

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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**IN THE MATTER OF THE  
APPLICATION OF NAVIGATOR  
HEARTLAND GREENWAY, LLC FOR  
A PERMIT TO CONSTRUCT THE  
HEARTLAND GREENWAY PIPELINE  
IN SOUTH DAKOTA**

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\* **STAFF’S RESPONSE TO MOTION TO**  
\* **RETURN APPLICATION**  
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\* **HP22-002**  
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Staff (Staff) of the South Dakota Public Utilities Commission (Commission) hereby files this Response to Motion to Return Application.

On January 24, 2023, Intervenors represented by Attorney Brain Jorde (collectively, Landowners) filed a Motion to Return Application pursuant to SDCL 49-41B-13(2). The Motion invoked no other statute upon which action was sought, therefore, Staff confines its response to whether the Motion should be granted pursuant to 49-41B-13(2).

SDCL 49-41B-13(2) provides

An application may be denied, returned, or amended at the discretion of the Public Utilities Commission for...[f]ailure to file an application generally in the *form and content* required by this chapter and the rules promulgated thereunder; ...  
The commission shall, upon denying or returning an application, provide the applicant with reasons for such action and shall allow the applicant to make changes *in the application* in order to comply with the requirements of this chapter. {*emphasis added*}

The landowner notices required by SDCL 49-41B-5.2 are not a part of the form and content of an application. Consideration of statutes and rules for form and content include, but are not limited to, those found in SDCL 49-41B-11 and ARSD 20:10:22. Examples of requirements related to the “form” of an application include number copies of the application to be served on the Commission, use of page numbers, and paper size. The “content” of the

application refers to the information that must be included with or within an application, such as name and address of the applicant, description of the nature and location of the facility, and cost estimates, among other things, which can be found in SDCL 49-41B-11 and ARSD 20:10:22.

While SDCL 49-41B-13(2) is not limited to items listed in SDCL 49-41B-11 and ARSD 20:10:22, it is limited to the form and content of the *application* (as demonstrated by the emphasized language of the statute provided above) and does not apply to all requirements and filings that arise throughout the docket process.

The Commission has had occasion to discuss deficiencies arising under SDCL 49-41B-13(2) in recent years. In Docket No. EL17-028,<sup>1</sup> the Commission denied and dismissed a siting application for a wind farm and electric transmission line pursuant to SDCL 49-41B-13(2). Specifically, the Commission found that the application was not filed “generally in the form and content required under 20:10:22:33.02,” because the application did not contain a singular project layout configuration and because it failed to accurately state the number of wind turbines in the proposed project.

In their Motion, Landowners specifically request the Commission return Navigator’s application pursuant to SDCL 49-41B-13(2). Because that statute cannot be expanded beyond its stated purpose to include matters outside the form and content of an application, it is not an appropriate vehicle through which issues arising under SDCL 49-41B-5.2 can be addressed.

Even if the Commission were to find that compliance with SDCL 49-41B-5.2 implicates the legal remedies provided in SDCL 49-41B-13(2), return of the Application is not in the best interest of those involved.

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<sup>1</sup> *In re Application of Crocker Wind Farm, LLC.*

If the Commission were to return the Application, SDCL 49-41B-13 would require the Commission to provide reasons for doing so and allow the applicant to make the necessary corrections in order to comply. SDCL 49-41B-13. Therefore, prior to returning the Application, the Commission would need to determine what necessary corrections Applicant must make in order to comply. If the failure is sending notices to a number of landowners, the correction would be to send those notices. Applicant has done that. Therefore, returning the Application and directing Applicant to take corrective action by sending notice to landowners is a moot point and not in the interest of judicial economy.

Landowners allege that they may suffer prejudice if newly noticed landowners do not participate, because Landowners will be “deprived of the insights, questions, concerns, and solidarity of another South Dakota landowner involved in the docket.”<sup>2</sup> Any party involved could raise this concern, but it is significantly speculative, as we do not know the positions of these landowners. In the Motion, Landowners state that “[w]orse than a landowner appearing late is a landowner who doesn’t appear at all.”<sup>3</sup> While true, we cannot force individuals to participate in this proceeding. Since the additional notices were sent, only one comment from a member of the public has been submitted, and it was not submitted by a person who received late notice.

Moreover, in the month since the mailing was sent, one individual on that mailing list was granted party status, demonstrating that a landowner interested in participating in the Commission’s process was able to do so. Therefore, it is all the more difficult to argue that landowners on the mailing list are prejudiced by not being able to meaningfully participate in the Commission’s proceedings.

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<sup>2</sup> See Motion at ¶ 27.

<sup>3</sup> See Motion at ¶ 27.

However, as far as prejudice to a landowner that may be a prospective party, Staff can only be responsible for or suffer prejudice through its own discovery. Therefore, Staff will not assume to know what another may be missing out on or claim to have standing to make those assertions of prejudice.

Dated this 30th day of January 2023.



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