

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Burke Wind, LLC
Burke Wind Transmission Line – Burke & Mountrail
Siting Application

Case No. PU-18-302

Burke Wind, LLC
Burke County Wind Energy Center – Burke County
Siting Application

Case No. PU-18-344

AFFIDAVIT OF SERVICE BY REGULAR AND ELECTRONIC 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 June 2019**, she deposited in the United States Mail, Bismarck, North Dakota, **5** envelopes by first class mail, fully prepaid, securely sealed each containing a photocopy of:

- **Findings of Fact, Conclusions of Law and Order**

The envelopes were addressed as follows:

See attached list

Geralyn R. Schmaltz further deposes and says that on the **12th day of June 2019**, she sent an electronic message to **46** addressees, each including an electronic copy in portable document format of the same document.

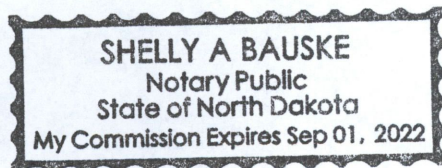
The electronic mails were addressed as follows:

See attached list

The addresses shown are the respective addressee's last reasonably ascertainable post office and electronic mail addresses.

Subscribed and sworn to before me
this **12th day of June 2019**.

(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

135 PU-18-344 Filed 06/12/2019 Pages: 30
Affidavit of Service, Reg. and E-mail - Order
Public Service Commission

93 PU-18-302 Filed 06/12/2019 Pages: 30
Affidavit of Service, Reg. and E-mail - Order
Public Service Commission

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Burke Wind, LLC
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Siting Application

Case No. PU-18-302

Burke Wind, LLC
Burke County Wind Energy Center - Burke County
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Case No. PU-18-344

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 12, 2019

Appearances

Commissioners Brian Kroshus, Julie Fedorchak and Randy Christmann,

Casey Furey and Wade Mann, Crowley Fleck PLLP, 100 W. Broadway Ave., Suite 250, Bismarck North Dakota 58502 on behalf of Applicant, Burke Wind, LLC

Brian D. Schmidt, Smith Porsborg Schweigert Armstrong Moldenhauer & Smith, 122 E. Broadway Ave., Bismarck, North Dakota 58502, Special Assistant Attorney General, on behalf of the North Dakota Public Service Commission.

Timothy J. Dawson, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street–Suite 303, Bismarck, ND 58503, as Procedural Hearing Officer.

Preliminary Statement

On August 9, 2018, Burke Wind, LLC (Burke Wind) filed an Application for a Certificate of Corridor Compatibility and Transmission Facility Route Permit for the Burke Wind Transmission Line to be located in Burke and Mountrail Counties in Case No. PU-18-302.

On September 14, 2018, Burke Wind filed an Application for Certificate of Site Compatibility (Wind Project Application) for a 300-megawatt (MW) wind energy conversion facility known as the Burke County Wind Energy Center to be located in Burke County in Case No. PU-18-344.

On November 14, 2018, Burke Wind amended its Wind Project Application and proposed to construct an up-to 200-Megawatt (MW) energy center of up to 76 wind turbine generators and associated facilities in Burke County, North Dakota (Amended Wind Project Application).

The North Dakota Public Service Commission (Commission) issued its January 23, 2019, Notice of Filings and Notice of Consolidated Hearing (Notice) finding Case No. PU-18-302 and PU-18-344 involved similar questions of fact and law and no prejudice to the rights of the parties or public interest would result from consolidation. The Commission scheduled a consolidated public hearing for March 8, 2019, at 9:00 a.m. CST, at Memorial Hall, 100 Main Street NW Bowbells, ND 58721. The Notice identified the following issues to be considered at the consolidated hearing:

1. Will the location and operation of the proposed facilities produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?
2. Are the proposed facilities compatible with the environmental preservation and the efficient use of resources?
3. Will the proposed facility locations minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

On March 8, 2019, the public hearing was held as scheduled. Having allowed all interested persons an opportunity to be heard, and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

1. Applicant, Burke Wind, is a Delaware limited liability company and is a wholly owned, indirect subsidiary of NextEra Energy Resources, LLC (NextEra).

Size, Type and Preferred Location of Facilities

Wind Energy Conversion Facility

2. Burke Wind proposes to construct a wind energy conversion facility (Wind Project) within an area of approximately 22,933 acres of land in Burke County, North Dakota as depicted in Exhibit # 35 (Wind Project Area). Burke Wind proposes the Wind Project to consist of up to 76 wind turbines and have a nameplate capacity of up to 200 MW.
3. The Amended Wind Project Application indicates Burke Wind proposes to use both General Electric (GE) 2.72 MW and 1.715 MW wind turbine generators. The GE 2.72 MW wind turbines would have a 295-foot hub height and measure 485.5 feet from the base of the tower to the tip of the upright blade. The GE 1.715 MW wind turbines would have a 262-foot hub height and measure 431.5 feet from the base of the tower to the tip of the upright blade. The portion of above-ground foundation would be 16 to 18 feet wide at the

base of the tower. Each turbine would be grounded and shielded to prevent against lightning strikes.

4. Burke Wind proposes that the power from the wind turbines would be run through an underground 34.5 kV collection system. The collection system would terminate at the collector substations where voltage would be stepped up from 34.5 kV to transmission line voltages for interconnection to the transmission grid.

5. Burke Wind indicated the turbines would have a Supervisory Control and Data Acquisition (SCADA) system to allow control and monitoring of the Wind Project. The SCADA systems would permit automatic, independent operation and remote supervision allowing simultaneous control of the turbines.

6. Burke Wind indicated additional facilities, including access roads, underground electrical collection systems, a collection substation, an operation and maintenance building, and meteorological evaluation tower would be constructed in association with the Wind Project.

7. Burke Wind indicated the Wind Project would be constructed pursuant to National Electric Safety Code requirements.

8. Burke Wind indicated an Aircraft Detection Lighting System would be installed on the Wind Project in compliance with Federal Aviation Administration requirements and North Dakota Century Code § 49-22-16.4.

9. Burke Wind indicated it signed a 30-year power purchase agreement with Basin Electric Power Cooperative for the full output of energy produced by the proposed Wind Project.

10. Burke Wind indicated it obtained all easement agreements and options necessary for the siting and construction of the Wind Project.

Transmission Line Corridor and Route

11. Burke Wind proposes to construct an approximately 37-mile long 345 kV electric transmission line and associated facilities in Burke and Mountrail Counties in North Dakota. (Transmission Line Route). Burke Wind also seeks approval for a 150 to 200-foot corridor (Transmission Line Corridor) encompassing approximately 729 acres. The Transmission Line Route and Transmission Line Corridor are proposed to originate at the Wind Project and terminate at the interconnection to the existing Basin Electric Power Cooperative (Basin) Tande Substation in Mountrail County as depicted in Late-filed Exhibit # 50.

