

February 12, 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

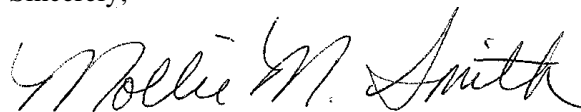
**RE: Ruso Wind Partners, LLC – Ruso Wind Project – Siting Application
Ward & McLean Counties, North Dakota
Case No. PU-19-28**

Dear Mr. Kahl:

Enclosed for filing in the above-referenced docket are an original and ten copies of Ruso Wind Partners, LLC's Reply 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/69352407

cc: Service List
Elizabeth Wash (via e-mail only, w/ enclosures)
Morgan Berry (via e-mail only, w/ enclosures)

Attorneys & Advisors
main 612.492.7000
fax 612.492.7077
fredlaw.com

Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota
55402-1425

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 Reply Memorandum Regarding
NDCC § 49-22-16.4 and NDAC Ch. 69-06-11**

INTRODUCTION

Ruso Wind Partners, LLC (“Ruso Wind”) provides this reply memorandum in response to Advocacy Staff’s memorandum received on February 11, 2020. As explained below, Ruso Wind’s interpretation of North Dakota Century Code (“NDCC”) § 49-22-16.4 and the North Dakota Public Service Commission’s (“Commission”) associated rules gives effect to all parts of the statute/rules, avoids legal inconsistency and impossibility, and is consistent with the legislative/rulemaking history. Advocacy Staff’s interpretation, however, is not consistent with applicable rules of statutory rules of interpretation or the legislative and rulemaking history.

DISCUSSION

I. Ruso Wind’s Interpretation of NDCC § 49-22-16.4 Gives Effect to All Parts of the Statute and Avoids a Legal Inconsistency.

Advocacy Staff’s memorandum focuses on one phrase in NDCC § 49-22-16.4(2) – “must be equipped” – to argue that light-mitigating technology is required irrespective of whether installation of such technology complies with the requirements of the Federal Aviation Administration (“FAA”). However, Advocacy Staff’s interpretation fails to acknowledge three statutory rules of interpretation: (1) “The entire statute is intended to be effective” (NDCC § 1-

02-38(2)); “A result feasible of execution is intended” (NDCC § 1-02-38(4)); and “Compliance with the constitutions of the state and of the United States is intended” (NDCC § 1-02-38(1)).

First, Advocacy Staff’s focus on the “must be equipped” language ignores the statute’s other requirements:

- First, subpart 1 requires the Commission to adopt light-mitigating technology rules that “**must be consistent with the federal aviation administration regulations.**” NDCC § 49-22-16.4(1) (emphasis added).
- Second, subpart 2 requires that wind projects that receive 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.**” NDCC § 49-22-16.4(2) (emphasis added).

When read as a whole, NDCC § 49-22-16.4 requires not just installation of light-mitigating technology, but installation of light-mitigating technology that “must be” consistent with FAA regulations.

Further, Advocacy Staff’s interpretation creates an internal inconsistency that can – as it has here – result in directly opposing requirements. Advocacy Staff appears to view “must be equipped” as separate and distinct from the requirement that the Commission’s rules must be consistent with FAA regulations. Under such an interpretation, there are two requirements: be equipped with a light-mitigating system and comply with FAA regulations. However, if a project is not authorized by the FAA to install an aircraft detection lighting system (“ADLS”), it is impossible for that project to both “be equipped” with light-mitigating technology and also install, operate, and maintain a light-mitigating system “consistent with [FAA] regulations.”¹

¹ As explained in Ruso Wind’s January 29, 2020 memorandum, ADLS is currently the only light-mitigating technology approved by the FAA and must be authorized by the FAA on a project-by-project basis.

Thus, under Advocacy Staff's interpretation, it is legally impossible for projects, such as the Ruso Wind Project, to comply with all requirements of NDCC § 49-22-16.4.

Rather than ignore portions of the statute or apply segments in isolation, NDCC § 49-22-16.4 can and should be interpreted to give effect to all provisions, while making compliance with the statute feasible. *See In re Estate of Hogen*, 863 N.W.2d 876, 883 (N.D. 2015) (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)); *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."); *see also Minnesota Grain, Inc.*, 756 N.W.2d at 766 (holding that a court's "interpretation of a statute must be consistent with legislative intent and done in a manner [to further] the policy goals and objectives of the statutes" and the court "presume[s] the Legislature did not intend an unreasonable result or unjust consequence."). When all parts are read together, NDCC § 49-22-16.4 requires installation of a light-mitigating technology system that is consistent with FAA regulations – in other words, the requirement to install light-mitigating technology is qualified by the requirement to comply with the Commission's rules, which, in turn, must be consistent with FAA regulations. Another way to think about the provision is the following: Consistent with FAA regulations, projects must be equipped with light-mitigating technology. The "must be equipped" is dependent upon consistency with FAA regulations.

