, 2019 to be equipped with ADLS Systems. Specifically, SDCL 49-41B-25.2 states:

> For any wind energy facility that receives a permit under this chapter after July 1, 2019, **the facility shall be equipped with an aircraft detection lighting system** that meets the requirements set forth by the Federal Aviation Administration for obstruction marking and lighting in Chapter 14 of FAA Advisory Circular (AC) 70/7460-1L, "Obstruction Marking and Lighting," dated December 4, 2015. Any cost associated with the installation, operation, or maintenance of a system under this section is solely the responsibility of any owner of the wind energy facility. (*emphasis added)*

While one could potentially argue this statute is ambiguous, case law provides guidance that clarifies how this statute should be interpreted.

> "A statute or portion thereof is ambiguous when it is capable of being understood only by reasonably well-informed persons in either of two or more senses."
>
> Whenever a case such as this one is before the court, however, it is obvious that people disagree as to the meaning to be given to a statute. This alone cannot be controlling. The court should look to the language of the statute itself to determine if "well-informed persons" *should have* become confused.
>
> *Petition of Famous Brands, Inc.*, 347 NW2d 882, 886 (SD 1984), *National Amusement Co. v. Wisconsin Dep't of Taxation*, 41 Wis.2d 261, 267, 163 N.W.2d 625, 628 (1969). (Citing *State ex*

> *rel. Neelen v. Lucas, supra,* 24 Wis.2d at 267, 128 N.W.2d at 428.) (emphasis in original)

If there is some ambiguity in a statute, the Court provided further guidance, explaining:

> [t]here are instances when it is necessary to look beyond the express language of a statute in determining legislative intent. Most notably, when the language is ambiguous, unclear, or if confining ourselves to the express language would produce an absurd result. (Citing *Myrl & Roy's Paving, Inc.,* 2004 SD 98, ¶ 6, 686 N.W.2d at 654; *Moeller v. Weber,* 2004 SD 110, ¶ 46, 689 N.W.2d 1, 16
>
> [I]n cases where a literal approach would functionally annul the law, the cardinal purpose of statutory construction — ascertaining legislative intent — ought not be limited to simply reading a statute's bare language; we must also reflect upon the purpose of the enactment, the matter sought to be corrected and the goal to be attained. (Citing *De Smet Ins. Of South Dakota v. Gibson*, 552 NW 2d 98, 100 (S.D.1996).
>
> *MGA Ins. Co., v. Goodsell*, 707 NW2d 483, 487 (S.D. 2005)

In this case, while interested persons could potentially argue the statute is not clear, accepting Crowned Ridge's explanation from the January 10 Letter as a reasonable interpretation of the statute would lead to an absurd result and an essential annulment of the statute. While Staff believes the statute is clear, even if there is some ambiguity, Staff cannot propose an interpretation that would essentially annul the statute of any effect.

The Legislature passed this statute during the 2019 Legislative Session, well after the Commission built a strong record of including an ADLS requirement as a condition of wind facility permits. The Legislature is well practiced in drafting new laws to convey their intent. The Legislature regularly utilizes delayed effective dates and regularly inserts modifiers into the law if the intent is that any portion of compliance with the law is begin at a date other than the effective date of the statute. If the Legislature's intent was to require that a facility be equipped with ADLS within a year of construction, or by some other milestone the Legislature would have included such a provision.

Instead, the Legislature elected not to include a delayed effective date or other specific date, knowing that under SDCL 2-14-16, statutes are effective July 1, after they are passed. Based on this rationale, it is unreasonable to believe the intent of the statute was that developers simply work on equipping the facility with an ADLS at some unknown point in the future.

Frequently throughout the South Dakota Codified Laws, the Legislature has required that something shall be done. In the various statutes "shall" is always understood to be a constant and a prerequisite. Many examples can be found SDCL Chapter 32, the chapter dedicated to motor vehicles. One such example is SDCL 32-17-8.1, which provides:

> Stop lamps required--Mounting--Visibility--Violation as petty offense. Except for a vehicle equipped with a slow-moving vehicle emblem in compliance with §§ 32-15-20 and 32-15-21, each motor vehicle, trailer, semitrailer, and pole trailer shall be equipped with at least two stop lamps with at least one on each side. The side stop lamps shall be mounted on the same level and as widely spaced laterally as practicable. However, each motor vehicle, trailer, semitrailer, and pole trailer manufactured and assembled before July 1, 1973, and each motorcycle and motor-driven cycle shall be equipped with at least one stop lamp. A stop lamp shall be mounted on the rear of the vehicle at a height of no more than seventy inches nor less than fifteen inches. Each stop lamp shall display a red light visible from a distance of not less than three hundred feet to the rear in normal sunlight, except for a moped, which shall be visible from a distance of not less than one hundred fifty feet. Each stop lamp shall be actuated upon application of the brake which may be incorporated with one or more rear lamps. A violation of this section is a petty offense.

Clearly, this statute mandates that stop lamps are required at the time the vehicle operates. The lamps are a prerequisite to legally operating the vehicle.

In the same vein, ADLS is a prerequisite to operating the Crowned Ridge Wind Farm.

III. CONCLUSION

Staff recognizes that this is a new statute and is aware that many factors, some out of Crowned Ridge's direct control, affect when ADLS is operational at the Project.

However, it is important to consider that SDCL 49-41B-25.2 was seemingly enacted to bring aesthetic relief to residents living within and around wind energy facility. Without an operational ADLS, the lights are required by the FAA to blink around the clock. One light blinking at the top of one tower may not be hugely impactful to the surrounding area, but, 87 lights at the top of wind turbines spread over the project area, blinking in unison at night light up the entire sky, far beyond the boarder of the project area. Staff understands a wind facility's failure to utilize an ADLS may have a large aesthetic impact on the residents surrounding the facility.

While there may be specific mitigating factors associated with this case, Staff believes those factors should not affect the Commission's decision as to whether a violation has occurred but should instead be considered in determining whether a penalty is appropriate, and what penalty would be reasonable given the circumstances. A decision by this Commission that the statute does not actually require ADLS to be used once a project is constructed or operational would remove any true meaning from the statute.

For the foregoing reasons, Staff requests the Commission issue an Order to Show Cause so this issue may be investigated further and so Staff and Crowned Ridge can work together to come to a reasonable resolution for the benefit of all involved.

Dated this 31st day of January 2020.

Amanda M. Reiss
Kristen Edwards
Staff Attorneys
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Amanda.reiss@state.sd.us