12. Burke Wind's proposed transmission line would be constructed using steel monopole structures. The average monopole height is proposed to range from 80 to 160 feet depending on final engineering design. The proposed monopoles would be directly embedded into the ground with an overall foundation diameter of approximately six feet and an embedded length of approximately 15 to 20 feet. The proposed monopole structures would be approximately 800 feet apart but may range from 400 to 1,200 feet depending on the length needed to avoid constraints. Burke Wind indicated some monopole structures will require guy wires.

13. Burke Wind indicated the transmission line would be constructed pursuant to National Electrical Safety Code requirements.

14. Burke Wind indicated all easement agreements and options necessary for the siting and construction of the transmission line and associated facilities have been obtained.

15. Burke Wind admitted the Wind Project and Transmission Line were co-dependent upon one another. Burke Wind testified that if the Wind Project proposed in PU-18-344 is denied, it would not seek approval of the Transmission Line corridor or route in PU-18-302.

Study of Preferred Location for the Wind Project

16. Burke Wind coordinated with and received feedback from the following federal and state departments, agencies, and entities:

a. Federal: United States Army Corps of Engineers (USACE); United States Fish and Wildlife Service (USFWS); and United States Federal Aviation Administration (FAA).

b. State: North Dakota Geological Survey; North Dakota Department of Health; North Dakota Game and Fish Department (NDGFD); North Dakota Department of Trust Lands (NDDTL); North Dakota State Water Commission; North Dakota Industrial Commission; and State Historical Society of North Dakota.

17. Burke Wind performed a desktop evaluation on the Project Area for soils, land use, wetlands and waterbodies, trees and shrubs, and protected species and critical habitats.

18. Burke Wind conducted a Class I Literature Search of the Project Area to identify previously recorded archaeological sites identified during previous surveys, and historic architecture within the Project Area and a two-mile study area surrounding the Wind Project Area.

19. Burke Wind conducted a Class II Architectural Survey of the Project Area and submitted the report to the State Historic Preservation Office (SHPO). Burke Wind filed

a copy of SHPO's concurrence letter with the Commission (Exhibit # 15) indicating its "no significant sites affected" determination.

20. Burke Wind conducted a Class III Cultural Resource Inventory for archaeological resource and submitted the report to SHPO. Burke Wind filed a copy of the SHPO's concurrence letter with the Commission (Exhibit # 17) indicating its "no significant sites affected" determination.

21. Burke Wind undertook a voluntary outreach and consultation with Native American Tribes to address potential cultural concerns and avoid potential impacts to resources of tribal or cultural significance.

22. Burke Wind conducted natural resource field surveys, grassland breeding bird surveys, grouse lek aerial surveys, aerial and ground-based raptor nest surveys, a bat habitat study, a grasslands analysis, and an analysis of potential whooping crane habitat in Wind Project Area.

23. Agency consultations and comments were admitted and addressed by exhibits and testimony presented at the public hearing.

Study of Preferred Location for Transmission Line

24. Burke Wind performed a desktop evaluation centered on the Transmission Line Corridor for soils, land use, wetlands and waterbodies, trees and shrubs, and protected species and critical habitats.

25. Burke Wind conducted a Class I Literature Search within a one-mile buffer on the Transmission Line Route.

26. Burke Wind completed a Class III Cultural Resource Inventory for archaeological resources in the Transmission Line Corridor. Burke Wind submitted its Class III Cultural Resources Inventory Report for archaeology to the SHPO. Burke Wind filed a copy of SHPO's concurrence letter with the Commission (Exhibit #19) indicating no significant sites will be affected as a result of the Transmission Line.

27. Burke Wind conducted natural resource field surveys within the Transmission Line Corridor. The field surveys gathered information on soils, land use and vegetation, wetlands and waterbodies, trees and shrubs, and wildlife, including protected species and critical habitats.

28. Burke Wind conducted a wildlife survey, which included an analysis of potential whooping crane habitat in the area of the Transmission Line. Burke Wind committed to marking the transmission line with bird diverters.

29. Burke Wind undertook a voluntary outreach and consultation with Native American Tribes to address potential cultural concerns and avoid potential impacts to resources of tribal or cultural significance.

30. Burke Wind coordinated with and received feedback from the following federal and state departments, agencies, and entities:

a. Federal: USFWS; United States Department of Defense; FAA; and USACE

b. State: NDGFD; NDDOH; North Dakota State Historical Society; NDDTL; North Dakota State Water Commission; and North Dakota Department of Transportation.

31. Agency consultations and comments were admitted and addressed by exhibits and testimony presented at the public hearing.

Problems raised by federal agencies, other state agencies and local entities

32. The Commission is guided by, but is not limited to, considering problems raised by federal agencies, other state agencies, and local entities to aid in the evaluation and designation of sites, corridors, and routes. N.D.C.C. § 49-22-09(11). The evidence indicates the NDGFD and USFWS raised various problems with respect to Burke Wind's Applications.

Problems raised by NDGFD

33. The evidence indicates NDGFD submitted three letters with respect to Burke Wind's Applications. The first letter is dated November 16, 2017 (Exhibit # 4, Appendix C). The second letter is dated May 22, 2018 (Exhibit # 4, Appendix C). The third letter is dated March 7, 2019 (Exhibit # 44).

34. NDGFD's November 16, 2017, letter included in Appendix C of Exhibit # 4 is incorporated herein. NDGFD's letter raised concerns with the length and adequacy of avian surveys, including grassland breeding bird surveys, conducted as of that date. NDGFD's letter also questioned the validity and use of the breeding waterfowl density survey. It also stated the surveys for both the Sandhill and Whooping Cranes were lacking at that time and noted the proposed project area contains high priority habitat for those species. Further, it noted the proposed project area at that time has extremely high wetland density, "as high as 100-150 wetlands per square mile or more." This letter was submitted early in the process and prior to the Amended Wind Project Application.

35. NDGFD's May 22, 2018, letter is also included in Appendix C of Exhibit # 4 and is incorporated herein. This letter provides that NDGFD "openly expressed great concern about the potential impacts to wildlife on a number of occasions, most recently in a joint meeting on 29 January 2018, as well as in a letter dated 16 November 2017, and a meeting with NextEra on 27 September 2016." The letter provides that the proposed area, at the time, was "extremely important to an uncommonly high number of wildlife species due to its high degree of relatively undisturbed native habitats, including nearly 12,000 acres of native prairie and over 6,000 wetlands, and central location amid other valuable habitat areas (the project is only one mile from Lostwood National Wildlife Refuge)." NDGFD's letter further stated the "proposed project area is some of the 'best of the best' prairie-wetland habitat in North America." The letter further noted that disturbance to native prairie will adversely impact a wide variety of wildlife species. NDGFD's letter noted the proposed project area is located within the Missouri Couteau, which has an extremely high concentration of wetlands "some of the highest in North America." The May 22, 2018, letter noted the wetlands "are the most productive wildlife habitat in North Dakota" and "make up a large portion of the project area." The letter stated concerns with respect to the proposed Wind Project's impact on the whooping crane, waterfowl production, eagles, sharp-tailed grouse, various species of conservation concern, and the length of the avian survey. This letter was also sent prior to the Amended Wind Project Application.

