

Brian R. Bjella
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, ND 58502-2798
Office: 701.223.6585
bbjella@crowleyfleck.com

November 25, 2014

via hand delivery

Mr. Darrell Nitschke
Executive Director
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480



In re: Thunder Spirit Wind, LLC
Case No. PU-11-601

Dear Mr. Nitschke:

Enclosed for filing in the above captioned matter are the original and ten copies of Thunder Spirit Wind, LLC's Response to Requests or Reconsider Proceeding by William and Ellen Elder. Also enclosed is the Affidavit of Service upon Ellen and William C. Elder.

Please call should you have any questions. Thank you.

Very truly yours,


Brian R. Bjella

bw
Enc.
cc: Ellen and William C. Elder

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Thunder Spirit Wind, LLC
150 MW Wind Energy Project – Adams County
Siting Application**

Case No. PU-11-601

**RESPONSE OF THUNDER SPIRIT WIND, LLC
TO REQUESTS TO REOPEN OR RECONSIDER PROCEEDING
BY WILLIAM AND ELLEN ELDER**

Thunder Spirit Wind, LLC (“Thunder Spirit”) is in receipt of the request to “reopen the permit” as submitted by William and Ellen Elder (“Elders”) by two separate letters each dated November 13, 2014.

Thunder Spirit opposes the Elders’ requests to reopen the permit or schedule a new hearing.

The requests by the Elders are untimely and thus the Public Service Commission (“Commission”) does not have subject matter jurisdiction.

In two separate paragraphs in Mr. Elder’s letter he requests the Commission to “reopen” the permit application or permit hearing. In two separate paragraphs in Mrs. Elder’s letter she requests the Commission to either “reopen” the permit or “reconsider” the application of Thunder Spirit. As a result, it appears that these letters from the Elders, in effect, constitute a petition for reconsideration pursuant to North Dakota Century Code § 49-22-19 and North Dakota Administrative Code § 69-02-06-02.

However, whether the requests by the Elders are considered a petition for reconsideration or request for a new hearing, they are untimely and the Commission does not have jurisdiction.

As background, the Commission held a public hearing in Hettinger on this wind farm on September 19, 2013. The Commission ultimately entered its Findings of Fact, Conclusions of Law and Order, dated October 9, 2013, approving this wind energy project and issuing Certificate of Site Accountability No. 35 to Thunder Spirit.

On May 30, 2014, Thunder Spirit filed with the Commission an application to amend the order requesting the use of a different turbine technology along with 18 new turbine locations and shifts in 25 previously approved locations. With respect to this amended application the Commission issued its Notice of Finding, Notice of Informal Hearing and Notice of Opportunity for Hearing (“Notice”) on June 11, 2014. Any comments with respect to the amended application and request for a hearing had to be received by July 23, 2014. Said Notice was properly published in the Adams County legal notices.

The Commission held its informal hearing on June 25, 2014. The Commission then issued its Supplemental Order dated August 14, 2014, approving the amended application of Thunder Spirit. Notices of said Supplemental Order and the corresponding First Amended Certificate of Site Compatibility No. 35 were issued by the Commission on August 15, 2014, and August 26, 2014.

North Dakota Administrative Code § 69-02-06-02(1) provides in part that a “petition for reconsideration must be filed within fifteen days after notice of a decision has been given under North Dakota Century Code § 28-32-13.” In addition, North Dakota Century Code § 28-32-40(1) provides in part that a petition for reconsideration must be filed within fifteen days after the last notice has been given. Thus, the Elders had by no later than September 15 to request re-consideration. They did not do so.

For a court or administrative agency to have subject matter jurisdiction over an appeal, the party appealing must meet the statutory requirements for perfecting the appeal. Proper filing of an appeal is mandatory and jurisdictional. By failing to timely request reconsideration, the Elders did not meet the statutory requirements and the Commission does not have subject matter jurisdiction. *Smith v Burleigh County Board of Commissioners*, 578 N.W.2d 533, 535 (N.D. 1998); and *DuPaul v North Dakota Department of Transportation*, 672 N.W.2d, 680, 682 (N.D. 2003).

In addition, by their submittals the Elders have attempted to present to the Commission new evidence which was not presented either at the public hearing held on September 9, 2013, or at the informal hearing held on June 25, 2014. An administrative agency cannot consider evidence which was not timely submitted at the administrative hearing. The attempt by the Elders to submit additional evidence which is untimely may not be considered by the Commission. *Wright v North Dakota Workers Compensation Bureau*, 625 N.W.2d 256, 261 (N.D. 2001).

