

Late-Filed Exhibit No. 35 – Response to North American Coal Comments

At the June 28, 2022 public hearing, North American Coal Corporation (“NAC”) and others presented testimony during the public comment portion of the North Dakota Public Service Commission (“Commission”) public hearing. In its comments, NAC asserted that Badger Wind, LLC’s (“Badger Wind”) Certificate of Site Compatibility Application (“Application”) for the Badger Wind Project (“Project”) did not meet the “need” requirement and the Project was not “fully developed” because it did not have an off-taker, would displace coal generation on the grid, and would negatively impact grid reliability.

As discussed below, Badger Wind’s Application does meet the requirements of NDCC Chapter 49-22, the North Dakota Energy Conversion and Transmission Facility Siting Act (“Siting Act”). The Application contains a statement of need, as required by the Commission’s application content rules. Further, the Commission does not have authority to consider need under the Siting Act and, even if it did, the NAC admits a market and demand exist for the Project.

With respect to reliability, the Federal Energy Regulatory Commission (“FERC”) and regional transmission operators (“RTOs”), such as the Midcontinent Independent System Operator (“MISO”), have authority over grid reliability. MISO thoroughly studied the Project’s proposed interconnection to ensure the grid’s continued reliability, and the Project has a fully executed Generator Interconnection Agreement (“GIA”) authorizing interconnection.

In reality, as NAC admits, its issues are with federal and state energy policy and the market’s demand for renewable generation. However, these issues are outside of the Commission’s siting authority and control.

I. Badger Wind’s Application Satisfies the Application Content Need Requirement, and the Commission Does Not Have Authority to Consider Need in Siting.

Contrary to NAC’s assertion, the only “need” requirement for a siting application is a statement of need application requirement, which Badger Wind’s Application satisfied. Need is not a siting factor in the Siting Act and, the Commission and the North Dakota Supreme Court have previously determined that the Commission does not have authority to consider need in a siting docket. Further, even if the Commission had authority to consider need, as NAC acknowledges, there is a market and demand for additional renewable resources, such as the Project.

A. Badger Wind’s Application Satisfies the Statement of Need Application Content Requirement and Was Deemed Complete.

NAC asserted that Badger Wind’s application does not contain a statement of need. This is not true. Badger Wind’s application included a statement explaining the need for the facility, thereby satisfying the statement of need application content requirements in NDCC § 49-22-08(1) and NDAC § 69-06-04-01(2). *See* BW Exhibit 1 at 11-12 (Application). On May 25, 2022, the Commission approved a motion to deem the application complete, affirming that the application content requirements had been satisfied.¹

B. The Commission Does Not Have Authority to Consider “Need” Under the Siting Act.

Although NAC acknowledged that the Commission does not have authority to consider need in a siting docket, NAC essentially urges the Commission to consider “need” in this proceeding. While a “statement explaining the need for the facility” is an application content requirement, it is not a siting factor under NDCC § 49-22-09.

In *In the Matter of the Application of Nebraska Public Power District*, 330 N.W.2d 143 (N.D. 1983), the North Dakota Supreme Court considered whether “need” is a criterion to be considered by the Commission under the Siting Act. In that case, opponents of a transmission line project appealed a Commission decision issuing a Certificate of Corridor Compatibility and Route Permit for the project. In its decision, the Commission had determined that need for the facility was not a consideration within the Commission’s siting authority. *Id.* at 148-49. On appeal, the appellants asserted need should have been considered, and questioned why a statement of need would be required in the application if need were not an issue to be determined by the Commission.

The court agreed with the Commission that need is not within the Commission’s siting authority, noting the limited authority of the Commission under the Siting Act: “The [Commission’s] authority to regulate is limited to that given it by the Legislature.” *Id.* at 149.²

¹ *See* Letter and Motion, available at <https://psc.nd.gov/database/documents/22-0086/017-020.pdf>.

² *See also 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); *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”); *Schwind v. Dir., Dakota Dep’t of Transp.*, 462 N.W.2d 147, 150 (N.D. 1990) (“[T]he jurisdiction of an administrative agency is dependent upon the terms of a statute”); *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).

With respect to the statement of need application content requirement, the court stated that “[a]ccording to the [Commission] the information is to be used by itself, the public, and the Legislature in planning and scheduling, and it is used to help the [Commission] understand the nature of the applicant’s project.” *Nebraska Public Power District*, 330 N.W.2d at 148. However, the court further noted: “Until the Legislature specifically directs the [Commission] to use this information to evaluate the need for a line, the [Commission] believes it does not have the authority to do so.” *Id.* at 148. The court “found no direction in the Siting Act or its legislative history giving the [Commission] the authority to determine if a need has been shown.” *Id.* at 149. The court also noted that while other states allow a Commission to consider need, North Dakota does not; further, the North Dakota Legislature has the ability to authorize an administrative agency to determine need³ but has not done so for siting. *Id.* at 149. Thus, the court concluded that the Commission “does not have the authority or duty to determine need.” *Id.* at 149.