36. NDGFD's March 7, 2019, letter, which is dated after the Amended Wind Application was filed, was admitted into evidence as Exhibit # 44 and is incorporated herein. This letter provides that during its first consultation with NextEra and USFWS, NDGFD's staff indicated "the applicant '*could not have picked a worse spot in the state*' with regards to potential negative impacts to prairie and wetland wildlife species." (Emphasis in original). NDGFD noted that despite hearing these concerns, NextEra "continued to move forward with the project." The letter indicated NDGFD felt NextEra misrepresented its use of the USFWS's voluntary Land-Based Wind Energy Guidelines (WEG). The letter further provides "[a]lthough NextEra has made significant efforts to 'reduce' their environmental footprint, we were disappointed with their misuse and misrepresentation of the voluntary WEG, as well as their subsequent decision to push forward with a project that has raised explicit concerns from both agencies. The grassland-wetland mosaic of this area is extremely valuable for a number of Species of Conservation Concern...Despite NextEra's efforts to minimize impacts, their initial site selection and succeeding resolve to proceed in this extremely resource-rich landscape shows poor recourse regard and should not be rewarded." The March 7, 2019, letter further provided:

As the state's lead wildlife agency, we recognize the important economic value provided to our state and its local communities from both wind energy development and our naturally-occurring resources. We acknowledge the key role wind energy

has in the 'all of the above' strategy for energy in North Dakota and understand the difficult challenges of managing the risk to public wildlife resources and their habitats while advancing renewable energy development. Nevertheless, this state is blessed with abundant opportunities to develop and site wind projects to best balance these two important resources. As we have relayed from the start, the Department believes this project was ill-planned in its site selection relative to natural resources and, consequently, will have substantial impacts to native wildlife and their habitats.

Problems raised by the USFWS

37. The USFWS submitted two letters which were received as evidence. The first letter is dated November 25, 2018 and is included as Exhibit # 23. The second letter is dated March 6, 2019, and is included as Exhibit # 45.

38. USFWS's November 25, 2018, letter references the 300 MW project and is incorporated herein. The letter indicated the USFWS's "foremost recommendation regarding the [Wind Project] is to relocate the project to an area that would have less impact to natural resources." USFWS noted it had significant resource concerns at the current project location including the "amount/number of grasslands and wetlands (approximately 7,000 prairie potholes); the proximity to Lostwood National Wildlife Refuge; the potential/known existence of federally listed species; and the likely impacts to other sensitive species at this site such as grassland nesting birds, raptors (about 40 known nests), waterfowl, and grouse (nearly 30 known/possible grouse leks.)" The letter provides that from "an environmental perspective, it is a highly sensitive location to the detrimental impacts of wind energy development." USFWS also acknowledged that during an October 10, 2018, conference call, NextEra proposed to reduce the Wind Project from 300 MW to 200 MW, and shift the project away from Lostwood National Wildlife Refuge. The letter provides the proposed adjustment would "likely serve to lower the environmental impact of the project" but noted "the project is still located in an area of high resource value, and significant impacts to those resources are still anticipated... the Service continues to recommend relocation of this project to an area with fewer natural resources at stake, preferably an area dominated by crop ground." USFWS also included a variety of additional information with respect to its WEG, land interests, eagle guidance, threatened/endangered species, wetlands, birds of conservation concern, avian avoidance of wind turbines, mitigation, bird and bat conservation strategy, meteorological towers, and overhead power lines. USFWS also requested it be informed of any additional information so it can reconsider its determinations. This letter is dated nine days after Burke Wind filed its Amended Application.

39. USFWS's March 6, 2019, letter was submitted as Exhibit # 45 and is incorporated herein. The letter provides that USFWS and NDGFD "have indicated to NextEra that the location of the proposed project falls within an unusually high-value wildlife resource area, and significant negative direct and indirect impacts to wildlife are anticipated if this project proceeds to construction and operation. Our primary recommendation has been to avoid development of the project at the current proposed location." USFWS noted its overarching concerns are that the wetlands and grasslands in the project area and surrounding landscape support "a) some of the highest concentrations of waterfowl documented in North Dakota and the entire Prairie Pothole Region, and b) a diverse array of numerous other species such as raptors including bald and golden eagles, grouse, shorebirds and grassland birds, and some federally listed species." USFWS acknowledged the Wind Project size had been reduced and contracted from the eastern side of the project, but noted the "current project proposal...remains on the Missouri Coteau in an area dense with wetlands and still includes plans for numerous turbines to be sited in grasslands...In short, the project area is still within a high-value natural resource area, thus our primary recommendation remains that development not occur in this area."

40. The USFWS attached a document entitled "U.S. Fish and Wildlife Service additional information, concerns, and response to proposed offsets for the proposed Burke Wind Energy Center - March 7, 2019." This attachment is included in Exhibit # 45 and incorporated herein. The attachment provides the following statistics and opinions:

a) USFWS indicated the "high wetland density in the Burke project area is one characteristic indicating this area is highly valuable for wildlife" and provided the following points to illustrate the correlation of high wetland density of the Burke project area with high waterfowl use:

i) Less than 1% (0.17%; 85 of 49,849) of one-square mile sections in North Dakota contain wetland communities that harbor over 200 pairs of breeding waterfowl. It is rare to find such productive areas in the state. However, at Burke, that percentage of that rare habitat is much higher than the state average: 24% (8 of 34) of the square mile sections within the project area have densities of 200+ pairs.

ii) Relatively more one-square mile sections in North Dakota contain wetland communities that harbor breeding waterfowl densities of over 100 pairs per square mile (which includes sections with 200+ pairs), but the percentage is still low at 11% statewide (5,767 of 49,849). In contrast, the same statistic at the Burke project area is significantly higher: 85% (29 of 34) of one-square mile sections in the wind project area support over 100 pairs of breeding waterfowl.

iii) Most one-square mile sections in North Dakota have wetland communities that harbor less than 100 pairs of breeding waterfowl. In this primarily agricultural state, it is not surprising that 89% of sections fall into that category. At Burke, however, the percentage of one-square mile sections containing wetland communities that attract less than 100 pairs is lower than the state average: only 14% (5 of 34 one-square mile sections). In other words, only a small portion of the Burke project contains a wetland community that attracts less than 100 pairs.