For a court or administrative agency to issue a valid order, it must have both subject matter jurisdiction and personal jurisdiction over the parties. A failure to timely request reconsideration deprives a court or administrative agency of such jurisdiction. As a result, it is not an abuse of discretion for a district court or administrative agency to deny an untimely request for reconsideration. Rather, to grant such a request would be an abuse of discretion. *Alliance Pipeline LP v Smith*, 833 N.W.2d 464, 472 (N.D. 2013).

An order of an administrative agency, acting in a quasi-judicial capacity, with jurisdiction and under authority of law is not subject to collateral attack in the absence of fraud or bad faith. 73 A.C.J.S. Public Administrative Law and Procedures § 349 (2014). A properly issued administrative order, like that of a court of law, is immune from collateral attack. 2 Am.Jur. 2d, Administrative Law § 358 (2014). The request by the Elders for reconsideration or a new hearing is, in effect, a collateral attack on the validly issued orders of this Commission in this case. Their remedies were either a timely motion for reconsideration, or a timely appeal to district court, neither of which they did. As they did not timely petition for reconsideration, their requests must be dismissed. *Americana*

Health Care Center v North Dakota Department of Human Services, 513 N.W.2d 889, 892 (N.D. 1994).

Validly issued orders of the Commission are entitled to application of the doctrine of res judicata. As noted by the North Dakota Supreme Court “administrative res judicata is simply the judicial doctrine of res judicata applied to an administrative proceeding to prevent collateral attacks on administrative agency decisions and to protect successful parties from duplicative proceedings.” *State of North Dakota v JFK Raingutters*, 733 N.W.2d 248, 255 (N.D. 2007). The Court further stated that application of the doctrine of administrative res judicata “is especially appropriate to bar new proceedings when an agency has conducted a trial-type hearing, made findings, and applied the law.” *Id.* Administrative res judicata applies to final agency orders. *Id.* at 256.

The orders issued by the Commission in this case were not appealed and became final. The Elders are attempting to re-litigate the same issues by their requests for reconsideration or a new hearing. However, administrative res judicata precludes re-litigation of the same issues. *Id.*

Thunder Spirt respectfully requests that the Commission find that the requests of the Elders to reopen or reconsider the orders previously issued by this Commission are untimely, result in collateral attack on valid orders of the Commission, and the doctrine of administrative res judicata is applicable. That as a result, the requests of the Elders must be dismissed.

Notwithstanding the absence of any legal basis for the Elders’ requests, Thunder Spirt is continuing to work with the Elders to resolve their disagreement in a mutually acceptable manner.

Dated this 25th day of November, 2014.

Respectfully submitted,

THUNDER SPIRIT WIND, LLC

CROWLEY FLECK PLLP

Attorneys for Applicant

100 West Broadway, Suite 250

Post Office Box 2798

Bismarck, North Dakota 58502-2798

Phone: 701-223-6585

By:


BRIAN R. BJELLA, ND Bar ID #03549

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

Thunder Spirit Wind, LLC
150 MW Wind Energy Project – Adams County
Siting Application

Case No. PU-11-601

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
)§
COUNTY OF BURLEIGH)

Beth Wald, being first duly sworn on oath, deposes and says: That she is a citizen of the United States over the age of eighteen years and not a party to, nor interested in, the above entitled action.

That on the 25th day of November, 2014, this affiant did deposit in the United States Post office at Bismarck, North Dakota, a true and correct copy of the following document:

RESPONSE OF THUNDER SPIRIT WIND, LLC
TO REQUESTS TO REOPEN OR RECONSIDER PROCEEDING
BY WILLIAM AND ELLEN ELDER

That the document with postage prepaid was mailed by certified mail, directed to the persons to be served at their last known post office address as follows:

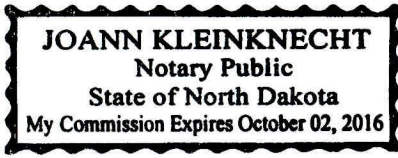
Ellen and William C. Elder
1758 S. Aspen River Way
Eagle, ID 83616

To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be served.



Beth Wald

Subscribed and sworn to before me this 25th day of November, 2014.



(S E A L)

A handwritten signature in blue ink that reads "Joann Kleinknecht". The signature is written over a solid horizontal line.

Joann Kleinknecht, Notary Public
Burleigh County, North Dakota
My Commission Expires: