

BEFORE THE STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Northern Divide Wind, LLC
200 MW Northern Divide Wind Energy Center
Burke County, North Dakota
Siting Application

Case No. PU-19-376

Northern Divide Wind, LLC
345 kV Transmission Line
Burke and Mountrail Counties
Siting Application

Case No. PU-19-377

NORTHERN DIVIDE WIND, LLC'S
POST-HEARING BRIEF

Northern Divide Wind, LLC (“Northern Divide Wind”), a wholly owned indirect subsidiary of NextEra Energy Resources, LLC (“NextEra”), hereby submits this Post-Hearing Brief in support of its request that the North Dakota Public Service Commission (“Commission”) issue a certificate of site compatibility for the Northern Divide Wind Energy Center (“Wind Project”) located in Burke County, North Dakota (Case No. PU-19-376) and a certificate of corridor compatibility and route permit for the Northern Divide Wind Transmission Line (“Transmission Project”) located in Burke and Mountrail Counties, North Dakota (Case No. PU-19-377) (collectively, the “Projects”). The evidence in these proceedings is clear. Northern Divide Wind’s applications, supportive filings, and testimony demonstrate the Projects will have minimal adverse effects and have satisfied the Commission’s criteria for approval of the requested certificates.

I. BACKGROUND

On April 17, 2020, a public hearing was held on Northern Divide Wind, LLC’s siting applications for the Northern Divide Wind Energy Center and 345 kV Transmission Line. PU-19-

376, Docket No. 1 (hereinafter “Wind Project Application”); PU-19-377, Docket No. 1 (hereinafter “Transmission Project Application”) (collectively, the “Applications”). Northern Divide Wind’s efforts to address environmental concerns and modify the Wind Project to avoid and minimize potential impacts to wildlife are detailed extensively in the record before the Commission. Northern Divide Wind’s Applications, supportive filings, and testimony at the April 17 hearing demonstrate that the Projects will produce minimal adverse human and environmental effects, as further highlighted herein.

II. STANDARD OF REVIEW

The purpose of North Dakota Century Code Chapter 49-22, Energy Conversion and Transmission Facility Siting Act (the “Siting Act”) is “to ensure 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 the state” § 49-22-02. To meet this standard, a site and/or route are to be sited “in an orderly manner compatible with environmental preservation and the efficient use of resources” and shall “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.” *Id.* As set forth above, the Commission’s standard is not whether a project will have no impact, but rather whether it will have minimal adverse impact. Projects are evaluated pursuant to the Commission’s siting criteria designated as Exclusion Areas, Avoidance Areas, Selection Criteria and Policy Criteria under North Dakota Administration Code Ch. 69-06-08 (“Siting Criteria”). These criteria “guide the site, corridor, and route suitability evaluation and designation process.” N.D.C.C. § 49-22-05.1.

III. ARGUMENT

A. Northern Divide Wind's Projects comply with the Commission's Siting Criteria and address concerns previously raised during the Burke Wind Project.

Northern Divide Wind has demonstrated the Projects comply with the Commission's Siting Criteria and will produce minimal adverse human and environmental impacts. The Wind Project is a revised iteration of the Burke Wind Energy Center ("Burke Wind Project") (Case No. PU-18-344); however, key differences highlighted herein set these projects apart. Northern Divide Wind collaborated with the U.S. Fish and Wildlife Service ("USFWS") and North Dakota Game and Fish Department ("NDGFD") (collectively "Wildlife Agencies") to develop a siting plan for the Wind Project that NDGFD found resulted in "significant impact avoidance and minimization." NDGFD March 17, 2020 Correspondence, PU-19-376, Docket No. 20; PU-19-377, Docket No. 19 (hereinafter "NDGFD March 17, 2020 Correspondence").

Importantly, Northern Divide Wind has addressed the primary concerns previously expressed by the Commission regarding the Burke Wind Project by avoiding, minimizing, and mitigating potential adverse impacts to wetlands, waterfowl habitat, grassland habitat, the area's biological wealth, and animal health and safety, as demonstrated below. *See* PU-18-344, Docket No. 133 & PU-18-302, Docket No. 91 ("Burke Wind Order").¹

These modifications to the prior project design were noted favorably by the NDGFD in its March 17, 2020 correspondence, in which it stated that "Northern Divide Wind has taken several positive steps to reduce and defray the impact of the [Wind Project]" and acknowledged that "Northern Divide Wind has taken the Department's recommendations seriously, resulting in

¹ Specifically, the Commission's June 2019 denial of the Burke Wind Project was based upon findings by the Commission that the project would have adverse impacts on wetlands; animal health and safety; grassland avian habitat, waterfowl habitat and population; and a unique area of biological wealth. PU-18-344, Docket No. 133, pp. 17-18, 21-22. The corresponding Burke Wind Transmission Project (Case No. PU-18-302) was denied as moot.