iv) Based on a peer-reviewed published study that documented avoidance of wind turbines by breeding pairs of waterfowl, an estimated 1004 breeding pairs of waterfowl may be displaced by the Burke wind farm (C. Loesch, USFWS, personal communication, 2019). This is based on an approximately 20% displacement rate from wetlands that are situated within 1/2 mile of wind turbines (Loesch et al. 2013). As a metric to estimate offsets necessary to compensate for waterfowl displacement, 236, 2.0-acre wetlands would need to be created or restored to compensate for this loss (C. Loesch, USFWS, personal communication, 2019).

b) USFWS noted grassland birds are known to be behaviorally impacted by industrial wind turbines on the landscape. Relying upon a “robust, multi-year, multi-facility, before-after-control-impact (BACI) study conducted by the U.S. Geological Service” that received NextEra funding and was conducted on NextEra wind facilities in North and South Dakota, USFWS provided the following:

i) Grassland nesting birds tend to avoid industrial turbines placed in their grassland habitats.

ii) Seven of nine grassland species showed turbine avoidance out to 300 meters, and the displacement rate, which averaged 53%, increased every year of the study up to 5 years post-construction.

c) USFWS asserted “NextEra’s understanding and intent of the WEG is not the same as our understanding of the role of this document in siting wind energy facilities...The WEG are designed to help developers identify environmentally sensitive areas such as these early in their development process, thereby precluding significant investments in projects that would ultimately be environmentally deleterious, protecting the environment as well as developers from substantial risk and cost. The grassland and wetland mosaic...in the Burke project area represents the type of high wildlife value area the WEG should have red-flagged for NextEra as environmentally concerning.” USFWS explained the purpose of its WEG, noted it was voluntary, but stated the “early indicators of the high wildlife value of the Burke project area have been supported by additional information gathered by NextEra per Tier 3 of the WEG (on-the-ground surveys for wildlife).” While USFWS

acknowledged NextEra applied avoidance measures per the WEG, it continued "to recommend relocation of the project to a more disturbed area."

d) USFWS noted Burke Wind will avoid all jurisdictional wetlands under the purview of the USACE. However, USFWS noted "the term 'jurisdictional' implies that non-jurisdictional wetlands at the Burke project location will not necessarily be avoided. We recommend avoidance, minimization, and finally compensation, in that order, for impacts to wetland resources at Burke for the benefit of wildlife regardless of USACOE jurisdictional authority."

e) USFWS noted Burke Wind committed to avoiding all Dakota Skipper habitat; however, USFWS questioned the validity of NextEra's studies on this issue. USFWS noted that "multiple and thorough vegetative surveys, as well as surveys for adults during the flight period, may be needed to establish lack of Dakota Skipper presence with high confidence. We encourage avoidance of all native plant areas to preclude impacts to this species if appropriate time of year surveys aren't feasible."

f) USFWS indicated Burke Wind's effort to avoid wetlands that represent suitable whooping crane stopover habitat appears to be based on an evaluation of the Wind Project Area by Watershed Institute, Inc. USFWS noted that over 30 whooping crane stopover locations have been reported in Burke County since the USFWS began collecting such data. USFWS asserted it performed modeling, based on known whooping crane sightings as they relate to landscape features, "confirms that much of the Burke project area suitable stopover habitat, ranked in the top decile of predicted use by whooping cranes...The project is near the center of the known whooping crane migration corridor of the only self-sustaining wild migratory population of whooping cranes in existence today." USFWS also questioned Burke Wind's whooping crane contingency plan and noted that while marking overhead transmission lines with avian flight diverters offers some protection for whooping cranes, this "would reduce, not completely preclude, collisions with transmission lines." USFWS noted that no whooping crane collisions have occurred at wind facilities to date.

g) USFWS noted that Burke Wind established buffers around raptor nests and sharp-tailed grouse leks and found these measures to be appropriate. USFWS noted additional grouse leks may exist and recommended a follow-up study if the project proceeds to construction. It concluded that grouse, like waterfowl and grassland bird populations, "are best kept intact by ensuring their habitat remains intact - particularly the most productive areas, such as that within the proposed project area."

h) USFWS commended NextEra's effort to preclude direct footprint impacts on easement lands; however, it noted the "placement of turbines within the high concentration of easements in the Burke project area; however (which, like wetland density, serves as an

early red-flag regarding the relatively high value of the project area), will result in displacement of breeding waterfowl and grassland birds on easements within 1/2 mile and 300 m of turbines, respectively.”

i) USFWS submitted various comments with respect to the eagle population present within the Wind Project Area. USFWS acknowledged the January 31, 2019, Pre-construction Eagle and Avian Use Study on the project indicated there were 50 bald eagles and 8 golden eagles observed both incidentally and during point counts at the Wind Project Area. USFWS noted “this is not surprising, as eagles frequently prey on waterfowl and the project area supports high waterfowl concentrations likely to draw eagles to the area.” USFWS further noted that both “bald and golden eagles are known to suffer mortality via wind turbine collisions.” USFWS indicated it was not aware as to whether Burke Wind conducted the Service’s Eagle Conservation Plan Guidance modeling effort to determine which eagle risk category applies to the Wind Project Area. USFWS further noted it was unaware as to whether Burke Wind intended to develop an Eagle Conservation Plan or pursue an eagle take permit. It recommended modeling be conducted to determine the risk category to eagles for this project. USFWS concluded that based “solely on the documented eagle use and associated prey base at the Burke project site, it appears at first glance that unauthorized take of eagles may occur if this project proceeds to construction.”

Burke Wind’s Response to NDGFD and USFWS Correspondence

41. Burke Wind provided a variety of responses to the opinions, concerns, and data submitted by NDGFD and USFWS.

42. With respect to the length and adequacy of the avian use surveys, Burke Wind’s application indicated it hired Atwell to conduct avian use point count surveys from April 2017 through March 2018 to document species presence and overall avian use of the Avian Use Study Area. Exhibit # 4, p. 82. Burke Wind explained the surveys totaled 840 hours of standardized effort in keeping with the WEG and Eagle Conservation Plan Guidance- Module (1) recommendations. It further, conducted over 400 cumulative hours documenting incidental eagle and species of concerns observations while enroute to surveys, during bald eagle nest surveys, and during targeted breeding season surveys throughout the Project. *Id.* Burke Wind testified it did its “surveys based on species of interest as expressed by agencies or concerned for other reasons.” Burke Wind explained that “surveys are tailored to habitat type.” It further provided that its protocols were presented to both the NDGFD and USFWS when it drafted its study.

