

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Meadowlark Wind I, LLC  
New Frontier Wind Energy Project – McHenry County  
Siting Application

Case No. PU-11-69

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

**Geralyn R. Schmaltz** deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **17th day of December 2018**, she deposited in the United States Mail, at Bismarck, North Dakota, **one** envelope with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

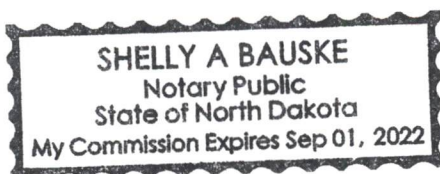
- **Consent Order**

The envelope was addressed as follows:

Mollie Smith  
Fredrikson & Byron, P. A.  
200 South Sixth Street Suite 4000  
Minneapolis, MN 55402-1425  
**Cert. No. 7018 0680 0001 3737 6977**

The address shown is the respective addressee's last reasonably ascertainable mailing address.

Subscribed and sworn to before me  
this **17th day of December 2018**.



SEAL

A handwritten signature in blue ink, appearing to read "Geralyn R. Schmaltz", written over a horizontal line.

A handwritten signature in blue ink, appearing to read "Shelly A. Bauske", written over a horizontal line.

Notary Public

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Meadowlark Wind I LLC  
New Frontier Wind Project – McHenry County  
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**Case No. PU-11-69**

**CONSENT ORDER**  
**December 13, 2018**  
**Preliminary Statement**

On August 22, 2011, Meadowlark Wind I LLC (Meadowlark) filed its Application for a Certificate of Site Compatibility for the New Frontier Wind Energy Project, located in McHenry County, North Dakota.

On April 25, 2012, the Public Service Commission (Commission) issued its Findings of Fact, Conclusions of Law, and Order (Order) granting Certificate of Site Compatibility No. 29 (Certificate) to Meadowlark for the project.

On November 22, 2016, Meadowlark filed a Certification of Continuing Suitability with supporting documents.

On May 10, 2017, the Commission issued an Order of Continuing Suitability for the project

On November 2, 2018, Meadowlark filed a Request for Setback Determination and variance.

On November 6, 2018, Meadowlark filed additional support for its request for the setback determination and asked the Commission to amend its May 10, 2017 Order of Continuing Suitability.

On November 8, 2018, the Commission issued a Notice of Intent to Amend Order and Notice of Opportunity for Hearing. The issues to be considered were identified as:

1. Whether the Commission has the authority to grant a variance to the turbine setback area and, if so, should one be granted for the placement of T26.

2. Whether T6 complies with the Order of Continuing Suitability.
3. Whether Meadowlark's proposed amendments to the Order of Continuing Suitability will continue to produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.
4. Whether Meadowlark's proposed amendments will continue to be compatible with the environmental preservation and the efficient use of resources, and
5. Whether Meadowlark's proposed amendments will continue to minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that the energy needs are met and fulfilled in an orderly and timely fashion.

On November 15, 2018, the Commission held an Informal Hearing to discuss the filings in the Commission Hearing Room, 12<sup>th</sup> Floor, State Capital, Bismarck, North Dakota.

### **Discussion**

Meadowlark is a foreign corporation with a principal office located at STE 1200 10423, 101 St. NW Edmonton, AB T5H OE9. Meadowlark's registered agent is C T Corporation System, 120 W Sweet Ave, Bismarck, ND 58504-5566.

The Order of Continuing Suitability provided, among other things, that Meadowlark site turbines at least 1,400 feet from currently occupied residences and that Meadowlark comply with the siting criteria set forth in the version of Section 69-06-08-01 of the North Dakota Administrative Code in effect on May 10, 2017.

Meadowlark halted construction and voluntarily contacted Commission Staff in late October, 2018 to report the construction of five turbines in violation of setback requirements set forth in the Order of Continuing Suitability and to discuss the appropriate future steps.

North Dakota Administrative Code section 69-06-08-01, as currently in effect, identifies areas that must be excluded from consideration of a site for a wind energy conversion facility, including areas one and one-tenth times the height of a turbine from interstate or state roadway right-of-way, and one and one-tenth times the height of the turbine from a one hundred fifteen kilovolt or higher transmission line. The Order of Continuing Suitability adopted these exclusion areas as setbacks, even though they were not required by the rules at the time the Order was written.

Turbines T26 and T32 were constructed within one and one-tenth times the height of the turbine from an interstate or state roadway right-of-way. T26 was constructed 10.7 feet into the setback. T32 was constructed approximately 103 feet into the setback.

Turbine T6 was constructed within one and one-tenth times the height of the turbine from a one hundred fifteen kilovolt or higher transmission line.

Turbines T24 and T8 were constructed within 1,400 feet from two occupied residences. T24 was constructed approximately 5 feet into the setback and T8 was constructed approximately 35 feet into the setback.

### Project Permitting History

At the time the Order and Certificate were issued, the Commission's siting criteria did not include the specific wind energy conversion facility setback requirements that are currently set forth in North Dakota Administrative Code section 69-06-08-01(2).