significant impact avoidance and minimization.” NDGFD March 17, 2020 Correspondence. In particular, Northern Divide Wind’s efforts with regard to the Wind Project included: moving the boundary further to the west and away from areas deemed by the Wildlife Agencies as more sensitive; shifting infrastructure primarily into agricultural land; decreasing the area by 52%; and, as recommended by the Wildlife Agencies, relocating 44 and eliminating three of the prior Burke Wind Project turbines. *See id.*, at p. 1.

i. Wetlands

“Northern Divide Wind has sited the Projects to avoid all impacts to wetlands, *i.e.*, Northern Divide Wind will not locate the Projects’ infrastructure in any wetland.” Prepared Testimony of Dustin Jones, PU-19-376, Docket No. 27 & PU-19-377 Docket No. 26 (hereinafter “Jones Prepared Testimony”), p. 13. This includes avoiding impacts “to all wetlands regardless of their [U.S. Army Corps of Engineers] jurisdictional status.” Wind Project Application, p. 5-21; *see also* Transmission Line Application, pp. 5-17 and 5-18. Wetlands are evaluated differently for energy conversion facilities and transmission facilities under the Siting Criteria; however, both Projects avoid all temporary and permanent impacts. *See* N.D. Admin. Code § 69-06-08-01(3)(e) (energy conversion facility Avoidance Area) *but see*, § 69-06-08-01(3)(b)(4) (transmission facility Selection Criteria).

In particular, as the below table demonstrates, the Wind Project consists of 65% fewer wetland acres and 62% fewer wetland features than the Burke Wind Project:

Decreased Environmental Impacts from the Burke Wind Project to the Wind Project

Metric	Burke Wind Project	Wind Project	Decrease (%)
Project Area (ac)	22,933	10,912	52
Wetland features in Project Area (ac) ¹	3,016	1,067	65
Wetland features in Project Area (count) ¹	2,470	950	62
Wetland features percent of Project Area (%) ¹	13	10	23
Wetland impacts: permanent or temporary (ac)	0	0	0
Wetland features within 0.5 mile of turbines (ac)	3,664	1,261	66
Breeding waterfowl pair estimated displacement (count)	981	486	51
Breeding waterfowl pair estimated habitat offset (ac)	398	196	51

Jones Prepared Testimony, p. 8.

Northern Divide Wind will avoid all wetlands located within the Projects’ construction easements through micrositing project infrastructure, shifting infrastructure based on the results of surveys, and/or taking other avoidance measures. Temporary impacts to wetlands from underground collection lines will be avoided by boring underneath wetlands. *Id.* “Additionally, Northern Divide Wind will not locate the Projects’ infrastructure in any USFWS wetland easements.” *Id.*, p. 13. Prior to construction, wetlands in close proximity to the Projects’ features will be flagged, and Northern Divide Wind will “provide contractors with constraint maps and ensure compliance through onsite environmental construction monitoring.” Wind Project Application, p. 5-21; Transmission Project Application, p. 5-18. Thus, the Projects will have zero impacts to wetlands.

This is true no matter how impacts are characterized – whether permanent, temporary, direct, or indirect. Northern Divide Wind witness Dustin Jones explained various types of wetland impacts at the April 17 hearing. An unofficial recitation of his testimony is provided below. Electronic Hearing Audio, PU-19-376, Docket No. 53 & PU-19-377, Docket No. 50 (“Electronic Hearing Audio”), Part 2: Approximate 00:18:42.

Attorney Schmidt: . . . I guess my first question is, what is a temporary impact to wetlands?

Jones: A temporary impact could be you're trenching a collection line across a wetland and then you restore it when you're done so the collection line goes underground and when you are done you restore the surface. So that would be a temporary impact, there is no permanent infrastructure like a road or a turbine foundation that stays in a wetland.

Attorney Schmidt: Then what is a permanent impact to wetlands?

Jones: Kind of like I described, it's an impact such as a road or a turbine foundation that replaces an area of the wetland.

* * *

Approximate 00:20:20.

Attorney Schmidt: [In table 8 of your Prepared testimony], are you talking about direct impacts or indirect impacts to the wetlands with your statements about this table?

Jones: I'm talking about direct impacts.

Attorney Schmidt: So what is, in your opinion, what is the difference between a direct impact and an indirect impact to a wetland?

Jones: Sure. A direct impact would be something say you fill one acre of a 10-acre wetland with a turbine base. That would be a direct impact. An indirect impact is something that would be measured over time so maybe there is some erosion that takes place off of the 10 years down the road and there is some sediment that washes down into the wetland, I would consider that an indirect impact from improper sedimentation controls that have a downstream effect, but it's not directly related to you replacing a certain area of that wetland with a road or foundation.