43. Burke Wind disagreed with NDGFD’s assertion that the proposed Wind Project Area was some of the “best of the best prairie wetland habitat in North America.” Burke Wind explained it tried to investigate “what that really means” and questioned how this

term can be put "into context for this project area." Specifically, Burke Wind testified the project area is "similar to several other existing wind energy projects in North Dakota and thus it is unclear how the project should be deemed best of the best." Burke Wind cited the Minot Wind Site, the Tonka, Dakota Wind, and a site near Rugby, North Dakota, as similar locations with respect to wetland grassland mix.

44. Both NDGFD and USFWS expressed concerns over the Wind Project's location with respect to impact it will have on native prairie land. Burke Wind testified that disturbance to native prairie would be avoided where possible and acknowledged it serves as an important habitat to certain wildlife. Burke Wind also explained that by reducing the size of the project from 300 MW to 200 MW the impact on native prairie would be substantially mitigated. Burke Wind testified that a total of 5.8 acres of native prairie would be permanently disturbed by the 200 MW layout. Burke Wind also explained it took landowner preference into account when identifying proposed turbine locations with respect to impact on native prairie.

45. The USFWS and NDGFD expressed concerns with respect to the Wind Project's impacts on wetlands. Burke Wind's Amended Application provides the "current 200-MW Project Area contains over 2,470 wetland features, approximately six (6) percent of which are wetland features that were determined to likely be jurisdiction WOUS." Exhibit # 4, p. 77. Burke Wind testified that it differentiated between water bodies that are under the jurisdiction of the USACE and water bodies that were not under the USACE's jurisdiction. Figure 14 of Exhibit # 4 included a map which identified all isolated wetlands and USACE jurisdictional wetlands. Burke Wind's Amended Application provides that it is "committed to avoiding impacts to jurisdictional wetlands and WOUS...Burke Wind avoided all wetlands and waters during Project design, regardless of potential jurisdictional status, to the degree feasible." Exhibit # 4, p. 78.

46. The USFWS and NDGFD expressed concerns with respect to the Wind Project's location within a whooping crane migratory corridor. Burke Wind's Amended Application acknowledges the Wind Project "is located within the migratory corridor for the federally endangered whooping crane, but there is not federally designated critical habitat for any federally listed species in the Project Area." Exhibit # 4, p. 17. Burke Wind submitted a Whooping Crane Migration Corridor Map as Figure 17 of Exhibit # 4. It explained the Project Area is in the middle of the whooping crane corridor. Burke Wind's Whooping Crane Addendum and Whooping Crane Habitat Assessment were admitted into evidence as Exhibit # 27. Figure 6 of Appendix A in Exhibit # 27 identifies all wetlands within the Project Area. Figure 7 of Appendix A in Exhibit # 27 identified all wetlands that were not near development or other areas where cranes are known to avoid. Figure 8 of Appendix A in Exhibit # 27 identified the potential suitable habitats for whooping cranes within the Project Area. Burke Wind testified it avoided all wetlands regardless of jurisdictional status if they were found to have any stopover value for whooping cranes. Burke Wind

further testified that it will use avian diverters on the transmission line to mitigate the risk of collisions with whooping cranes and also testified that no whooping crane fatalities are known from impacts with wind turbines. Lastly, Burke Wind testified that impacts to whooping cranes are not anticipated from the Wind Project or Transmission Line.

47. Burke Wind responded to the USFWS and NDGFD's concerns with respect to the impact the Wind Project will have on waterfowl. Burke Wind agreed the Wind Project is anticipated to indirectly impact waterfowl. Burke Wind indicated it is difficult to quantify indirect impacts to waterfowl. It also testified that most research showed limited to no displacement or impacts to migratory waterfowl from wind projects, but testified that research from North Dakota indicated that 20 to 21 percent of duck pairs were displaced within half a mile of turbines. It also testified that direct impacts due to mortality of waterfowl in the Project Area are expected to be low and the reduction in size from 300 MW to 200 MW would decrease the impact on breeding duck pairs.

48. Both the USFWS and NDGFD expressed concerns with respect to the Wind Project's impact on the sharp-tailed grouse. Burke Wind testified that the study for sharp-tailed grouse took place in April 2017 and indicated there were 20 confirmed leks, which averaged 12.8 grouse per lek, in the 200 MW study area. Burke Wind disputed NDGFD's position that prairie grouse avoid wind turbines and noted a study by Kent State University looked at some related prairie grouse and showed no consistent avoidance or impact of turbines as a subset of potential tall structures on grouse. Burke Wind asserted the data on this issue is rather inconclusive. Burke Wind further testified that all turbines in the 200 MW project will be located more than one half mile away from all leks identified during surveys and the reduction of project size will reduce potential impacts on grouse. Burke Wind acknowledged the sharp tailed grouse is a species of conservation priority as defined by NDGFD, it asserted that sharp-tailed grouse are not rare to North Dakota and there is a healthy population of sharp-tailed grouse within the state.

49. Burke Wind responded to concerns with respect to the Wind Project's impact on the Sprague's Pipit at hearing. While Burke Wind acknowledged it did not conduct a study specifically for the Sprague's Pipit, its avian survey encompassed it. Burke Wind testified that the highest concentration of grassland species of concern, including the Sprague's Pipit, was found outside of the Project Area. Burke Wind admitted it did not conduct a study for the Sprague's Pipit with respect to the transmission line. However, Burke Wind testified it did not expect a population level impact on the Sprague's Pipit.

50. Burke Wind responded to USFWS and NDGFD's concerns with respect to interpretation of the WEG. Burke Wind testified that NDGFD was not accustomed to working with the WEG and further asserted that the USFWS construed its own guidelines too narrowly. Burke Wind testified the WEG sets forth three pre-construction tiers and in each tier there is a point where it had to make a decision to abandon the project, consider

further studies, or mitigate impacts. Burke Wind testified that it acknowledged that species of concern were known to be present in the Project Area at tier one, but proceeded to gather site specific data. Burke Wind further explained that during its evaluation of the WEG it believed there was potential for adverse impacts, but it believes its current plan has avoided, minimized and mitigated those impacts. Burke Wind testified it did not believe its efforts under the WEG were accurately represented in NDGFD's correspondence.

51. Burke Wind responded to concerns related to the impact the Wind Project may have on the Dakota Skipper. Burke Wind acknowledged the Dakota Skipper is a federally threatened butterfly. It further acknowledged that native prairie land is a known habitat for the Dakota Skipper, but asserted that native prairie and Dakota Skipper habitat are not always one in the same and testified there could be native prairie that is not also Dakota Skipper habitat. Burke Wind submitted a Dakota Skipper Habitat Assessment Report as Exhibit # 28. Burke Wind's field survey assessments for Dakota Skipper habitat are found on Table 1 of Exhibit # 28 and indicate it performed studies on various locations of the Project Area at different times, including the winter months. Burke Wind's maps located in Appendix A of Exhibit # 28 indicate suitable Dakota Skipper habitat exists within its study area. However, Burke Wind testified the Wind Project will have no surface impacts to Dakota Skipper habitat.