The statutes cited by the North Dakota Supreme Court in *Nebraska Public Power District*, NDCC §§ 49-22-08 and 49-22-09, have not been amended with respect to the substantive terms considered by the North Dakota Supreme Court. As a result, determining need remains outside of the Commission’s authority in a siting docket.⁴

C. As NAC Admits, Even if Need Were a Consideration, a Need for the Project Exists.

Even if considering need were within the Commission’s authority, NAC acknowledges there is a market demand, and therefore a need, for renewables. NAC implies that Badger Wind has not demonstrated need for the facility because it does not have an off-taker yet.⁵ However,

³ “The North Dakota Legislature has demonstrated that, when it desires to do so, it can mandate that an administrative agency consider the issue of need.” *Id.* at 149 (citing NDCC § 49-03.1-04 (“need for the service” to be considered by the PSC before granting a certificate of public convenience and necessity); NDCC § 6-02-06(1) (state banking board must diligently inquire if the place where the proposed banking facility is to be located “is in need of further banking facilities”)).

⁴ In its comments, NAC asserts that the Commission’s siting authority over transmission lines and generation facilities differs because the Commission can deny a permit to a generation facility, but cannot deny a permit for a transmission facility. NDCC § 49-22-08(6) applies to designation of both a site for a generation facility and a corridor for a transmission line – thus, the “may designate” and “refusal of designation” language referenced by NAC is equally applicable to both. However, while the Commission has the authority to deny an application for either a transmission line or generation facility for failure to comply with the requirements of the Siting Act, the Commission does not have authority to deny the application for reasons outside of its authority, such as need.

⁵ Having an off-taker is not a requirement of the Siting Act, nor does the Siting Act does give the Commission authority over electric facility interconnection. Moreover, the Commission has issued Certificates of Site Compatibility to past wind projects and a solar project without knowing who would be purchasing the power. *See, e.g.,* Rolette Power Development, LLC’s Application for a Certificate of Site Compatibility for the Rolette Wind Power Project (Docket No. [PU-15-124](#)), Glacier Ridge Wind Farm, LLC’s Application for a Certificate of Site Compatibility for the Glacier Ridge Wind Farm (Docket No. [PU-16-539](#)), and Harmony Solar ND, LLC’s Application for a Certificate of Site Compatibility for the Harmony Solar Project (Docket No. [PU-18-219](#)).

as Badger Wind testified, the Project would be marketable as a merchant project.⁶ Further, as NAC admitted, low cost renewable energy is more competitive in the market than higher cost generation sources, such as coal.⁷ Thus, the issue is not that the Project's output is not needed – the issue is that the Project's output is more desirable to the market than coal generation.

II. The Project Will Not Impact System Reliability and Integrity.

NAC argues that the Project threatens system reliability. However, NAC's argument ignores the fact that MISO, an independent FERC-approved system operator, is responsible for the reliability of the grid and has conducted the studies necessary to ensure the Project will not negatively impact system reliability and integrity.

First, NAC raises concerns that approving the Project will harm the transmission system by utilizing existing transmission capacity and displacing coal-fired facilities' access to it. This argument demonstrates a fundamental misunderstanding of how the interconnection process works. Approving the Project will strengthen, not harm, the transmission system.

MISO as the operational authority of the regional transmission system required Badger Wind to undergo numerous phases of system reliability studies before granting the Project permission to interconnect. As it does with all generating facilities interconnecting to the system it operates, MISO provided Badger Wind with an interconnection agreement that requires it to pay for any project-related system upgrades necessary to facilitate interconnection without negatively impacting the reliability and integrity of the grid. In this case, MISO is requiring Badger Wind – and not North Dakota's consumers – to pay for \$18,871,500 in transmission system upgrades that must be placed in service before allowing the Project to operate at full output under normal system conditions per their GIA. Additionally, affected systems studies are conducted in coordination between MISO and their neighboring RTOs, Independent System Operators ("ISOs"), and Transmission Operators ("TOs") on an on-going basis to determine the impacts of interconnection requests on each other's transmission system. In other words, Badger Wind is placing upon itself financial responsibility to expand and to improve the transmission system.

