

January 29, 2020

VIA E-MAIL AND FEDERAL EXPRESS

Mr. Steven Kahl
Executive Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

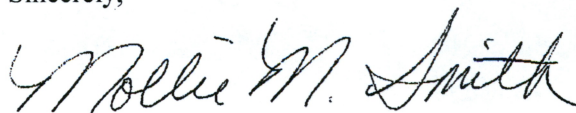
**RE: Ruso Wind Partners, LLC – Ruso Wind Project – Siting Application
Ward & McLean Counties, North Dakota
Case No. PU-19-28**

Dear Mr. Kahl:

Enclosed for filing in the above-referenced docket are an original and ten copies of Ruso Wind Partners, LLC's Memorandum Regarding NDCC § 49-22-16.4 and NDAC Ch. 69-06-11 and a Certificate of Service, submitted by Ruso Wind Partners, LLC. Electronic copies of the same are being filed with the Commission via e-mail.

If you have any questions, please let me know.

Sincerely,



MOLLIE M. SMITH

MMS/69246879

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154 PU-19-28 Filed: 1/29/2020 Pages: 15
**Memorandum regarding Light-mitigating technology
system Rules**

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Ruso Wind Partners, LLC

Mollie Smith - Fredrikson & Byron, P.A.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Ruso Wind Partners, LLC
Ruso Wind Project – Siting Application
Ward & McLean Counties, North Dakota

Case No. PU-19-028

**Ruso Wind Partners, LLC’s Memorandum Regarding
NDCC § 49-22-16.4 and NDAC Ch. 69-06-11**

INTRODUCTION

Ruso Wind Partners, LLC (“Ruso Wind”) provides this memorandum to explain why North Dakota Century Code (“NDCC”) § 49-22-16.4 and the North Dakota Public Service Commission’s (“Commission”) rules adopted thereunder in North Dakota Administrative Code (“NDAC”) Ch. 69-06-11 require the Commission to give deference to the Federal Aviation Administration’s (“FAA”) regulations when imposing lighting requirements on the Ruso Wind Project (“Project”).

As discussed in Section I below, the plain language and legislative history of NDCC § 49-22-16.4, as well as the Commission’s rules enacted thereunder, mandate that the light-mitigating technology requirement be implemented consistent with the FAA’s regulations. Further, as discussed in Section II below, an aircraft detection lighting system (“ADLS”) is the only light-mitigating technology currently approved by the FAA, and the FAA has specifically conditioned its issuance of Determinations of No Hazard (“DNH”) for the Project on installation of a standard lighting system (not ADLS) based on input and safety concerns from the Department of Defense and Minot Air Force Base. Thus, a Commission order requiring approval/installation of a light-mitigating technology system as a condition precedent to

construction/operation of the Project would be inconsistent with the statutory directive that implementation of light-mitigating technology be consistent with FAA regulations.

Finally, as set forth in Section III below, Ruso Wind has proposed a light-mitigating technology condition that is consistent with NDCC § 49-22-16.4, NDAC Ch. 69-06-11, and the FAA's regulations. For these reasons, Ruso Wind respectfully requests that its proposed condition be included in an order granting a Certificate of Site Compatibility to Ruso Wind for the Project.

DISCUSSION

I. The Plain Language and Legislative History of NDCC § 49-22-16.4 and NDAC Ch. 69-06-11 Require Deference to the FAA's Regulations.

The plain language of NDCC § 49-22-16.4, and the rules enacted thereunder (NDAC Ch. 69-06-11), require deference to the FAA's regulations. Additionally, even if the statute and rules are considered ambiguous, the legislative history of NDCC § 49-22-16.4 and NDAC Ch. 69-06-11 evidences a clear intent to defer to the FAA's expertise and regulations when implementing the light-mitigation technology statute.