52. Burke wind responded to comments with respect to the Wind Project's proposed impact on eagles. Burke Wind testified that it performed an eagle survey and concluded its eagle risk is low and did not believe it needed to prepare an eagle conservation plan for the USFWS. Burke Wind specifically testified there were no eagle nests in the project or within 10 miles. It further testified that overall eagle use appeared to be limited to migration periods and winter. Further, it testified that most eagle use was outside of the current project area.

Siting Criteria

53. Pursuant to Section 49-22-05.1 of the North Dakota Century Code, the Commission developed criteria to be used in identifying exclusion and avoidance areas and to guide the site, corridor, and route suitability evaluation and designation process. These criteria include an identification of impacts and policies or practices which may be considered in the evaluation and designation process. The Commission's criteria for siting an energy conversion facility is found in Section 69-06-08-01 of the North Dakota Administrative Code.

54. Section 69-06-08-01(1) of the North Dakota Administrative Code identifies various exclusion areas. Under the Commission's criteria, geographical areas identified as

exclusion areas, with the exception of prime and unique farmland, must be excluded in the consideration of a site for an energy conversion facility.

55. If the Commission finds the removal of prime and unique farmland for the life of the facility is of such small acreage as to be of negligible impact on agricultural productions, this exclusion does not apply.

56. Prime farmland is not located within the Project Area. Farmland of statewide importance has been avoided to the extent practical. Permanent impacts to farmland statewide importance are less than one percent of the total Project Area. The Commission finds that the amount of farmland of statewide importance that may be disturbed by the Project is of such small acreage to be of negligible impact on agricultural production.

57. Areas critical to the life stages of threatened or endangered animal or plant species are identified as an exclusion area by N.D. Admin. Code § 69-06-08-01. While the record discloses that threatened or endangered animal species may use the Wind Project Area as a habitat, the preponderance of the evidence does not establish these areas are critical to the life stage of a threatened or endangered animal species.

58. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged are identified as exclusion areas by N.D. Admin. Code § 69-06-08-01. The preponderance of the evidence does not establish that areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.

59. Designated or registered archaeological and historical sites are identified as exclusion areas. Burke Wind identified sites within the Project Area; however, the proposed project would avoid those sites.

60. The Commission finds the proposed Wind Project would not be located within any exclusion areas as defined by N.D. Admin. Code § 69-06-08-01(1).

61. With respect to wind energy conversion facilities, geographical areas identified in N.D. Admin. Code § 69-06-08-01(2) are also exclusion areas. The Commission finds the proposed Wind Project would not be located in any of the geographical areas identified in this section.

62. Section 69-06-08-01(3) of the North Dakota Administrative Code identifies various avoidance areas. Under the Commission's criteria, geographical areas identified as avoidance areas may not be approved as a site for an energy conversion facility unless the applicant shows under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility the Commission may consider, among other things, the proposed management of adverse

impacts, the orderly siting of facilities, system reliability and integrity; the efficient use of resources; and alternative sites. Economic considerations alone will not justify approval of these areas. A buffer zone of reasonable width to protect the integrity of the area must be included. Natural screening may be considered in determining the width of the buffer zone.

63. Woodlands and wetlands are designated as avoidance areas under N.D. Admin. Code § 69-06-08-01(3)(e). The Commission defines a "wetland" as "an aquatic area important to the life stages of certain wildlife species as defined by the United States fish and wildlife service." N.D. Admin. Code § 69-06-01-01(16). Burke Wind's study indicates the Wind Project area contains over 2,470 wetland features. Exhibit # 4, p. 77. The NDGFD's March 7, 2019, letter indicated it believed Burke Wind could not have picked a worse spot in the state with respect to potential negative impacts to wetland wildlife species. The USFWS indicated the "high wetland density in the Burke project area is one characteristic indicating this area is highly valuable for wildlife." USFWS also estimated that 236, 2.0-acre wetlands would need to be created or restored to compensate for the impact of the Wind Project. USFWS indicated that less than 1% of one-square mile sections in North Dakota contain wetland communities that harbor over 200 pairs of breeding waterfowl; however, at the proposed Wind Project site "that percentage of rare habitat is much higher than the state average: 24% (8 of 34) of the square mile sections within the project area have densities of 200+ pairs." USFWS also indicated that based on a peer-reviewed published study, an estimated 1004 breeding pairs of waterfowl may be displaced by the Wind Project. While Burke Wind committed to avoiding all wetlands within the USACE's jurisdiction, its own data indicates this only encompasses approximately 6% of the wetland features in the Wind Project Area. Burke Wind also testified it will avoid all wetlands to the degree feasible. However, when considering the totality of the evidence before the Commission, the Wind Project will have adverse impacts upon wetlands. Burke Wind testified that it is always possible to move a turbine. Burke Wind also testified that when considering alternative sites, it declined to move the project because it would have negatively impacted the efficiency of the wind resource by at least 10 percent. However, Burke Wind failed to establish by a preponderance of the evidence that there is no reasonable alternative to this project location. Therefore, the Commission finds the Wind Project does not satisfy the siting criteria with respect to the avoidance area defined by N.D. Admin. Code § 69-06-08-01(3)(e).

64. The proposed Wind Project does not impact any other avoidance areas as set forth in N.D. Admin. Code § 69-06-08-01(3)-(4).

65. Section 69-06-08-01(5) of the North Dakota Administrative Code provides that a site may be approved in an area only when it is demonstrated to the Commission by the applicant that any significant adverse effects resulting from the location, construction, and operation of the facility in that area as they relate to the listed criteria will be at an

acceptable minimum, or that those effects will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum.

66. The Commission finds the Wind Project's impact of the proposed Wind Project upon agriculture will be at an acceptable minimum.

67. The Commission finds the Wind Project's impact upon the availability and adequacy of the services and facilities listed in N.D. Admin Code § 69-06-08-01(5)(b) will be at an acceptable minimum.

68. The Commission finds the Wind Project's impact upon the criteria listed in N.D. Admin Code § 69-06-08-01(5)(c)(1-6) and (8-9) will be at an acceptable minimum.