In May 2012, the Commission initiated a rulemaking proceeding to revise its rules related to siting applications. See Public Service Commission, Public Utilities, Rulemaking, Case No. PU-12-165. The rule amendments added specific wind energy conversion facility exclusion areas to North Dakota Administrative Code section 69-06-08-01(2). The amended rules became effective in April 2013, a year after the Commission issued the Certificate to Meadowlark.

Since the project was not constructed within four years of issuance of the Certificate, Meadowlark submitted a Certification of Continuing Suitability in November 2016 pursuant to North Dakota Century Code section 49-22-17 and North Dakota Administrative Code chapter 69-06-09. The Commission held an informal hearing for the Certification of Continuing Suitability on February 7, 2017.

On May 10, 2017, the Commission issued an Order of Continuing Suitability. In the Order of Continuing Suitability, Meadowlark's commitment to comply with the then current version of North Dakota Administrative Code section 69-06-08-01 was incorporated into the Order (see Ordering Paragraph 4.b), as was the turbine setback of 1,400 feet from occupied residences (see Ordering Paragraph 4.c). The Order of Continuing Suitability also specified that the provisions of the April 25, 2012 Order remained in effect except to the extent superseded or modified.

### Identification of Turbine Setback Issues

Meadowlark began construction of the project in April 2018. As of early October, 2018, project construction was approximately 80 percent complete. With respect to Turbines T26, T6, T24, T32, and T8, Meadowlark completed the turbine foundations, tower erection, nacelle installation, electrical work, and access roads. Blades were installed on Turbines T24 and T8.

As a result of an American Land Title Association (ALTA) survey for the project, Meadowlark discovered that its consultant used the incorrect setback from the GRE transmission line. Meadowlark contacted GRE to discuss the location of the turbine in relation to its transmission line. GRE indicated it will execute an agreement allowing the turbine to remain in place, subject to Commission approval, so long as Meadowlark agrees to pay for any damages that may occur in the future to the GRE transmission line as a result of the turbine.

Additionally, as a result of the ALTA survey, Meadowlark discovered that its consultant had measured the state highway setback for Turbine T26 from the centerline of the highway, rather than the edge of the highway right-of-way. T26 is approximately 10.7 feet too close to the highway right-of-way. Meadowlark contacted the North Dakota Department of Transportation (DOT) to discuss the location of the T26 in relation to State Highway 41. DOT indicated it will execute an agreement allowing the turbine to remain in place, subject to Commission approval, so long as Meadowlark agrees to pay for any damages that may occur in the future on DOT right-of-way as a result of the turbine.

T32 was built approximately 103 feet too close to the highway right-of-way. After this discovery, Meadowlark stopped construction of the turbine and began removal and reclamation of T32.

As a result of the ALTA survey, Meadowlark also identified two turbines that are less than 1,400 feet from two occupied residences. Turbine T24 is approximately 1,395 feet from a residence, and Turbine T8 is approximately 1,365 feet from a residence. Meadowlark has obtained signed setback waiver agreements from the owners of the two residences.

#### Request to Amend and Informal Hearing

In Meadowlark's Request for Setback Determination, Meadowlark requested a variance for the placement of T26 and a clarification of compliance for T6. In its request to amend, Meadowlark requested that two provisions of the Order of Continuing Suitability be amended: (1) amend the voluntary setback commitment in Ordering Paragraph 4.b to allow turbines T6 and T26 to remain in the location constructed; and (2) amend the voluntary setback commitment in Ordering Paragraph 4.c to allow home owners to waive the 1,400 foot setback from occupied residences.

Meadowlark's November 6, 2018 filing asserted that it is required to comply with North Dakota Administrative Code section 69-06-08-01(2) and the 1,400 foot setback from occupied residences due only to the Order of Continuing Suitability and that consequently, they both may be modified by the Commission. Meadowlark also submits that given the "unique facts presented," amending the Order of Continuing Suitability will not set precedent for future cases with regard to exclusion areas.

At the informal hearing, Meadowlark withdrew its request for a variance and presented testimony and exhibits to support its request to amend the Order of Continuing Suitability, including evidence that granting the motion will avoid environmental and landowner impacts that would result if the Commission requires Meadowlark to move the four turbines. Meadowlark also presented evidence that the current locations of the turbines would not adversely impact public safety. Meadowlark acknowledged that the turbines at issue would violate the specific terms of the Order of Continuing Suitability absent the Commission granting the requested amendment and Meadowlark volunteered to pay a penalty.

During the informal hearing, Staff stated that Meadowlark violated the Commission's Order of Continuing Suitability. Staff acknowledged that a 1,400 foot setback from inhabited residences is a guideline and that there have been other wind turbines sited with distances similar to those of T8 and T24. Staff also agreed that this is a unique circumstance due to the Order of Continuing Suitability, the timing of issuance of the Certificate and rulemaking.

At the conclusion of the informal hearing, the Commission directed Staff to consult with Meadowlark regarding a potential agreement on a penalty. Staff and Meadowlark discussed a penalty and associated resolution of the pending setback issues.