Although Northern Divide Wind has sited the Projects to avoid all impacts to wetlands, Northern Divide Wind has also committed to the Wildlife Agencies to restore or recreate 196 acres of wetland habitat. *See Jones Prepared Testimony at p. 7; see also NDGFD March 17, 2020 Correspondence.* At the April 17 hearing, Mr. Jones was asked how Northern Divide Wind concluded the Wind Project will impact zero wetlands when it has committed to restore or recreate wetland habitat. Electronic Hearing Audio, Part 2: Approximate 00:27:58.

The commitment that Northern Divide Wind has made to the Wildlife Agencies to restore or recreate wetland habitat does not result from the Projects having any direct or indirect impacts

to the wetlands themselves. Rather, Northern Divide Wind's commitment to restore habitats is intended to address potential displacement impacts to species that may use the wetlands. This potential impact is characterized by the Wildlife Agencies as a potential indirect impact to species and not to the actual wetland or grassland habitat. As Mr. Jones explained during the April 17 hearing:

Electronic Hearing Audio, Part 2: Approximate 00:29:19.

Attorney Schmidt: The Company has engaged in an agreement to offset some habitat loss as a result of this project?

Jones: I would disagree. We are not resulting in habitat loss. We are just displacing species that use that habitat. There will be no loss of wetland habitat.

Attorney Schmidt: So what is a habitat if species can't live there? So what is the definition of a habitat then?

Jones: There are other species that could still use it. It doesn't mean that all ducks leave that wetland, other ducks can still use it. So, the habitat still functions as it should, as it would under normal conditions, it's just some birds may move.

Attorney Schmidt: So, you're really talking about the impact on the animal, not the impact on the physical location. Am I understanding that correctly?

Jones: Yes, sir. That is [what] the models are based off of. The studies, [they] study the impact of the wildlife, not on the habitat itself.

Attorney Schmidt: So, the 196 acres of wetlands that are being used as an offset, that's really just to account for the animals, or birds I guess, that would be potentially leaving that area based off of your models, is that fair to say?

Jones: Yes, sir. That that 196 acres of habitat will be available for ducks and other wildlife to use.

Because the Wind Project avoids impacts to all wetlands, the Wind Project meets the Avoidance Criteria for wetlands, which requires that a proposed project have no impact to wetlands unless there is no reasonable alternative. *See* N.D. Admin. Code § 69-06-08-01(3)(e). Northern Divide Wind does not need to demonstrate there is "no reasonable alternative" because the Wind Project does not impact wetlands. Mitigation associated with "wetland habitat" is associated with displacement, a potential indirect impact to species separate from the Commission's wetlands

Avoidance Area. Similarly, because the Transmission Project avoids impacts to wetlands, it satisfies the Commission's Selection Criteria, which requires the Commission to consider the effects of a proposed transmission line for its impacts on wetlands. *See* N.D. Admin. Code § 69-06-08-02(3)(b)(4).

ii. Waterfowl

The Projects are expected to have minimal adverse effect on waterfowl, both to species mortality and to displacement, as discussed in the Prepared Testimony of Clayton Derby. PU-19-376, Docket No. 28 & PU-19-377, Docket No. 27 (hereinafter, "Derby Prepared Testimony"), at pp. 7-8. Because the Projects will not have direct impacts to wetlands, as explained above, and direct impacts to waterfowl from turbine collisions have been found to be minimal, potential direct impacts to waterfowl are expected to be minimal. *See id.* at p. 8. In particular, Mr. Derby testified that "[m]ortality of waterfowl is expected to be similarly low as other wind projects within North Dakota and other locations." *Id.* Further, as NDGFD noted in its March 17, 2020 Correspondence, Northern Divide Wind worked with the Wildlife Agencies to move all turbines away from key Northern Pintail duck breeding habitat.

Moreover, while the Projects may result in some potential displacement of waterfowl (*i.e.*, birds moving to another location), that is an indirect impact to the species and is not synonymous with mortality. As Mr. Jones testified at the April 17 hearing:

Electronic Hearing Audio, Part 2: Approximate 00:25:00.

Attorney Schmidt: What does the term displacement mean, within this table and with respect to your testimony?

Jones: Sure. Displacement is a term, it's an indirect effect. We were talking about direct and indirect. Displacement would be an indirect effect from a turbine. We may site a turbine in an upland, or in a tilled cropland, but a duck may move away. They've been displaced. It means that a duck moved. It doesn't say what happened to that duck. It could have gone over the hill to another wetland, it could have gone to another state, it just moved. It just moved. We don't know what happened to them.

Attorney Schmidt: Does displacement include a project number of fatalities?

Jones: No, it does not. It's not a projection of a loss of species, just a projection that they moved.

Although waterfowl species have been observed within and adjacent to the Wind Project, it is not appropriate to conclude that displacement will cause substantial risk to the species or result in substantial fatality or population level effects, as explained in the prepared testimony of Mr. Derby.