69. Subsection 7 of N.D. Admin. Code § 69-06-08-01(5)(c) requires the Commission to consider the adverse effects on animal health and safety. Both USFWS and NDGFD expressed substantial concerns with respect to this factor. The NDGFD indicated the current proposed Wind Project "will have substantial impacts to native wildlife." Exhibit # 44. NDGFD indicated the Wind Project Area "is extremely valuable for a number of Species of Conservation Concern" and also noted that Burke Wind "*could not have picked a worse spot in the state*" with regards to potential negative impact to prairie and wetland wildlife species." Exhibit # 44 (emphasis in original). Further, the USFWS indicated "the location of the proposed project falls within an unusually high-value wildlife resource area, and significant negative direct and indirect impacts to wildlife are anticipated if this project proceeds to construction and operation." Exhibit # 45. USFWS further indicated the proposed project will result in displacement of breeding waterfowl and grassland birds and expressed concerns with an unauthorized take of eagles if the project proceeds to construction. In sum, both the NDGFD and USFWS opposed this project based on their opinion that this project will have an adverse impact on the health and safety of wildlife. Both agencies, but specifically USFWS, noted Burke Wind's attempt at mitigation measures and their recommendations continued to be relocation of the project. While the Commission acknowledges that Burke Wind has expressed numerous measures to mitigate the impacts to wildlife, the Commission finds the weight of the evidence shows the proposed Wind Project will have adverse effects upon animal health and safety that are not at an acceptable minimum.

70. Section 69-06-08-01(6) of the North Dakota Administrative Code provides the Commission may give preference to an applicant that will maximize benefits that result from the adoption of identified policies and practices. The Commission may also give preference to an applicant that will maximize interstate benefits.

71. The Commission recognizes the Wind Project may have a positive impact on some of the criteria set forth in N.D. Admin. Code § 69-06-08-01(6). However, under the

circumstances, the Commission is not of the opinion that any preference that could apply under these criteria outweighs the adverse direct and indirect impacts as a whole. Therefore, no preference will be given under N.D. Admin. Code § 69-06-08-01(6).

Evaluation of Considerations set out in N.D.C.C. 49-22-09.

72. Any designation of a site or corridor for a proposed facility shall be made in accordance with the evidence presented at the hearings, and evaluation of the information provided in the application and the considerations set out in section 49-22-09 in a finding with the reasons for the designation. N.D.C.C. § 44-22-08(5). Section 49-22-09 provides the Commission shall be guided by, but is not limited to, identified considerations, where applicable, to aid in the evaluation and designation of sites, corridors, and routes. The Commission makes the following findings with respect to the considerations set forth in section 49-22-09:

a) Available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment.

i) The Commission has received and reviewed substantial research and investigations relating to the effects of the location, construction, and operation of the Wind Project on natural resources and the environment. The Wind Project was investigated by the NDGFD, USFWS, Burke Wind, and also by local citizen Karen Smith. Ms. Smith testified that she has a Bachelor's of Science degree, with a specialty in Conservation, that she obtained in 1969 from Michigan State University. She testified that she worked with the Fish and Wildlife Service from approximately 1969 until May 13, 2001. She further testified that she worked at the Lostwood National Wildlife Refuge from 1977 until she retired in May of 2001. In addition to her testimony, Ms. Smith submitted a paper with citations to various studies that was admitted into evidence as Exhibit I¹. Ms. Smith's paper and testimony appeared to be based on her familiarity with the area, experience, and reliance upon various studies and data. Burke Wind disputed the accuracy or characterization of many of the studies and data relied upon in her paper as it explained in Late-Filed Exhibit # 51.

¹ Burke Wind objected to Exhibit I; however, the ALJ allowed it into evidence. Burke Wind was granted the opportunity to respond to Exhibit I, which it did in Late-Filed Exhibit # 51. Burke Wind's response indicated it reviewed the information and concluded there is "no materially new information provided that Burke Wind has not previously addressed through filings...or through direct testimony...at the hearing on March 8, 2019." Late-Filed Exhibit # 51.

ii) NDGFD and specifically the USFWS provided a substantial amount of information with respect to the effects of the proposed Wind Project on natural resources and the environment as explained above. Among other metrics, USFWS specifically indicated that 236, 2.0 acre wetlands would need to be created or restored to compensate for the Wind Project's impact. While Burke Wind's investigation into the Wind Project Area indicated only six percent of the wetlands within the Wind Project area fall within the USACE's jurisdiction and it committed to avoiding impact to those wetlands, the greater weight of the evidence from the available research and investigation into the location, construction, and operation of the proposed facility indicates there will be an adverse impact to natural resources and the environment if this project were to be constructed in this location.

b) The effects of new electric energy conversion and electric transmission technologies and systems designed to minimize adverse environmental effects.

i) Burke Wind testified it will utilize boring methods, bird diverters, and shut down the turbines when required to avoid impacts to known wildlife and wetlands². The Commission acknowledges this to be a standard industry practice to mitigate adverse impacts.

c) The potential for beneficial uses of waste energy from a proposed electric conversion facility.

i) The Commission notes the record is underdeveloped with respect to the beneficial uses of any waste energy. Burke Wind testified the electricity generated by this facility would be transmitted to the Basin Electric. However, the Commission finds this factor to be inapplicable to the Wind Project based on the evidence in the record.

d) Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated.

i) The Commission recognizes that substantial testimony was received with respect to the adverse direct and indirect effects of the Wind Project. While Burke Wind provided various examples of what is or is not a direct or indirect impact that is anticipated to result from the project, Burke Wind, USFWS, and NDGFD appear to agree there will be environmental effects that cannot be avoided should the

² The Commission notes Burke Wind submitted a post-hearing brief which further explained its mitigation measures with respect to the Proposed Project. The proposed mitigation measures included additional collection line bore locations, abandonment of crane paths, and minor shifts in access roads to avoid wetland impacts.

proposed site be designated. NDGFD indicated concern for the Wind Project's disturbance of the "extremely valuable" grassland-wetland mosaic and indicated it "will have substantial impacts to native wildlife and their habitats." The USFWS emphasized the high wetland density of the Project Area, and stated 236, 2.0 acre wetlands would need to be created or restored to compensate for the loss caused by the Wind Project, and recommended location of the project to a more disturbed area. It is clear to the Commission that the Project Area contains a valuable environment for wildlife. The Commission finds the direct and indirect effects upon the environment as a result of Wind Project will not be at an acceptable minimum given the value of natural resources in the proposed project location.

e) Alternatives to the proposed site, corridor, or route which are developed during the hearing process and which minimize adverse effect.

i) The Commission acknowledges that Burke Wind reduced the size of the proposed Wind Project from 300 MW to 200 MW. The Commission further acknowledges this minimized the overall adverse impact of this project. However, the Commission also finds this reduction in size was due to the concerns raised by the NDGFD and USFWS. Prior to the reduction in project size, NDGFD indicated the project was located in the "best of the best" prairie wetland habitat in North America." NDGFD also noted that Burke Wind "could not have picked a worse spot in the state" to locate this project. Initially, the USFWS also indicated its foremost recommendation was to relocate the project to an area that would have less impact to natural resources. Even after the project was adjusted to 200 MW, both NDGFD and the USFWS objected to the location of this project. Burke Wind testified at hearing that it considered an alternative location; however, an alternate location would have resulted in a lower capacity factor for the Wind Project thus negatively impacting its economics.

f) Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.

i.) Based on the information discussed above, the Commission finds there are anticipated irreversible commitments of natural resources should the proposed site be designated. Specifically, the proposed Wind Project's impact on grassland avian habitat, waterfowl habitat, and population has been explained at length by both NDGFD and the USFWS. Further, the Commission notes the public testimony in opposition to the Wind Project and the information submitted by Ms. Smith further support that concerns exist with respect to irreversible and irretrievable commitments of natural resources. While Burke Wind has proposed various mitigation measures to limit this impact, it also acknowledges there will be

irreversible commitments of natural resources should the proposed Wind Project be designated.

g) The direct and indirect economic impacts of the proposed facility.

i.) The Commission acknowledges the proposed Wind Project would have beneficial direct and indirect economic impacts through payment to participating landowners, easements, labor force, and an increased tax base.

h) Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.

i.) The Commission is unaware of any existing plans for other developments at or in the vicinity of the proposed site, corridor, or route.

i) The effect of the proposed site or route on existing scenic areas, historic sites, and structures, and paleontological or archaeological sites.

i) The Commission acknowledges the various testimony from members of the public who testified as to their opinions of the effect the Wind Project would have on the scenery, but acknowledges individuals have various opinions with respect to wind projects' impact on existing scenery. The record does not reflect any designated scenic areas are located within the Project Area. With respect to historic sites and structures, and paleontological or archaeological sites, the Commission accepts the recommendations of the SHPO and Burke Wind that the propose project will not impact these sites.

j) The effect of the proposed site or route on areas which are unique because of biological wealth or because they are habitats for rare and endangered species.

i) The Commission notes that both the NDGFD and USFWS have emphasized the unique biological wealth of the proposed Project Area and the effect the proposed site would have upon it. Specifically, USFWS indicated the Project area harbors a uniquely dense population of breeding waterfowl. The NDGFD also stated the Project Area encompasses a unique and thriving area of biological wealth as explained above. Burke Wind acknowledges this area is dense in wetlands, but asserted the grassland-wetland composition was not unique. Considering all evidence, the Commission finds the proposed Wind Project will have an adverse effect upon a unique area of biological wealth. The Commission finds the information provided by the USFWS, NDGFD, and the testimony and report submitted by Ms. Smith persuasive with respect to this finding.

ii) The Commission acknowledges the proposed Wind Project may impact the stopover habitat for the endangered whooping crane. However, the Commission finds the mitigation measures proposed by Burke Wind would reduce the potential impact to the whooping crane to an acceptable minimum. The Commission also acknowledges the Dakota Skipper is an endangered species with potential habitat within the Wind Project area. However, the Commission finds the mitigation measures proposed by Burke Wind would reduce the potential impact to the Dakota Skipper to an acceptable minimum.

k) Problems raised by federal agencies, other state agencies, and local entities.

i) The Commission explained the problems raised by the USFWS and NDGFD above and those agencies' opinions are incorporated herein. The Commission also acknowledges that Burke Wind responded to the problems raised. The evidence shows that both USFWS and NDGFD oppose the location of this project and specifically, USFWS continued to recommend no development occur in the Wind Project Area even after the Wind Project was reduced in size. Given the continued opposition from both USFWS and NDGFD and the reasons those agencies provided, the Commission is persuaded the problems presented to be valid and significant.

From the foregoing Findings of Fact, the Commission makes the following:

Conclusions of Law

1. The Commission has jurisdiction over Burke Wind and the subject matter of the applications submitted in PU-18-302 and PU-18-344.
2. Burke Wind is a utility as defined in North Dakota Century Code § 49-22-03(14).
3. The wind energy conversion facility proposed by Burke Wind is an electric energy conversion facility as defined in North Dakota Century Code § 49-22-03(5).
4. Section 49-22-02 of the North Dakota Century Code provides that the construction of energy conversion facilities and transmission facilities affects the environment and the welfare of the citizens of North Dakota. It is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and upon the welfare of the citizens of this state by providing that no energy conversion facility or transmission facility shall be located, constructed, and operated within this state without a certificate of site compatibility or a route permit. It is the policy of North Dakota to site energy conversion facilities and to route transmission facilities in an orderly manner compatible with

environmental preservation and the efficient use of resources. In accordance with this policy, sites and routes shall be chosen which minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion.

5. A utility may not begin construction of an electric energy conversion facility or an electric transmission facility without first having obtained a certificate of site compatibility or a route permit from the Commission pursuant to Chapter 49-22 of the North Dakota Century Code. N.D.C.C. § 49-22-07(1).

6. Pursuant to N.D.C.C. § 49-22-08(5), the Commission may designate a site or corridor for a proposed facility following the study and hearings provided for in this chapter. Any designation shall be made in accordance with the evidence presented at the hearings, an evaluation of the information provided in the application, the criteria established pursuant to section 49-22-05.1, and the considerations set out in section 49-22-09 in a finding with reasons for the designation, and shall be made in a timely manner no later than six months after the filing of a completed application for a certificate of site compatibility or no later than three months after the filing of a completed application for a certificate of corridor compatibility. The time for designation of a site or corridor may be extended by the commission for just cause. The failure of the commission to act within the time limits provided in this section shall not operate to divest the commission of jurisdiction in any certification proceeding. The commission shall indicate the reasons for any refusal of designation.

7. The Commission finds just cause exists for the extension of a decision with respect to this proposed project. Late-Filed Exhibits were allowed by Burke Wind after the hearing date and the complexity of this Wind Project required substantial document review and consideration.

8. Based on the above findings of fact, the Commission concludes Burke Wind failed to meet its burden of proof to show the location, construction, and operation of the Wind Project will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.

9. Based on the above findings of fact, the Commission concludes Burke Wind failed to meet its burden of proof to show the Wind Project will minimize adverse human and environmental impact, while ensuring continuing system reliability and integrity, and ensuring that energy needs are met and fulfilled in an orderly and timely fashion.

10. Based on the above findings of fact, the Commission concludes Burke Wind failed to meet its burden of proof to show the location, construction, and operation of the Wind Project are compatible with environmental preservation and efficient use of resources.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes the following:

Order

1. The Commission orders that Burke Wind's Amended Wind Project Application in Case No. PU-18-344 be denied.
2. Based on Burke Wind's admission at hearing, Burke Wind's Application for a Certificate of Corridor Compatibility and Transmission Facility Route Permit for the Burke Wind Transmission Line in Case No. PU-18-302 is denied as moot.

PUBLIC SERVICE COMMISSION

		
Julie Fedorchak Commissioner	Brian Kroshus Chairman	Randy Christmann Commissioner