A. The plain language of NDCC § 49-22-16.4 and NDAC § 69-06-11-03 require deference to the FAA.

In ascertaining the Legislature's intent, one should first look to the plain language of the statute and give each word of the statute its ordinary meaning. *See State ex rel. Clayburgh v. Am. W. Cmty. Promotions, Inc.*, 645 N.W.2d 196, 205 (N.D. 2002); *In re Estate of Hogen*, 863 N.W.2d 876, 883 (N.D. 2015). A statute must be construed as a whole, with effect given to each of its provisions if possible. *State ex rel. Clayburgh*, 645 N.W.2d at 205; *see also Hogen*, 863 N.W.2d at 883 (noting that statutes are construed as a whole and are harmonized to give effect to all of their provisions, so that no part of a statute is rendered inoperative or superfluous) (citing

NDCC §§ 1-02-07, 1-02-38(2) and (4)); *Sloan v. N. Dakota Workforce Safety & Ins.*, 804 N.W.2d 184, 189 (N.D. 2011) (“[S]tatutory construction requires interpretation of related provisions together, if possible, to harmonize and to give meaning to each provision.”).

NDCC § 49-22-16.4 addresses the requirements for implementation of light-mitigating technology systems on wind energy conversion facilities, stating (in relevant part):

49-22-16.4. Light-mitigating technology system - Rules.

1. The commission shall adopt rules by January 1, 2019, relating to the implementation of light-mitigating technology systems on wind energy conversion facilities. *The rules must be consistent with the federal aviation administration regulations [14 CFR 1.1 et seq.] and must include service and maintenance requirements, safety standards, and lighting system requirements.*
2. By December 31, 2019, every wind energy conversion facility for which the commission issued a certificate of site compatibility after June 5, 2016, must be equipped with a functioning *light-mitigating technology system that complies with rules adopted by the commission.*

(Emphasis added).

Per NDCC § 49-22-16.4(2), wind projects are required to be equipped with a functioning light-mitigating technology system “*that complies with rules adopted by the commission*” (emphasis added). Per NDCC § 49-22-16.4(1), the Commission’s rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities “*must be consistent with the [FAA] regulations [14 CFR 1.1 et seq.]*” (emphasis added). In fact, the Commission’s rules on light-mitigating technology state: “Each light-mitigating technology system must be installed, operated, and maintained *in accordance with United States department of transportation [FAA] regulations [14 CFR 1.1. et. seq] in effect as of July 1, 2018.*” NDCC § 69-06-11-03 (emphasis added). Therefore, the consistency with FAA regulations mandated in NDCC § 49-22-16.4(1) also applies to NDCC § 49-22-16.4(2). Stated another way, since the

Commission's rules must be consistent with FAA regulations, and implementation of light-mitigating technology must comply with the Commission's rules, then implementation of light-mitigating technology must also comply with FAA regulations. *See, e.g., Hogen*, 863 N.W.2d at 883 (holding that statutes are construed as a whole and are harmonized to give meaning to related provisions, so that no part of a statute is rendered inoperative or superfluous); *Great W. Bank v. Willmar Poultry Co.*, 780 N.W.2d 437, 440 (N.D. 2010) ("Statutes should be harmonized to avoid conflicts between them."); *Pub. Serv. Comm'n v. Minnesota Grain, Inc.*, 756 N.W.2d 763, 766 (N.D. 2008) ("This Court 'harmonize[s] statutes when possible to avoid conflict between them.'").

Further, were the Commission not to defer to the FAA regulations in its implementation of NDCC § 49-22-16.4, it would be exceeding the authority granted to it by the Legislature. *See Heier v. North Dakota Dept. of Corrections and Rehabilitation*, 820 N.W.2d 394, 399 (N.D. 2012) (holding that an administrative agency only has the authority or power granted to it by the Legislature); *see also In the Matter of the Application of Nebraska Public Power District*, 330 N.W.2d 143, 149 (N.D. 1983) ("The PSC's authority to regulate is limited to that given it by the Legislature."); *State ex rel. Pub. Serv. Comm'n v. N. Pac. Ry. Co.*, 75 N.W.2d 129, 134 (N.D. 1956) ("[T]he powers of the Public Service Commission must be exercised in accordance with the statutes granting such powers. ... The constitution of this state provides that 'the powers and duties' of the Public Service Commissioners shall be prescribed by law. ... The powers conferred upon the commissioners must be exercised in accordance with the statute bestowing such powers and they can act only in the mode prescribed by the statute.") (internal citations omitted); NDCC § 28-32-46 (a court may overturn an agency decision that "is not in accordance with the law"); *Moore v. North Dakota Workmen's Compensation Bureau*, 374 N.W.2d 71, 75 (N.D. 1985)

(reversed in part, on other grounds) (stating that an agency’s “authority does not extend to the promulgation of an administrative regulation, *or the application of a regulation in such a fashion, that is wholly inconsistent with the dictates of the Legislature.*”) (Emphasis added). Accordingly, any light-mitigating technology system requirement imposed by the Commission on Ruso Wind must be “consistent with the [FAA] regulations” on lighting. *See* NDCC § 49-22-16.4(1) and (2).