The reasonableness of this interpretation is highlighted by the fact that the FAA's regulations were adopted at the direction of Congress to ensure aviation safety through a unified system of flight rules. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973). Specifically, the Federal Aviation Act (49 U.S.C. § 40101 *et seq.*) declares that "[t]he

United States Government has exclusive sovereignty of airspace of the United States,” 49 U.S.C. § 40103(a)(1), and directs the Administrator of the FAA to “develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.” Further, courts have held that the FAA’s regulations preempt state regulations with respect to airspace management and air safety. *See Big Stone Broad., Inc. v. Lindbloom*, 161 F. Supp. 2d 1009, 1017-18 (D.S.D. 2001) (citing *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 627 (1973)). For example, in *Big Stone Broad., Inc.*, the federal district court concluded that “Congress did not intend to give the states veto power over FAA ‘no hazard’ determinations” and, applying the Supremacy Clause in the U.S. Constitution, held that the Federal Aviation Act preempted the South Dakota Aeronautics Commission’s determination that a radio broadcast tower created an aeronautical hazard. *Id.* at 1020.

As noted above, a principle of statutory interpretation is that statutes are presumed to be intended to comply with the U.S. Constitution and the laws enacted thereunder. *See* NDCC § 1-02-38. If a statute is susceptible of being construed in two ways, one which will be compatible with constitutional provisions or one which will render the statute unconstitutional, courts “must adopt the construction which will make the statute valid.” *Paluck v. Bd. of Cnty. Comm'rs., Stark Cnty.*, 307 N.W.2d 852, 856 (N.D. 1981); *Ash v. Traynor*, 579 N.W.2d 180, 182 (N.D. 1998) (“If a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, we adopt the construction that avoids constitutional conflict.”). Here, as explained above, Ruso Wind’s interpretation of NDCC § 49-22-16.4 avoids pitting the state’s lighting requirement against the FAA’s regulations, thereby avoiding any potential inconsistency or preemption concerns.

II. At a Minimum, NDCC § 49-22-16.4 and the Associated Rules Are Ambiguous and the Legislative History Supports Ruso Wind’s Interpretation.

Advocacy Staff asserts that NDCC § 49-22-16.4 and North Dakota Administrative Code (“NDAC”) Ch. 69-06-11 are unambiguous and, therefore, we should not look at the legislative or rulemaking history. However, the fact that multiple interpretations of NDCC § 49-22-16.4 have been offered, and there is uncertainty regarding how the Commission should implement the statute and its associated rules, indicates that the statute is not unambiguous. As such, it is appropriate to examine the legislative history of both the statute and the rules to determine and implement the Legislature’s and the Commission’s intent. *See State ex rel. Clayburgh Am. W. Cmty. Promotions, Inc.*, 645 N.W.2d 196, 205 (N.D. 2002).

As discussed in detail in Ruso Wind’s initial memorandum, the legislative history indicates an intent by both the Legislature and the Commission for the statute and the rules to incorporate the FAA’s regulations into the light-mitigating technology requirement. There are multiple references to relying on the FAA’s expertise and the fact that the FAA must determine the appropriateness of installing ADLS on a project-specific basis during both the Legislative hearings and in the Commission’s rulemaking proceeding. In particular, the Commission’s response to Basin Electric’s concerns regarding the ability of its PrairieWinds ND 1 Project (located near Minot Air Force Base assets) to install ADLS indicates that the Commission believed the reference in NDAC Ch. 69-06-11 to the FAA regulations – dictated by NDCC § 49-22-16.4 – meant that light-mitigation would not be imposed in a manner inconsistent with the FAA’s lighting and marking determinations. *See Case No. PU-17-339, Order Submitting Rules to Attorney General at 5* (March 29, 2018). Therefore, interpreting the requirement to install

light-mitigating technology to be qualified by and subject to FAA regulations, as Ruso Wind proposes, is consistent with the intent of the Legislature and the Commission.

CONCLUSION

As discussed above, Ruso Wind's interpretation of NDCC § 49-22-16.4 and the Commission's rules adopted thereunder (NDAC Ch. 69-06-11) is consistent with the requirements of statutory interpretation, as well as the legislative and rulemaking history. Further, Ruso Wind has proposed a light-mitigating technology condition that is also 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 of its initial memorandum and issue a Certificate of Site Compatibility for the Project.

Dated this 12th day of February, 2020.

FREDRIKSON & BYRON, P.A.

By 

MOLLIE M. SMITH, ND Bar #06714
BRIDGET A. DUFFUS, ND Bar #09235
Attorneys for Ruso Wind Partners, LLC
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7270
msmith@fredlaw.com
bduffus@fredlaw.com

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

Rachel Sundberg, being first duly sworn, does depose and state that on February 12, 2020, this Certificate of Service and a true and correct copy of the following documents:

1. Ruso Wind Partners, LLC's Reply 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:

Steven Kahl
Executive Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov
(original and 10 copies)

Hope L. Hogan
Administrative Law Judge
Office of Administrative Hearings
2911 North 14th Street, Suite 303
Bismarck, ND 58503
hlhogan@nd.gov
(1 copy)

Zachary E. Pelham
Special Assistant Attorney General
Pearce & Durick
314 East Thayer Avenue
Bismarck, ND 58501
zep@pearce-durick.com
(1 copy)

Kevin Pranis
Labors District Council of Minnesota
& North Dakota
81 East Little Canada Road
St. Paul, MN 55117
kpranis@liunagroc.com
(1 copy)

Brian Johnson
Advocacy Staff
Special Assistant Attorney General
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck ND, 58505
brljohanson@nd.gov
(1 copy)

/s/ Rachel Sundberg
Rachel Sundberg