

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Sunflower Wind Project, LLC  
Wind Energy Conversion Facility – Stark & Morton  
Siting Application

Case No. PU-14-105

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 **12th day of May 2023**, 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 a photocopy of:

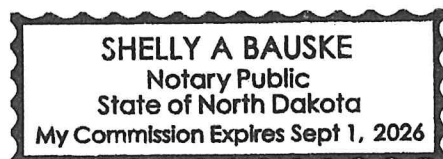
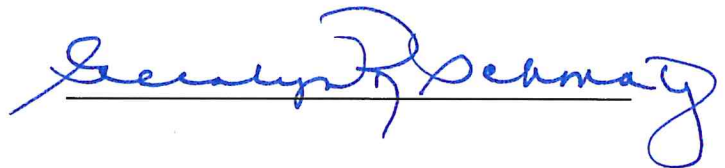
- **Order on Consent Agreement**

The envelope was addressed as follows:

Mollie Smith  
Fredrikson & Byron, P. A.  
200 South Sixth Street Suite 4000  
Minneapolis, MN 565402-1425  
**Cert. No. 7021 2720 0000 4438 7238**

The addresses shown are the respective addressee's last reasonably ascertainable post office address.

Subscribed and sworn to before me  
this **12th day of May 2023**.



SEAL



Shelly A Bauske  
Notary Public

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

**Sunflower Wind Project, LLC**  
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**Siting Application**

**Case No. PU-14-105**

**ORDER ON CONSENT AGREEMENT**

**May 11, 2023**

**Preliminary Statement**

On June 25, 2014, the Commission issued Certificate of Site Compatibility Number 39 to Sunflower Wind Project, LLC (Sunflower), designating a site for the construction, operation and maintenance of an energy conversion facility for the Sunflower Wind Energy Project (Project) in Stark and Morton Counties, North Dakota. On January 7, 2015, the Commission amended Certificate of Site Compatibility Number 39 allowing for an alternative site plan and turbine model.

On November 12, 2021, Sunflower petitioned for an extension from December 31, 2021, to June 30, 2022, to procure and install a functioning Aircraft Detection Lighting System (ADLS).

On December 1, 2021, the Commission issued a notice of hearing on the November 12, 2021, request for extension, scheduling a Public Hearing for January 10, 2022, in the Commission Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck, North Dakota 58505.

On January 5, 2022, Commission staff sent Sunflower a Notice of Noncompliance, noting that Sunflower was not in compliance with North Dakota Century Code (NDCC) Section 49-22-16.4(3) and North Dakota Administrative Code (NDAC) Section 69-06-11-02(2) by failing to have a functioning ADLS at the Project by December 31, 2021. The Notice of Noncompliance noted that Sunflower may be subject to civil penalty pursuant to NDCC Section 49-22-21, and that, in addition, the Commission may suspend or revoke the Certificate of Site Compatibility issued for the Project for operating in violation of the applicable statutes, rules or provisions of the Commission's Order issuing the Certificate.

On January 10, 2022, the hearing was held as scheduled.

On January 18, 2022, the Commission denied Sunflower's request for extension.

On December 27, 2022, Sunflower notified the Commission that the ADLS at the Project became operational on December 14, 2022.

On January 11, 2023, the Commission appointed Advocacy Staff in this proceeding.

On April 21, 2023, a Consent Agreement was filed between Sunflower and Advocacy Staff.

### **Discussion**

Sunflower Wind Project, LLC owns and operates the Sunflower Wind Energy Project. Sunflower Wind Energy Project is a 104-megawatt wind farm located in Stark and Morton Counties, North Dakota.

NDCC Section 49-22-16.4(3) provides “By December 31, 2021, every wind energy conversion facility for which the commission issued a certificate of site compatibility before June 5, 2016, must be equipped with a functioning light-mitigating technology system that complies with the rules adopted by the commission. After public hearing, the commission may grant a waiver or an extension of time based on technical or economic feasibility considerations.”

NDAC Section 69-06-11-02(2) provides “A wind energy conversion facility for which a certificate of site compatibility was issued before June 5, 2016, must be equipped with a functioning light-mitigating technology in compliance with this chapter by December 31, 2021. The commission may grant an extension of time based on technical or economic feasibility considerations.”

Certificate of Site Compatibility Number 39 for the Sunflower Wind Energy Project was issued before June 5, 2016; therefore, it was required by NDCC Section 49-22-16.4(3) and NDAC Section 69-06-11-02(2) to be equipped with functional light-mitigating technology by December 31, 2021.

Advocacy Staff investigated the matter and concluded that Sunflower violated NDCC Section 49-22-16.4(3) and NDAC Section 69-06-11-02(2) by failing to have functional light-mitigating technology at the Project by December 31, 2021.

Sunflower and Advocacy Staff engaged in good faith settlement discussions resulting in a Consent Agreement intended to avoid further administrative proceedings or litigation.

Under the Consent Agreement, Sunflower and Advocacy Staff compromised to a penalty of \$100,000.

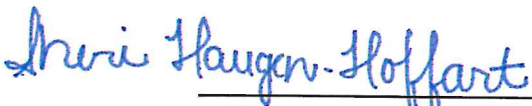
Having considered this matter, the Commission finds the Consent Agreement filed on April 21, 2023, is reasonable and acceptable. Therefore, the Commission issues the following:

## Order

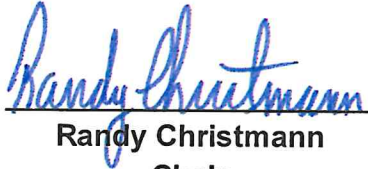
The Commission Orders:

1. The Consent Agreement between Sunflower Wind Project, LLC and Advocacy Staff filed with the Commission on April 21, 2023, is approved. A copy of the Consent Agreement is attached to and made part of this Order on Consent Agreement (Order).
2. Sunflower Wind Project, LLC is assessed a civil penalty of \$100,000 for violating NDCC Section 49-22-16.4(3) and NDAC Section 69-06-11-02(2).
3. Sunflower Wind Project, LLC shall remit the \$100,000 civil penalty, payable to the North Dakota Public Service Commission within ten business days of service of this Order.
4. For identification of Internal Revenue Code, 26 U.S.C. Section 162(f)(2)(A)(ii), the performance is restitution, remediation, or an amount paid to come into compliance with the law. Sunflower Wind Project, LLC shall provide the Commission with a U.S. Department of the Treasury Internal Revenue Service Form W-9 for the purpose of the identification requirement of 26 U.S.C. Section 162(f)(2)(A)(ii) within ten business days of service of this Order.

### PUBLIC SERVICE COMMISSION



**Sheri Haugen-Hoffart**  
Commissioner



**Randy Christmann**  
Chair



**Julie Fedorchak**  
Commissioner

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

**Sunflower Wind Project, LLC  
Wind Energy Conversion Facility – Stark and Morton  
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**Consent Agreement**

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**Preliminary Statement**

This Consent Agreement is entered into by and between Sunflower Wind Project, LLC (“Sunflower”) and the North Dakota Public Service Commission (“Commission”) Advocacy Staff (“Advocacy Staff”) (together, the “Parties”) for resolution of the Commission’s January 5, 2022 Notice of Noncompliance issued to Sunflower in Case No. PU-14-105 (the “Matter”) concerning an Aircraft Detection Lighting System (“ADLS”) at the Sunflower Wind Energy Project (“Project”).

***ADLS Statute***

North Dakota Century Code (“N.D.C.C.”) Section 49-22-16.4(3) requires that “[b]y December 31, 2021, every wind energy conversion facility for which the [C]ommission issued a certificate of site compatibility before June 5, 2016, must be equipped with a functioning light-mitigation technology system that complies with rules adopted by the [C]ommission.” *See also* North Dakota Administrative Code (“N.D.A.C.”) Section 69-06-11-02(2).

Pursuant to N.D.C.C. Section 49-22-21, “[a]ny person who willfully engages in any of the following conduct is subject to a civil penalty of not to exceed ten thousand dollars for each such 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:

...

- b. Constructs, operates, or maintains an electric energy conversion facility or an electric transmission facility other than in compliance with the certificate or permit and any terms, conditions, or modifications contained therein.
- c. Violates any provision of this chapter or any rule adopted by the commission pursuant to this chapter.”

***Certificate of Site Compatibility – Energy Conversion Facility***

On June 25, 2014, the Commission issued Certificate of Site Compatibility No. 39 to Sunflower, designating a site for the construction, operation and maintenance of an energy conversion facility for the Project in Stark and Morton Counties, North Dakota. On January 7,

2015, the Commission issued First Amended Certificate of Site Compatibility No. 39 approving an additional site plan and turbine option.

### *ADLS Installation at Project*

On August 2 and 10, 2021, the Commission sent a notice and request for status updates to Sunflower, noting that the Project is required by N.D.C.C. Section 49-22-16.4(3) to be equipped with a functioning light-mitigating technology system by December 31, 2021, and requesting that Sunflower file with the Commission monthly updates on the status of implementation of light-mitigating technology for the Project beginning the first week of September 2021.