B. The legislative history of NDCC § 49-22-16.4 and NDAC Ch. 69-06-11 support deference to the FAA’s regulations.

Even if the plain language of NDCC § 49-22-16.4 and the Commission’s rules are found to be ambiguous, the legislative history of NDCC § 49-22-16.4 and the rulemaking docket for NDAC Ch. 69-06-11 (Case. No. PU-17-339) evidence a clear intent to defer to the FAA’s regulations regarding the implementation of light-mitigating technology. *See State ex rel. Clayburgh*, 645 N.W.2d at 205 (noting that if the language of a statute is ambiguous, the court may resort to extrinsic aids to interpret the statute).

1. *The legislative history of NDCC § 49-22-16.4 demonstrates a clear intent to defer to the FAA and its regulations.*

The legislative history of NDCC § 49-22-16.4 shows that the Legislature intended deference to the FAA and its lighting regulations. A cardinal rule of statutory construction is that it must be consistent with legislative intent and done in a manner which will accomplish policy goals and statutory objectives. *See Minnesota Grain, Inc.*, 756 N.W.2d at 766; *Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 152 (N.D. 1996); *see also Hogen*, 863 N.W.2d at 883 (“The primary objective in interpreting a statute is to determine the intent of the legislation.”).

During legislative committee hearings on House Bill 1378, which eventually was enacted as NDCC § 49-22-16.4, deference to the FAA and, specifically, FAA approval of lighting

systems, was repeatedly referenced. Statements by the legislators during the hearings on the proposed legislation, and the information provided to the legislators during the hearings, demonstrate a clear intent to defer to the FAA's expertise in determining the appropriateness of a lighting system for each wind facility:

- “If the FAA doesn’t approve it, regardless of what date we have in our bill, we can’t, I mean we wouldn’t be able to do that.... We aren’t going to turn all the lights off on a wind farm if the FAA hasn’t approved a new method of detection.” Statement by Sen. Armstrong, Recording of Senate Energy and Natural Resources Committee Hearing on HB 1378 at 38:52 (March 2, 2017).
- In response to House Committee Chairman Keiser’s question regarding whether the system will identify aircraft without special equipment for drones, Commissioner Fedorchak responded in the affirmative and noted “that was part of the FAA vetting.” *See* Exchange between Chairman Keiser and Commissioner Fedorchak, Minutes of House Industry, Business and Labor Committee Hearing on HB 1378 at 2 (Feb. 1, 2017).
- “They [the FAA] have looked at this, they’ve tested it, they’ve approved it as being safe, what they still need to do is they look at every single site and the plans for every site and the facility owner has to get their lighting plan approved by the FAA, and so they would do the same with this type of technology. Any technical problems that might arise would be handled through that discussion.” Statement by Commissioner Fedorchak, Recording of House Industry, Business and Labor Committee Hearing on HB 1378 at 22:52 (Feb. 1, 2017).
- “My impression has always been that we rely on the FAA as the experts at protecting the air and the planes that are flying through it, so we defer to them and if they’re ok with it, we’re ok with it.” Statement by Commissioner Fedorchak, Recording of House Industry, Business and Labor Committee Hearing on HB 1378 at 24:15 (Feb. 1, 2017); *see also* Statement by Commissioner Fedorchak, Recording of House Industry, Business and Labor Committee hearing on HB 1378 at 24:15 (Feb. 1, 2017) (stating that the Commission “rel[ies] on the FAA as the experts at protecting the air and the planes that are flying through it, so [the Commission] defer[s] to them.”).
- “...[I]n certain areas, I’ve since learned, if you’re in a flight path, like say, the facility Oliver Wind which is just north and a little west of Mandan, they’re in a flight path into the Bismarck airport – the FAA may decide they can’t use it there, so there’s that issue as well ... so the ADLS system does depend on the location and those are the things that the FAA will take into consideration in determining whether or not the facility can even use this technology, the ADLS.” Statement

by Commissioner Fedorchak, Recording of Senate Energy and Natural Resources Committee Hearing on HB 1378 at 15:58 (March 2, 2017).