NAC also argues that the Commission should deny the Application for fear that it will displace coal-fired facilities. Having the Commission take such an approach will not achieve NAC's desired outcome. MISO operates much of North Dakota's transmission system as part of a large balancing area that covers much of the Midwestern United States. Generating facilities compete across the MISO region to serve load. Even if North Dakota denied all wind project applications, renewable energy projects would continue to grow throughout the MISO territory, ultimately serving North Dakota. Furthermore, electricity demand is rapidly expanding as new needs arise, such as data servers and electric vehicles. More generation is needed to meet

⁶ See Pub. Hrg. Tr. at 86 (June 28, 2022).

⁷ See Pub. Hrg. Tr. at 212 (June 28, 2022).

demand. Based on a 2021 Barr Engineering report, Power Forecast 21, North Dakota is predicted to have load growth between 240-260 percent over a 20-year projection period.⁸

Furthermore, to the extent a coal-fired plant needed for reliability faces financial difficulty, MISO has the authority to prevent it from retiring. In exchange, FERC has established that the coal plant forced to stay open is entitled to full cost recovery. FERC explained:

Because MISO has the ability to force a generator that wishes to retire to continue to provide utility service to meet reliability needs, even though it may be uneconomic for the generator to do so, a generator would effectively be denied the opportunity to recover its fixed costs if it were only permitted to recover going-forward costs. Therefore, when a generator in the MISO region is forced to continue to operate for reliability reasons under the Tariff, even though it has made a business decision to suspend or retire due to economic or other reasons, the generator should be provided an opportunity to recover its fixed costs through a full cost-of-service rate.⁹

Therefore, even if the growth of wind resources place further financial pressure on uncompetitive coal, MISO as the grid operator can provide the coal plant a guaranteed rate of return when needed for reliability.

Additionally, renewable resources provide benefits that assist RTOs in economically meeting system load needs. While renewable resource availability varies, when available, renewable resources are able to respond quickly when called on to address changes in load. Renewable resources also have relatively low maintenance costs and rely on a no-cost fuel source (wind).¹⁰ Baseload resources, on the other hand, are aging and have significant maintenance requirements. As MISO noted in its Response to the Reliability Imperative Report: “[T]he aging thermal assets that remain in service may be more prone to unplanned outages and face supply chain issues.”^{11,12} While intermittency can be addressed through careful forecasting and planning, unplanned outages cannot.

⁸ North Dakota Transmission Authority. Power Forecast Study: 2021 Update at 19, prepared by Barr Engineering Co. (January 2022), <https://www.nd.gov/ndic/ic-press/Power%20Forecast%20Study%20-%202021%20Update%20v1.pdf>.

⁹ *Ameren Energy Resources Generating Co. v. Midcontinent Independent System Operator, Inc.*, 153 FERC ¶ 61,062, at ¶ 35 (FERC October 15, 2015) (citations omitted).

¹⁰ See Assumptions to the Annual Energy Outlook 2022: Electricity Market Module at 6, Eia.gov (2022), <https://www.eia.gov/outlooks/aeo/assumptions/pdf/electricity.pdf>.

¹¹ MISO’S Response to the Reliability Imperative at 9, Misoenergy.org (Updated January 2022), <https://cdn.misoenergy.org/MISO%20Response%20to%20the%20Reliability%20Imperative504018.pdf> [hereinafter “MISO’s Response to the Reliability Imperative”].

While NAC asserts renewables are displacing coal, the reality is that coal does not have the flexibility of other baseload resources, such as natural gas, and cannot easily adapt to the grid's changing operational needs. In its Response to the Reliability Imperative, MISO provides future estimates of the MISO generation mix. While natural gas was seven percent of the mix in 2005 and 34 percent in 2020, MISO estimates the proportion of natural gas will increase to 45-55 percent by 2030.¹³ By comparison, renewables (wind and solar) are estimated at 20-34 percent by 2030.¹⁴ As such, natural gas, also a North Dakota resource,¹⁵ has more potential to displace coal than wind.

As the above shows, the Project's GIA confirms its interconnection will not impact the reliability and integrity of the grid. Intermittency does not equal unreliability, and all generation resources pose benefits and challenges that are factored into the mix by the RTOs charged with managing the grid.