With respect to waterfowl, avian and waterfowl-specific surveys found waterfowl use throughout the Wind Project. The studies found that in general, use by wetland-associated species, including [species of conservation priority ("SCP")] species, was similar or lower within the Wind Project when compared to the Burke Wind Project. However, most historic research has shown very limited direct impacts from wind projects to waterfowl. This includes studies specifically done in the Dakotas (Gue *et al.* 2012¹⁹). Overall, waterfowl comprise less than three percent of all wildlife fatalities from wind projects, even though waterfowl often are one of the most common bird groups observed during pre-construction surveys.

Similarly, most research to date has shown limited to no displacement of, or impacts to, migratory waterfowl from wind projects. For example, studies conducted in Iowa showed no impacts to duck and goose use days at wildlife areas immediately adjacent to a wind project after construction when compared to usage before construction (Jones *et al.* 2010¹⁹).

Derby Prepared Testimony, pp. 7-8 (emphasis added).

In accordance with recommendations from the Wildlife Agencies (*see* NDGFD March 17, 2020 Correspondence), Northern Divide Wind and its consultants utilized the Shaffer *et al.* (2019)

model to estimate potential displacement of waterfowl from Wind Project turbines. Derby Prepared Testimony, pp. 7-8. As shown in the above-referenced table, Northern Divide Wind estimates that the Wind Project will have a 51% decrease in breeding waterfowl displacement compared to the Burke Wind Project. *See* Jones Prepared Testimony, p. 8.

The Shaffer *et al.* (2019) model estimates potential displacement based upon estimated waterfowl breeding densities within one-half mile of a turbine. Derby Prepared Testimony, p. 8. “This displacement could result in approximately 486 pairs of ducks being displaced, but, as noted above, it is possible that these ducks simply move to another wetland and successfully breed.” *Id.* To put this in context, the estimated displacement approximates only 0.03 percent of the estimated 3,400,000 breeding duck population in North Dakota as estimated by the NDGFD 2019 survey. *Id.* As described above, to offset this potential displacement of breeding waterfowl pairs, Northern Divide Wind has committed to recreate and restore 196 wetland-acres (± 98 2-acre wetland basins). *Id.* Again, this offset commitment is intended to restore wetland-acres based on displacement of waterfowl and is not associated with impacts to the wetlands themselves.

For these reasons, potential direct impacts to waterfowl are anticipated to be limited, and indirect impacts (*i.e.*, from the displacement of waterfowl) will be mitigated through Northern Divide Wind’s voluntary offset package to recreate or restore wetland acres.

iii. Grasslands and Grassland Breeding Birds

The Wind Project has been shifted to a predominantly 64% agricultural landscape that consists of minimal unbroken grassland approximating only 7%. Wind Project Application, pp. 1-2. “Unbroken grassland includes native prairie, as well as areas used as pasture and hayland that have not been historically broken (*e.g.*, cultivated or extensive mechanized rock clearing).” Jones Prepared Testimony, p. 7. As the below tables demonstrates, the Wind Project consists of 84%

fewer unbroken grassland acres and a 67% reduction of unbroken grasslands as a percent of project area than the Burke Wind Project:

Decreased Environmental Impacts from the Burke Wind Project to the Wind Project

Metric	Burke Wind Project	Wind Project	Decrease (%)
Project Area (ac)	22,933	10,912	52
Unbroken grassland in Project Area (ac)	4,785	742	84
Unbroken grassland percent of Project Area (%)	21	7	67
Unbroken grassland impacts: permanent (ac)	6	0	100
Unbroken grassland impacts: temporary (ac)	112	8	93
Unbroken grassland within 300 m of turbines (ac)	751	188	75
Grassland bird pair estimated displacement (count)	159-478	39-116	75

Jones Prepared Testimony, p. 8. The Wind Project avoids all permanent impacts to unbroken grasslands and will temporarily impact only eight acres (1 percent) of unbroken grasslands. All turbines, roads, meteorological towers, and substations have been sited in tilled cropland. *Id.* at, p. 7. NDGFD also noted Northern Divide Wind’s commitment to relocate all wind turbines off and away from unbroken grassland sites. NDGFD March 17, 2020 Correspondence, p. 2. Accordingly, the Projects have been sited to avoid adverse impacts to unbroken grasslands.

Moreover, the Projects are expected to have minimal adverse effect on grassland birds, both to species mortality and to displacement. Derby Prepared Testimony, pp. 3-4. As discussed above, displacement is an indirect impact to species (*i.e.*, associated with the species moving locations), but it is not synonymous with mortality. Northern Divide Wind’s studies noted occurrences of a variety of grassland bird species. Details regarding these findings are located within the Applications, the Prepared Testimony of Clayton Derby, and more specifically within the Avian Use Report. “The surveys found the locations with the highest grassland-associated avian species richness and abundance were in the eastern half of the larger Burke Wind Project, which had a higher proportion of unbroken grasslands than the current Wind Project.” Derby

Prepared Testimony, p. 3. In coordination with the Wildlife Agencies, the Wind Project area was shifted to an area with a much lower percentage of unbroken grasslands than the prior Burke Wind Project. *Id.*