Given the discussion of the FAA's expertise on aviation matters, the Commission's deference to the FAA on aviation and lighting matters, and the FAA's role in the determination of appropriate lighting for individual wind farms, it is evident that the Legislature's intent in enacting NDCC § 49-22-16.4 was to require deference to the FAA and its lighting regulations.

2. *The record in the Commission's rulemaking docket for NDAC Ch. 69-06-11 demonstrates a clear intent to defer to the FAA's expertise and regulations.*

The rulemaking history of NDAC Ch. 69-06-11 likewise indicates deference to the FAA and its regulations. As explained by Commission Staff in the rulemaking proceeding, NDAC Ch. 69-06-11 "would provide that a wind energy conversion facility permitted after June 5, 2016 must be equipped with a functioning *USDOT/FAA approved* light-mitigating technology..." Case No. PU-17-339, Staff Testimony at 1 (Jan. 3, 2018) (emphasis added); *see also* Case No. PU-17-339, Order Submitting Rules to Attorney General at 3 (March 29, 2018) (summarizing Commission Staff's testimony). Further, in response to a public comment regarding the reliability of a radar detection system, the Commission stated:

As proposed, the rules require each light mitigating technology to be installed, operated, and maintained in accordance with FAA regulations. The purpose of aeronautical studies for FAA approval is to ensure safe and efficient use of navigable airspace and air navigation equipment. [citing 14 CFR § 77.1.] FAA regulations provide standards for inspection, repair and safety of lighting operations including daily monitoring and logging of system operations,^[1] partial permanent illumination of projects near

¹ "Advisory Circular No. 70/7460-1L, 4-4, Section 4.8. 'Obstruction lighting systems should be closely monitored by visual or automatic means. It is extremely important to visually inspect obstruction lighting in all operating intensities at least once every 24 hours on systems without automatic monitoring. . . . For each structure, a log should be maintained in which the lighting system's daily

obstructions to maintain safety,^[2] automatic turning on of lights in the event of system failure,^[3] and outage reporting...

Case No. PU-17-339, Order Submitting Rules to Attorney General at 4 (March 29, 2018). The Commission's explicit references to, and reliance upon, the FAA's regulations, studies, and determinations evidence an intent to defer to the FAA's judgment on matters within its expertise such as determinations regarding appropriate lighting systems.

Additionally, Basin Electric Power Cooperative ("Basin") submitted comments during the committee hearings on the proposed statute, as well as during the rulemaking process, expressing concerns regarding its operating wind facility, PrairieWinds ND 1, which "surrounds a ballistic missile base that includes a helicopter pad, and is within close proximity to the Minot Air Force Base." Case No. PU-17-339, Comments of Basin Electric Power Cooperative at 1 (Jan. 3, 2018); *see also* Statement by Jean Schafer, Minutes of Senate Energy and Natural Resources Committee hearing on HB 1378 at 2 (March 2, 2017). Basin noted that the FAA must approve any lighting system on all wind projects, that approval is done on a case-by-case basis, and its project's close proximity to the Minot Air Force Base means approval is also required from the United States Air Force. Case No. PU-17-339, Comments of Basin Electric Power Cooperative at 1 (Jan. 3, 2018). Basin requested a revision to the proposed rule to state that in

operations status is recorded." Case No. PU-17-339, Order Submitting Rules to Attorney General at 4, n. 3 (March 29, 2018).

² "[Advisory Circular No. 70/7460-1L,] 14-2, Section 14.2.3. 'It may be appropriate to keep certain obstructions closest to . . . activity areas illuminated during the nighttime hours, while the remainder of the group's obstruction lighting is controlled by ADLS.'" *Id.* at 4, n. 4.