Beginning on September 1, 2021 and ending in December 2022, Sunflower filed monthly updates with the Commission regarding the status of implementation of light-mitigating technology for the Project.

On November 12, 2021, Sunflower filed with the Commission a Request for Extension of Time to Install Light-Mitigating Technology System. Sunflower requested that the Commission grant an extension authorizing Sunflower to equip the Project with a functioning light-mitigating technology system by June 30, 2022.

On December 1, 2021, the Commission issued a notice for public hearing on the request for extension in the above-captioned case.

On January 5, 2022, the Commission sent Sunflower a Notice of Noncompliance, noting that Sunflower was not in compliance with N.D.C.C. Section 49-22-16.4(3) and N.D.A.C. Section 69-06-11-02(2) because Sunflower did not have a functioning ADLS at the Project by December 31, 2021. The Notice of Noncompliance noted that Sunflower may be subject to civil penalty pursuant to N.D.C.C. Section 49-22-21, and that, in addition, the Commission may suspend or revoke the Certificate of Site Compatibility issued for the Project for operation in violation of the applicable statutes, rules, or provisions of the Commission's Order issuing the Certificate.

On January 10, 2022, a public hearing was held on the request for extension.

On January 18, 2022, the Commission denied Sunflower's request for extension.

On February 10, 2022, Commission staff sent a request to Sunflower for continued monthly updates on the progress on its ADLS installation, pursuant to which Sunflower submitted additional updates.

On June 29, 2022, Sunflower filed with the Commission the certification and associated documentation for the ADLS infrastructure for the Project. On July 5, 2022, the Commission filed a letter acknowledging receipt of Sunflower's certification filing.

On December 27, 2022, Sunflower notified the Commission that the ADLS at the Project had become operational on December 14, 2022 and was operating as expected.

On January 11, 2023, the Commission appointed Advocacy Staff to negotiate a consent agreement with Sunflower for resolution of the Commission's January 5, 2022 Notice of Noncompliance issued to Sunflower concerning operation of an ADLS at the Project.

Subsequently, Sunflower provided Advocacy Staff with additional information regarding the basis for the delays to inform the negotiation discussions, which includes the following:

1. Western Area Power Administration ("WAPA") National Environmental Policy Act ("NEPA") Review.

Because the Project interconnects to a WAPA substation, and WAPA is a federal agency, WAPA had to complete a NEPA analysis and issued a Finding of No Significant Impact before authorizing interconnection. Given this federal connection, WAPA also had to evaluate the installation of the ADLS to ensure NEPA compliance. As a result, unlike other existing projects installing ADLS in North Dakota, Sunflower had to complete WAPA's review and approval process before commencing ADLS construction.

Once Sunflower decided to purchase an ADLS from Terma in the beginning of November 2021, Sunflower immediately began coordinating with WAPA to identify the process and submittal requirements for WAPA's review of the addition of the ADLS infrastructure to the Project. WAPA conducted an "informal" supplemental analysis review to determine whether additional formal environmental review was required. Sunflower could not submit the information required for WAPA to conduct its supplemental analysis review until the ADLS design was finalized. Additionally, Sunflower had to conduct cultural resource field surveys for any areas that would be impacted by the ADLS infrastructure and associated construction activities. Favorable weather conditions allowed Sunflower to complete these field surveys in March 2022. On April 4, 2022, Sunflower submitted a letter and accompanying documentation to WAPA describing the ADLS installation and providing information for WAPA to evaluate potential impacts. The report associated with the March 2022 cultural resource field surveys was submitted to WAPA on April 15, 2022.

On May 10, 2022, WAPA provided the cultural addendum report to the North Dakota State Historic Preservation Officer ("SHPO") and the Tribal Historic Preservation Officers ("THPOs") for review. SHPO and the THPOs had 30 days to review the report following receipt. WAPA could not issue its decision until expiration of this mandatory 30-day review period.

Throughout WAPA's review process, Sunflower promptly responded to WAPA's questions and requests for any additional information. WAPA worked with Sunflower to process this supplemental review on a much more expedited timeline than is typically possible. As soon as SHPO/THPOs' 30-day review period had expired, WAPA issued its review letter on June 10, 2022, which confirmed that installation of the ADLS could proceed without additional environmental review, following completion of a preconstruction avian nest survey at least seven days prior to commencing construction activities. In late June 2022, Sunflower completed the preconstruction nest survey, at which point Sunflower could begin construction.