Although there are no permanent impacts to unbroken grasslands, the Wildlife Agencies recommended that Northern Divide Wind use the Shaffer *et al.* (2019) model to estimate potential displacement of grassland nesting birds by the wind turbines. *Id.* at 4. One of the components utilized by the model is to account for the amount of unbroken grassland within the vicinity of a turbine, specifically, within 300 meters of a turbine. *Id.* This amounted to 188 acres for the Wind Project, which is a 75% decrease from the Burke Wind Project. The results indicate that between 39 and 116 pairs of grassland nesting birds potentially may be displaced over a five-year period, which is also a 75% reduction from the Burke Wind Project. *Id.* For the reasons outlined in Mr. Derby's Prepared Testimony, the model may actually overpredict grassland breeding bird displacement for the Wind Project. *Id.* Nevertheless, to offset this potential displacement, Northern Divide Wind has committed to recreate and restore 100 grassland-acres. NDGFD March 17, 2020 Correspondence.

Adverse effects to grasslands nesting birds and their habitat have been minimized by shifting the Wind Project to previously broken grasslands. Derby Prepared Testimony, p. 5. Mr. Derby notes that this finding is supported by the breeding bird survey data, which shows the Wind Project has been located in an area of lower grassland bird abundance and richness as compared to the Burke Wind Project. *Id.*

iv. Animal Health and Safety

Northern Divide Wind has sited the Projects to have minimal adverse effects on animal health and safety. In addition to the reasons discussed above with respect to waterfowl and grassland breeding birds, Northern Divide Wind shared all reports and findings regarding wildlife studies with the Wildlife Agencies and received no additional comment other than those addressed in the Applications. As a result of Northern Divide Wind's extensive efforts to avoid, minimize, and mitigate potential wildlife impacts, neither NDGFD nor USFWS expressed significant concerns about the Wind Project's impacts to wildlife. In fact, NDGFD's March 17, 2020 Correspondence stated, "[w]e acknowledge Northern Divide Wind has taken the Department's recommendations seriously, resulting in significant impact avoidance and minimization" and "appreciate Northern Divide Wind's efforts to address the Department's concerns." *See* NDGFD March 17, 2020 Correspondence, at p. 3 (emphasis added). In addition to the efforts discussed herein, additional mitigative measures Northern Divide Wind has taken with respect to the Projects are detailed in Attachment 2 to the Jones Prepared Testimony. *See also*, Wind Application, Appendix C6, Oct. 1, 2019 correspondence to NDGFD.

v. Project Area

As Mr. Jones testified, the Projects do not consist of areas that are unique because of their biological wealth. "Through Northern Divide Wind's siting efforts, which included close coordination with the Wildlife Agencies, the Projects are sited in or include areas commonly found in North Dakota, such as landscapes dominated by agricultural land uses." Electronic Hearing Audio, Part 2: Approximate 00:06:09.

Electronic Hearing Audio, Part 2: Approximate at 00:15:15.

Attorney Schmidt: Is the prairie pothole region located in the same area where this project is proposed to be located?

Jones: The prairie pothole region is a very large geographic region that extends from Canada down into South Dakota, Iowa and Minnesota. And the project is located within an area defined as the prairie pothole region.

Attorney Schmidt: What are the features of prairie pothole region?

Jones: Most people would describe it as a landscape of grasslands and wetland mosaics. I think that's the probably the simplest way to define it. That is the general term people would consider. I'd add that a large portion of it now has been manipulated through agriculture. About 75% of the prairie pothole region has been affected in some way by tillage.

Attorney Schmidt: The term Northern Missouri Coteau has been used throughout the last hearing as well as this one, what is your understanding of the Northern Missouri Coteau?

Jones: Yes, sir. The larger Missouri Coteau is a larger geographic region kind of within the prairie pothole region. It also stems from Canada down through North Dakota into South Dakota and Iowa. The Northern Missouri Coteau is a subdivision of that up in the northwest part of North Dakota extending into Montana and Canada.

* * *

Approximate 00:17:25.

Attorney Schmidt: Overall the combination of the prairie pothole region and the Northern Missouri Coteau overlapping with the project area, are these geographic regions important for the growth and development of wildlife?

Jones: It's part of many wildlife, avian species, it's part of their migration corridor which extends from the gulf coast up to Canada. And I would say yes, it is an important component. There are definitely areas within the Northern Missouri Coteau that are more important for wildlife than others. There are large areas that have been impacted by agriculture less favorable for wildlife.

Attorney Schmidt: How would you describe the project area as far as being important to the growth and development of wildlife?

Jones: I'd say through our coordination with the wildlife agencies as we were looking to relocate the project we identified areas within the old Burke Project that were more important to wildlife and we excluded those and moved into areas that were less suitable. We're about 64% agriculture in the Northern Divide Project because we have areas that are less important to wildlife either cropland or other types of agriculture.