³ "[Advisory Circular No. 70/7460-1L,] 14-2. Section 14.2.5. 'In the event of an ADLS component or system failure, the ADLS should automatically turn on all the obstruction lighting and operate ... as if it was not controlled by ADLS. The obstruction lighting must remain in this state until the ADLS and its components are restored.'" *Id.* at 4, n. 5.

addition to the lighting system being installed, operated, and maintained in accordance with the FAA’s regulations, the system must receive approval from the FAA “or any other federal agency with regulatory authority ... prior to implementation.” *Id.*

The Commission’s response to Basin’s concerns – which involved a situation very similar to Ruso Wind’s current situation – indicates that the Commission believed its rules would not result in an action contrary to the FAA’s recommendation:

The commission considered Basin’s comments and proposed revision and believes that revising the proposed rule so that the systems simply must be installed, operated and maintained in accordance with 14 Code of Federal Regulations (CFR) 1.1. et. seq., but not specify the necessity of ‘approval prior to implementation’ may provide a clearer alternative. By installing and operating in compliance with Title 14 CFR Part 77, Basin’s concerns regarding proximity to the Minot Air Force Base and ballistic missile base should be addressed. Under 14 CFR § 77.5, any proposed construction or alteration must provide adequate notice for the FAA to determine appropriate marking and lighting recommendations.^[4] As part of aeronautics studies and approval, the FAA considers the impact and proximity to flight routes, military use, airports, and the ‘interests of national security as determined by the Secretary of Defense.’^[5]

Case No. PU-17-339, Order Submitting Rules to Attorney General at 5 (March 29, 2018); *see also* Statement by Commissioner Fedorchak, Recording of Senate Energy and Natural Resources Committee hearing on HB 1378 at 15:58 (March 2, 2017) (“...in certain areas, I’ve since learned, if you’re in a flight path, like say, the facility Oliver Wind which is just north and a little

⁴ “14 CFR § 77.5.” Case No. PU-17-339, Order Submitting Rules to Attorney General at 5, n. 7 (March 29, 2018).

⁵ “Title 49 CFR § 44718; *See also* 14 CFR § 77.5(c)(3) and Advisory Circular No. 70/7460-1L, Section 14.2.3 (The FAA may deny ADLS applications based upon ‘proximity of the obstruction or group of obstructions to airports, low-altitude flight routes, military training areas, or other areas of frequent flight activity.’)” *Id.* at 5, n. 8.

west of Mandan, they're in a flight path into the Bismarck airport – the FAA may decide they can't use it there, so there's that issue as well ... so the ADLS system does depend on the location and those are the things that the FAA will take into consideration in determining whether or not the facility can even use this technology, the ADLS.”).

Consistent with the plain language directive of and the Legislative intent behind NDCC § 49-22-16.4, the rulemaking history of NDAC Ch. 69-09-11 indicates that the Commission intended for its light-mitigating technology rules to defer to the FAA's regulations. Since implementation of NDCC § 49-22-16.4 must “compl[y] with rules adopted by the commission,” the statute must likewise be implemented with deference to the FAA's regulations.

II. The FAA's Lighting Determination for the Project Was Made Pursuant to Its Authority Under the FAA Regulations and Is Entitled to Deference.

As noted above, a Commission order on light-mitigating technology must be “consistent with the [FAA] regulations” and the “rules adopted by the commission.” *See* NDCC § 49-22-16.4(1) and (2); NDAC § 69-06-11-03; *see also* NDCC § 28-32-46 (a court may overturn an agency decision that “is not in accordance with the law”). Accordingly, a Commission order requiring installation of a light-mitigating technology system that contradicts the FAA's determination made under its regulations would be inconsistent with the requirements of NDCC § 49-22-16.4.

The FAA's regulations provide that the FAA will issue a DNH when an aeronautical study concludes that the proposed construction or alteration will exceed an obstruction standard but would not have a substantial aeronautical impact to air navigation. 14 CFR § 77.31(d). A DNH may include: (1) conditional provisions of a determination; (2) limitations necessary to minimize potential problems, such as the use of temporary construction equipment;

(3) supplemental notice requirements, when required; and/or (4) “[m]arking and lighting recommendations, as appropriate.” 14 CFR § 77.31(d) (emphasis added). Currently, ADLS is the only light-mitigating technology approved by the FAA and must be authorized by the FAA on a project-by-project basis.