III. NAC Raises Policy Issues, Which Are Outside of the Commission's Siting Authority and Control.

As NAC acknowledged, it is essentially asking the Commission to deny a siting permit to Badger Wind's Project because NAC has been unable to change federal or state policy or market demand and is trying another course.¹⁶ However, not only are dictating generation policy and the market beyond the authority granted to the Commission in the Siting Act, neither can be changed by the Commission. This point is well-stated in *Resource Adequacy in North Dakota A Policy Primer* by former PSC and FERC Commissioner Tony Clark and Tom Erickson with Energy & Environmental Research Center:

¹² In its comments, NAC implied that Germany restarted coal plants due to issues with intermittent resources on the German grid. In reality, the issue was not with increased intermittent resources, but with reduced availability of natural gas imported from Russia. See Melissa Eddy, *Germany will fire up coal plants again in an effort to save natural gas*, N.Y. TIMES (June 19, 2022), <https://www.nytimes.com/2022/06/19/world/europe/germany-russia-gas.html>. Germany primarily utilizes renewable resources and has announced plans to increase renewable power to 80 percent by 2030 and 100 percent by 2035, using renewables as "the energy of freedom" from Russian fossil fuel sources. See *Germany aims to get 100% of energy from renewable sources by 2035*, REUTERS (February 28, 2022), <https://www.reuters.com/business/sustainable-business/germany-aims-get-100-energy-renewable-sources-by-2035-2022-02-28/>. In fact, the Ukraine conflict could accelerate Germany's transition to renewable energy, despite its recent restart of coal plants. See *Ukraine conflict could speed up German's green energy transition, study says*, REUTERS (July 17, 2022), <https://www.reuters.com/business/sustainable-business/ukraine-conflict-could-speed-up-germanys-green-energy-transition-study-says-2022-07-17/>.

¹³ MISO's Response to the Reliability Imperative at 13.

¹⁴ MISO's Response to the Reliability Imperative at 13.

¹⁵ In 2020, North Dakota consumed 150.2 trillion British thermal units ("Btu"), while it produced 1,211.3 trillion Btu. U.S. Energy Information Administration, *North Dakota Energy Consumption Estimates, 2020*, Eia.gov, <https://www.eia.gov/state/?sid=ND#tabs-1> (accessed August 11, 2022).

¹⁶ See Pub. Hrg. Tr. at 207 – 208 (June 28, 2022).

Attempts to ban certain generation resources in North Dakota via prohibitive siting measures or other approaches to discourage investment in alternative generation resources will ultimately prove ineffectual at protecting more traditional native generation resources. All the state's generation resources are part of broader regional transmission organizations, and resources built anywhere in the region will have spillover effects on North Dakota resources. While North Dakota may be able to prohibit or encourage a particular type of generation within its borders, what is built elsewhere is not controllable and will impact North Dakota-based resources, just as North Dakota-based resources have an impact on generators outside the state. North Dakota erecting roadblocks to one type of generation resource, for example, wind or solar, will simply encourage more of it to be built elsewhere. This will deprive the state of these investment opportunities while simultaneously doing little to improve the prospects of existing native generation resources.¹⁷

In other words, even if the Commission were to deny a certificate to this Project, the Commission would not change the broader federal or state energy policy or the demands of the energy market. Instead, the Commission would simply be denying North Dakota landowners the opportunity to develop their resources, and would be denying the state, counties, and townships the associated benefits. The market will continue purchasing based on cost and resource type; it just will be from somewhere else. Thus, regardless of how NAC or the Commission may feel about energy policy and market demand, neither issue falls within the purview of the Commission's siting authority or control. Instead, the Commission's ability to influence resource determinations is through its authority over rates,¹⁸ resource cost recovery,¹⁹ and integrated resource, reserve margin, and reliability planning²⁰ for the public utilities that it regulates, as well as its continued engagement in RTO stakeholder processes and state and federal policy decisions.²¹

¹⁷ Tony Clark and Tom Erickson, Resource Adequacy in North Dakota: A Policy Primer at 29-30 (2022), <https://www.wbklaw.com/wp-content/uploads/2022/03/Resource-Adequacy-in-North-Dakota-Feb2022-00B.pdf> [hereinafter "Resource Adequacy in North Dakota: A Policy Primer"].

¹⁸ NDCC Ch. 49-05.

¹⁹ NDCC § 49-05-16.

²⁰ NDCC §§ 49-05-04.4 and 49-05-17 – 49-05-19.

²¹ See Resource Adequacy in North Dakota: A Policy Primer at 28 ("North Dakota must be prepared to expend the resources to successfully engage in RTO stakeholder processes, and before the federal government, understanding that the state itself likely has as much influence on the RTOs as any single utility.").

IV. Conclusion.

As discussed above, NAC's assertions regarding need and reliability are not apt or accurate. In reality, as acknowledged, NAC is frustrated by energy policy and market issues that it has been unable to change through the appropriate venues. However, energy policy and the market are issues beyond the scope of the Commission's siting authority and control, and should not factor into the Commission's decision on Badger Wind's Application.