Consistent with the Commission’s findings in the Burke Wind Project, the Coteau does not constitute “critical habitat” under the Commission’s Siting Criteria. *See*, Burke Wind Order, p. 16 (although threatened or endangered species may use Burke Wind Project Area as habitat, evidence does not establish areas are critical to the life stages of threatened or endangered species). As discussed in the Projects’ Applications and in the testimonies of Mr. Jones and Mr. Derby, the Projects do not contain designated critical habitat, nor are the Projects anticipated to impact threatened or endangered species. The Commission also found with respect to the Burke Wind Project that the project did not impact areas where animal or plant species that are unique or rare to this state would be irreversibly damaged. Burke Project Order, p. 16.

Although the Projects contain wetlands and unbroken grasslands, these resources have been avoided, as discussed herein. The Projects also avoid impacts to woodlands. As referenced in the Wind Application, the Wind Project lacks contiguous woodlands. Woodlands are not present within the construction easement except for a few areas along collection lines where bores are planned; therefore, tree removal in those areas will be avoided. Additionally, impacts to trees and shrubs have been avoided to the extent practicable and will be mitigated in accordance with the Commission’s Tree and Shrub Mitigation Specifications.

vi. Human Health and Safety

In addition to wildlife and natural resources considerations, Northern Divide Wind has sited the Projects to minimize adverse impacts on human health and safety. The Projects’ compliance with applicable construction and safety codes, setback and zoning regulations, sound and shadow flickers standards, lighting requirements, and facility maintenance and monitoring procedures are documented at length throughout the Applications, supportive filings, and Northern Divide Wind’s prepared and oral testimony. At the April 17 hearing, Northern Divide Wind’s

Construction Director, Mr. Sean Harrington, testified to additional avoidance and minimization measures Northern Divide Wind has committed to take to further minimize adverse impacts to human health and safety regarding COVID-19. Electronic Hearing Audio, Part 2: 01:59:18 to 20:01:50. Mr. Harrington further testified that employee, contractor, and community safety is Northern Divide Wind's top priority. *Id.* Northern Divide Wind will work directly with its contractors to implement safety procedures and practices regarding COVID-19 including: employee health assessments, limiting work crew size and staggering crew schedules, practicing social distancing, limiting site access by non-essential personnel, regularly disinfecting all common areas at work sites and increasing trash and waste disposal. Northern Divide Wind testified it is continuing to monitor information from the North Dakota Department of Health and the Center of Disease Control to adjust its plans accordingly. *Id.*

B. The comments of Karen Smith and the Coteau Preservation Alliance are speculative and conclusory and should be given no weight by the Commission.

At the April 17 public hearing, Karen Smith ("Ms. Smith") testified during the public comment portion of the hearing. *See* PU-19-376, Docket No. 53, Part 3 at 00:14:00 to 00:38:09 ("Smith Testimony"). Ms. Smith also authored a report subsequently submitted on behalf of the Coteau Preservation Alliance. PU-19-376, Docket No. 54 and in PU-19-377, Docket No. 51 (hereinafter "Smith Report"). Despite NDGFD's comments that Northern Divide Wind's efforts in siting the Wind Project have "result[ed] in significant impact avoidance and minimization" (NDGFD March 17, 2020 Correspondence) (emphasis added), the Smith Report suggests the Wind Project "will have the same negative impacts on the natural resources as did the other Burke Wind project[] to native grasslands, wetlands, and the associated nesting and migrating avian species . . .". Smith Report, p. 3 (emphasis added). Yet, Ms. Smith testified she had not reviewed the (1) Wind Project Application, (2) Northern Divide Wind's wildlife reports, or (3) correspondence

between NDGFD and Northern Divide Wind regarding the Wind Project's wildlife studies and impacts. Instead, the Smith Report arbitrarily quotes to or references general statements from various sources without putting this information into context for the Wind Project.

The conclusions in the Smith Report regarding the Wind Project's potential impacts are incorrect and inconsistent with Northern Divide Wind's studies and reports, and the Wildlife Agencies' assessment and conclusions. The record demonstrates the Wind Project will have zero impacts to wetlands, woodlands, and minimal temporary impacts to eight acres of unbroken, non-native grasslands. The Smith Report's assertion that the Wind Project will have "adverse effects" also appears to confuse impacts to specific habitat types and potential indirect impacts associated with species' displacement; both of which have been avoided, minimized, and mitigated by Northern Divide Wind.

The Smith Report and Ms. Smith's testimony are entirely speculative, assert broad generalized conclusions, and fail to consider data and information related to the proceeding before the Commission. Nothing is more illustrative of this point than Ms. Smith's own testimony, an unofficial recitation of which is provided below. Electronic Hearing Audio, Part 3: Approximate 00:19:20.

Attorney Furey: Have you had a chance to review the application materials that Northern Divide Wind submitted to the Commission as well as their supplemental filings?