In Ruso Wind’s case, the FAA has specifically conditioned its issuance of DNHs for the Project on installation of a standard lighting system, and installation of ADLS would violate this condition of the DNHs. *See* Supplement to Late-Filed Exhibit No. 51; Late-Filed Exhibit No. 51(e). The FAA’s determination that a standard lighting system should be installed on the Project was based on input from the Department of Defense and the Minot Air Force Base, which cited safety and operational concerns with installation of ADLS near existing nuclear facilities. *See* Late-Filed Exhibit No. 51; Late-Filed Exhibit No. 51(a); Supplement to Late-Filed Exhibit No. 51; Late-Filed Exhibit No. 51(c). Specifically, the Minot Air Force Base determined that full-time lighting should be required when in proximity to nuclear facilities for safety and operational concerns. *See* Late-Filed Exhibit No. 51(a); Supplement to Late-Filed Exhibit No. 51; *see also* Late-Filed Exhibit No. 51(c).

If the Commission were to require the installation of light-mitigating technology (i.e., ADLS) on the Project, such a requirement would be counter to the safety-based recommendations of the Minot Air Force Base and the specific conditions of the DNHs issued by the FAA for the Project. In fact, it would be impossible for Ruso Wind to comply with both a Commission order requiring the Project to have authorization for, and install light-mitigating technology on, the Project as a condition of construction/operation, and the FAA’s requirement that standard lighting, not ADLS, be used on the Project. *See Great W. Bank*, 780 N.W.2d at 440 (“Statutes should be harmonized to avoid conflicts between them.”); *Minnesota Grain, Inc.*, 756

N.W.2d at 766 (“This Court ‘harmonize[s] statutes when possible to avoid conflict between them.’”). However, NDCC § 49-22-16.4 can and should be read to ensure consistency and compliance with FAA regulations, thereby avoiding any potential conflict.

III. Ruso Wind’s Proposed Condition Is Consistent with NDCC § 49-22-16.4 and the Commission’s Rules.

Ruso Wind proposes the following condition:

Ruso Wind Partners, LLC will install light-dimming technology or other light mitigating technology at the Ruso Wind Project if use of the technology is agreed to by the Minot Air Force Base and authorized by the Federal Aviation Administration, the technology is commercially available, and it is feasible to install the technology.

This proposed condition complies with the requirement in NDCC § 49-22-16.4 and the Commission’s rules (*e.g.*, NDAC § 69-06-11-03) that implementation of light-mitigating technology be consistent with FAA regulations. Additionally, Ruso Wind will commit to providing annual updates to the Commission regarding the availability and FAA approval status of any alternative light-mitigating technology systems and agrees to have such a commitment added as a condition to the Commission’s order.

CONCLUSION

As discussed above, NDCC § 49-22-16.4 and the Commission’s rules adopted thereunder (NDAC Ch. 69-06-11) dictate that the implementation of light-mitigating technology on wind energy facilities be *consistent with FAA regulations*. As such, a Commission order regarding light-mitigating technology must likewise be “consistent with the [FAA] regulations” and the “rules adopted by the commission.” *See* NDCC § 49-22-16.4(1) and (2); *see also* NDCC § 28-32-46 (a court may overturn an agency decision that “is not in accordance with the law”). In accordance with the FAA regulations referenced in NDCC § 49-22-16.4, the FAA has

specifically conditioned its issuance of DNHs for the Project on installation of a standard lighting system (not ADLS). Further, Ruso Wind has proposed a light-mitigation condition that is consistent with NDCC § 49-22-16.4, the Commission's rules, and the FAA's regulations. Accordingly, Ruso Wind respectfully requests that the Commission adopt the proposed condition set forth in Section III above and issue a Certificate of Site Compatibility for the Project.

Dated this 29th day of January, 2020.

FREDRIKSON & BYRON, P.A.

By 

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Ruso Wind Partners, LLC
Ruso Wind Project – Siting Application
Ward & McLean Counties, North Dakota

Case No. PU-19-28

CERTIFICATE OF SERVICE

Roxanne Gangl, being first duly sworn, does depose and state that on January 29, 2020, this Certificate of Service and a true and correct copy of the following documents:

1. Ruso Wind Partners, LLC’s Memorandum Regarding NDCC § 49-22-16.4 and NDAC Ch. 69-06-11; and
2. Filing Letter

were sent by electronic mail and mailed via Federal Express to:

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