2. Weather and Delivery-Related Construction Delays.

Sunflower began construction of the ADLS infrastructure in July, as soon as possible following completion of the WAPA review, receipt of all required permits, and completion of the pre-construction nest survey. However, weather and equipment delivery issues delayed construction activities. For example, in early July, site crews reported over 4.5 inches of rainfall, which delayed access road construction. Additional rainfall in July and early August 2022 interfered with excavation and concrete work, and construction of the ADLS tower foundation had to be delayed until site conditions improved.

By mid-August 2022, most major construction tasks were completed. However, installation of communications connections between the ADLS tower and turbine fiber communication lines was delayed due to delivery of the necessary fiber optic cabling and network connection devices being delayed. For example, additional fiber optic cabling was required to get from the base of the turbine towers up to the lights at the top of the towers and there was a supply chain shortage of fiber optic cabling. By September 19, 2022, all necessary parts had been received and installation could proceed.

3. Communications Issues During Commissioning and Testing Phases.

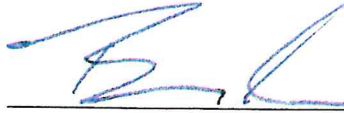
During each phase of commissioning the ADLS, there were unforeseen technological issues with establishing communications between the ADLS tower and the turbine fiber communication lines, which caused further delays. Issues were initially discovered as communications between the ADLS tower and turbine fiber communication lines were being established in September and October 2022. The fact that this was a retrofit was the main factor in the communications issues and resulting delays. While the ADLS radar system was functioning, there were difficulties in establishing communications between the radar and the existing lights. Additional time was needed to align the Project's existing fiber optic system with the new ADLS fiber optic system and ensure the two communicated properly, which was a trial and error process. Sunflower's contractors needed to identify, secure, and test a variety of equipment before determining a solution, and some of the equipment was not readily available. As soon as the communication issues between the radar and lights were addressed at the end of October 2022, Terma began commissioning and testing the ADLS. During commissioning, Sunflower and its consultants had to resolve additional retrofitting challenges, which delayed the final operational testing and the Federal Aviation Administration-required flight test until early December 2022. Once the flight test was performed, during which the ADLS operated as expected, the system was declared operational on December 14, 2022. To date, the ADLS has continued to operate as expected, which was Sunflower's foremost objective.

**Terms of Consent Agreement**

Sunflower and Advocacy Staff engaged in good faith settlement discussions regarding this Matter resulting in this Consent Agreement. Having agreed that settlement of this Matter will avoid further administrative proceedings or litigation and that entry of this Consent Agreement is the most appropriate means of resolving this Matter, Advocacy Staff and Sunflower agree on the following terms, subject to the approval and acceptance of the Commission:

1. Advocacy Staff and Sunflower agree to settle the Matter on the following terms:
  - a. Sunflower acknowledges that it did not have a functioning ADLS by December 31, 2021, and therefore did not comply with N.D.C.C. Section 49-22-16.4(3) and N.D.A.C. Section 69-06-11-02(2).
  - b. Subject to the provisions of this Agreement, Sunflower agrees to a civil penalty, payable to the North Dakota Public Service Commission, of \$100,000 for not complying with the ADLS statute.
  - c. As provided in N.D.C.C. Section 49-22-21(3), the civil penalty may be compromised by the Commission. The Commission acknowledges outside forces and events that contributed to the delayed implementation of Sunflower's ADLS, including: the need for WAPA to complete a NEPA review before Sunflower could initiate ADLS construction, which required completion of certain pre-application and post-approval/pre-construction studies; weather and equipment delivery issues, which delayed construction activities; and retrofit technological issues (i.e., establishing communications between the existing Project system the ADLS system), which caused delays at each phase of commissioning and testing.
2. There are no covenants, promises, undertakings, or understandings related to the resolution of the Matter other than those specifically set forth in this Consent Agreement.
3. This Consent Agreement may be executed in counterparts and duplicate copies, each which shall be deemed to be an original, and which, when taken together, shall constitute one and the same instrument.
4. The undersigned on behalf of Sunflower is authorized to act on behalf of Sunflower and bind Sunflower for purposes of this Consent Agreement and knows and fully understands the content and effect of this Consent Agreement.

Dated this 21<sup>st</sup> day of April, 2023.



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Brian Johnson  
Special Assistant Attorney General Bar ID 07397  
North Dakota Public Service Commission

Dated this 20th day of April, 2023.



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Name: Jeffrey Spurgeon  
Authorized Representative  
Sunflower Wind Project, LLC