Pursuant to North Dakota Century Code section 49-22-21(3), a person in violation of the Siting Act may be subject to a penalty up to \$10,000 for each violation for each day the violations persist, except that the maximum penalty may not exceed two hundred thousand dollars for any related series of violations. In arriving at the appropriate penalty, Staff considered the nature, circumstances, and gravity of the violation, the degree of culpability, history of prior violations, and the good faith of the company in attempting to achieve compliance after notification.

The result of the discussions between Meadowlark and Staff are contained in the following concurrences.

#### Concurrences

The Commission and Meadowlark hereby agree to resolve the pending setback issues identified in this order on the following terms:

1. Meadowlark admits that it is subject to North Dakota Century Code chapter 49-22 and North Dakota Administrative Code title 69, and that the Commission has jurisdiction over this matter.
2. The Commission has the authority to issue this Consent Order.
3. Meadowlark is a Delaware limited liability company that owns and will operate a wind energy conversion facility that was permitted by the Commission in this case.

4. Meadowlark is subject to the Order of Continuing Suitability issued by the Commission in this matter, which provides, in relevant part, as follows:
  - a. *Ordering Paragraph 4.b:* Meadowlark shall comply with the siting criteria set forth in the version of Section 69-06-08-01 of the North Dakota Administrative Code in effect as of the date of this Order.  
*Order Paragraph 4.c:* Meadowlark shall site turbines at least 1,400 feet from currently occupied residences.
5. The following mitigating factors apply to the penalty:
  - a. Meadowlark voluntarily reported the setback issues, worked constructively with the Commission on resolution, and began removal of T32 upon discovery.
  - b. Meadowlark independently engaged in and received responses from the DOT, GRE and affected landowners regarding the current turbine placements. The DOT, GRE, and affected landowners each provided a waiver for the relevant current turbine locations, subject to Commission acceptance.
  - c. Meadowlark and parent company, Capital Power, have no prior violations of the Siting Act.
  - d. Meadowlark demonstrated that although T6 and T26 are in violation of the Order of Continuing Suitability, their current positions should produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.
6. The Commission has determined that a Consent Order is in the public interest and Meadowlark and the Commission agree to resolve this matter as follows:
  - a. Meadowlark agrees to pay to the Commission the following penalties associated with the violations identified in these Concurrences:
    - i. Twenty thousand dollars (\$20,000.00) each for turbines T6 and T26;
    - ii. Ten thousand dollars (\$10,000) for turbine T32.
    - iii. Five thousand dollars (\$5,000) each for turbines T8 and T24.
  - b. Meadowlark agrees to continue to move turbine T32 and reclaim the turbine site to the standards set forth in rules, statutes, and the commission's orders.
7. Meadowlark agrees that the Commission retains its continuing jurisdiction over this matter, and nothing in this Consent Order shall be construed to limit or otherwise prevent the Commission from fulfilling its duties and responsibilities under state law.


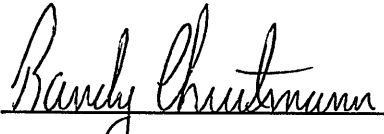

8. Meadowlark and the Commission have agreed to resolve this matter without further administrative proceedings.
9. There are no covenants, promises, undertakings, or understanding other than as specifically set forth in this Order.

**Order**

The Commission Orders:

1. Meadowlark violated the Commission's Order of Continuing Suitability provisions 4.b. and 4.c.
2. Meadowlark shall pay a fine of \$60,000, payable to the North Dakota Public Service Commission, within twenty business days of service of this Order.
3. Meadowlark shall move T32 and fully reclaim the impacted location.

**PUBLIC SERVICE COMMISSION**

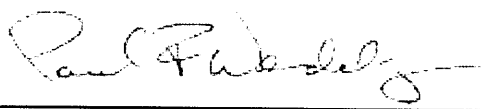
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|--|---|--|
| <br>_____<br><b>Brian Kroshus</b><br>Commissioner | <br>_____<br><b>Randy Christmann</b><br>Chairman | <br>_____<br><b>Julie Fedorchak</b><br>Commissioner |
|--|---|--|

### Consent to Entry of Order

The undersigned, on behalf of Meadowlark Wind I LLC (Meadowlark), is authorized to act on behalf of Meadowlark for the purposes of this Consent Order; has read the Consent Order, knows and fully understands its content and effect; has been advised of its right to present evidence and arguments to the Commission, the right to cross examine witnesses, and the right to appeal from an adverse determination after hearing; and that, by signing this Consent to Entry of Order, waives all those rights in their entirety on behalf of Meadowlark, and consents to entry of this order by the North Dakota Public Service Commission to resolve the violation without further administrative proceedings. It is further expressly understood that this order constitutes the entire settlement between the parties, there being no other promises or agreements either express or implied.

Signed this 13th day of December, 2018.

**Meadowlark Wind I LLC**

By:  \_\_\_\_\_

Its: Managing Director \_\_\_\_\_