Smith: Yes.

Attorney Furey: And you're aware of then, correspondence between North Dakota Game and Fish and Northern Divide Wind regarding various wildlife studies that were done with respect to the project and conclusions regarding the likelihood of any potential impacts, correct.

Smith: No, I have not studied those.

Attorney Furey: Ok. But you did say that you reviewed the application.

Smith: Yes, but I didn't study it in-depth like you would if I worked for you.

* * *

Approximate 00:22:45

Attorney Furey: Have you reviewed any of the wildlife reports that Northern Divide Wind has submitted in the project docket?

Smith: No.

Attorney Furey: Ok. So then you really wouldn't be able to speak whether or not impacts upon migrating birds have been evaluated, with respect to this project, correct?

Smith: That would be correct.

The Commission should not rely on or give weight to comments that draw conclusions regarding a project's potential impacts when those conclusions are not based on information necessary to render them reliable. In other words, without a review of Northern Divide Wind's Applications, wildlife studies and reports, and correspondence with the Wildlife Agencies, the opinions offered by Ms. Smith and the Smith Report are pure speculation and cannot be relied upon, let alone considered "expert testimony." For these reasons, the Smith Report should not be given any weight in this proceeding. To the extent the Smith Report purports to be expert testimony, its opinions are based on insufficient facts and data, and it fails to meet the requirements of North Dakota Rule of Evidence 703 for admission of expert testimony.

C. LIUNA's request for construction employment reporting is not necessary for the Commission's decision and confuses the issues before the Commission.

LIUNA requests the Commission impose a quarterly construction employment reporting requirement. However, this request is not necessary for the Commission's decision and confuses the issues before the Commission. Northern Divide Wind has demonstrated the Projects comply with the Commission's Siting Criteria, do not adversely affect local skilled and unskilled labor, and will provide positive economic benefits.

The purpose of the Commission's Selection Criteria is to evaluate a project's potential impacts in the site evaluation and designation process. *See* N.D.C.C. § 49-22-05.1. The Selection Criteria for energy conversion facilities provides that a site may be approved "when it is demonstrated by an applicant that any significant adverse effects resulting from the location, construction and operation of the facility in that area, as they relate to the [designated selection criteria], will be at an acceptable minimum." N.D. Admin. Code § 69-06-08-01(5) (emphasis added). "Temporary and permanent skilled and unskilled labor" is one of 23 designated Selection Criteria the Commission is called to evaluate to ensure any significant adverse effects from a project are at an acceptable minimum. *Id.* at § 69-06-08-01(5)(c)(10). Notably, this criterion is not designated for transmission facilities. *See id.* at § 69-06-08-02(3). Regardless, the record does not demonstrate the Projects will have any significant adverse effects on temporary or permanent skilled or unskilled labor.

The Commission has also developed criteria that "include an identification of ... policies or practices which may be considered in the [site] evaluation and designation process." These "policies or practices" are set forth in the Commission's Policy Criteria N.D. Admin. Code §§ 69-06-08-01(6), 69-06-08-02(4). "The Commission may give preference" to an applicant that will maximize benefits that results from the adoption of the practices and policies designated under §§ 69-06-08-01(6), 69-06-08-02(4). The Commission may also give preference to an applicant that will maximize interstate benefits. *Id.* Training and utilization of labor in the state, economies of construction and operation, and labor relations are several of the policies Northern Divide Wind has taken into consideration during the Projects' development. *See id.*

As set forth below, the record demonstrates Northern Divide Wind has maximized certain benefits related to construction, labor, and project economics, and the Projects will not adversely impact these considerations:

- The Wind Project is estimated to cost approximately \$300 million and the Transmission Project is estimated to cost approximately \$30 million. Prepared Testimony of Clay Cameron, PU-19-376, Docket No. 26 & PU-19-377 Docket No. 25 (“Cameron Prepared Testimony”), p. 5.
- The Project will have positive economic impacts for the local population, including lease and royalty payments for participating landowners, employment opportunities, and property and sales taxes. Wind Application, p. 5-1.
- The Projects are estimated to provide over \$30 million in tax revenue to Burke and Mountrail Counties over 30 years. Wind Application, p. 5-1. These revenues will also benefit the local economy as this money is reinvested in local goods and services. Cameron Prepared Testimony, p. 14.
- Even in the Projects’ development stages the Projects have provided local employment opportunities. Northern Divide Wind has hired local environmental and cultural consultants who performed surveys and studies necessary for siting. Electronic Hearing Audio, Part 1: Cameron Testimony, Approximate 0:36:00 to 0:36:28.
- The Projects will create 200-300 temporary construction jobs. Wind Application, p. 5-1.
- The Wind Project will create five to seven permanent full-time operations & maintenance jobs within the local area. *Id.*
- “Northern Divide Wind’s labor force during construction will be hired directly by its EPC who will hold a local job fair sometimes, 1, 2, even 3, prior to start of construction. The goal is to hire as much qualified labor as possible, first within a daily commute distance and then we look regionally, and then into the State of North Dakota, and eventually outside the state.” Electronic Hearing Audio, Part 1: Harrington Testimony, Approximate 01:54:30 to 1:55:48.
- Northern Divide Wind will work with its EPCs to implement safety procedures and monitor compliance on site. *Id.* at Approximate 01:51:50.

LIUNA’s assertion the Wind Project will have an adverse economic impact if a majority of local construction labor is not utilized fails for several reasons. A project’s potential economic impact is only one of many factors the Commission evaluates under the Siting Act. *See* N.D.C.C.

§§ 49-22-05.1, 49-22-09; N.D. Admin. Code ch. 69-06-08. Likewise, as LIUNA acknowledged, the use of local construction labor is only one of many factors that contribute to a project's economics. Electronic Hearing Audio, Part 2: Franco Testimony, Approximate 2:31:55 to 2:32:30. LIUNA's Exhibit I-3, *Maximizing the Benefits of Wind Energy Development Through Local Construction Hiring: The Northern Divide Wind Energy Project Case Study* ("LIUNA Report"), questions the economic benefits of the Wind Project by calling into question the utilization of local construction labor. PU-19-376, Docket No. 104 & PU-19-377, Docket No. 100. However, the report does not actually identify a quantifiable, qualified, and available local construction workforce, nor was LIUNA able to evidence a willing, available, and skilled local construction labor force at the hearing.

LIUNA claims a construction employment reporting requirement will increase transparency. However, LIUNA has not clarified how the information reported would be maintained or analyzed. What LIUNA has made clear is that it has not participated in job fairs held by NextEra's EPC contractor, has had limited active engagement with state agencies that have specific jurisdiction over labor considerations, and acknowledged that obtaining work has not been a historic issue for LIUNA. Electronic Hearing Audio, Part 2: Cortina Testimony, Approximate 3:17:50 to 3:18:30; 3:20:00 to 3:20:23; and 3:14:45 to 3:14:59.

LIUNA's own testimony states it does not advocate for designated hiring requirements yet, LIUNA adamantly presses for specific designated construction employment commitments that it characterizes as "voluntary." See Franco Prepared Testimony, PU-19-376, Docket No. 102 & PU-19-377, Docket No. 98, ("Franco Prepared Testimony"), p. 9 (Q. Does your organization advocate for the Commission to require the hiring of workers on wind energy project or to deny permits for wind energy project based solely on anticipated job impacts? A. No.) (emphasis added). LIUNA

submitted Exhibit I-6 following the hearing, which is a copy of filings submitted by other NextEra subsidiaries in separate proceedings before the Minnesota Public Utilities Commission related to use of construction labor on different projects. PU-19-376, Docket No. 161 & PU-19-377, Docket No. 156. LIUNA's Exhibit I-6 is not related to the Projects before the Commission, nor does it speak to the availability of local construction labor within the vicinity of the Projects or North Dakota as a whole. Mr. Harrington testified that every project is different and NextEra has seen much higher local construction labor available (both union and non-union) in Minnesota. Electronic Hearing Audio, Part 1, Approximate 02:19:30 to 02:21:12. For these reasons, Exhibit I-6 should be given no weight by the Commission.

LIUNA asserts the Wind Project's local employment and training benefits may be weighed against any negative impacts that could occur if it "crowds out" competing development opportunities. Franco Prepared Testimony, p. 7; Exhibit I-5. The record does not reflect any competing development opportunities, and this argument calls for the Commission to speculate regarding hypothetical projects and hypothetical impacts. LIUNA's assertion disproportionately weighs local construction labor more heavily against the remaining Siting Criteria, is not supported by Commission precedent, and deviates from the purpose of the Siting Act. *See* N.D.C.C. § 49-22-03 (to "minimize adverse human and environmental impact"); *id.* at § 49-22-09.

LIUNA has made numerous generalized claims regarding the availability of a local construction workforce, but notably, LIUNA has submitted no evidence that a sufficient local, qualified workforce is available within the timeframe necessary to meet the Projects' construction needs. Northern Divide Wind has committed to using local labor to the extent available and expanding more broadly within and outside of the state as necessary. The record demonstrates LIUNA's request for the Commission to establish reporting requirements is unnecessary. To the

extent LIUNA advocates for transparency, policy considerations associated with adopting the requested reporting requirement should be fully vetted and considered by all interested parties, which would be best served through the legislative or administrative rulemaking processes, and not selectively in this proceeding.

IV. Conclusion

For the reasons stated herein, the record demonstrates that the Projects meet the Commission's Siting Criteria and issuance of the requested certificates is warranted. In consideration of the foregoing, and North Dakota's limited construction window, Northern Divide Wind respectfully requests the Commission expedite issuance of the requested certificates.

Dated this 11th day of May, 2020.

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