BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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| IN THE MATTER OF THE APPLICATION BY CROCKER WIND FARM, LLC FOR A PERMIT OF A WIND ENERGY FACILITY AND A 345 KV TRANSMISSION LINE IN CLARK COUNTY, SOUTH DAKOTA, FOR CROCKER WIND FARM | EL17-028<br>RESISTANCE TO INTERVENER'S MOTION TO DENY AND DISMISS APPLICATION |

Applicant, Crocker Wind Farm (Crocker) hereby submits this Resistance to Intervener's Motion to Deny and Dismiss.

In their filed motion, the Interveners argue that:

1. The project fails to comply with all applicable laws and rules in one singular sense, that being that the application assumes a 2000ft. setback from non-participating homes.

2. The project must somehow pose a threat of serious injury to the environment because final assessments relative to use of wetland easements are incomplete.

3. The filed application, because it details more than one proposed turbine layout violates the Intervener's rights to "due process".

The arguments posed by the Interveners in this motion are not supported in fact or law and the intervener's motion should be denied in full as demonstrated and argued below.

**1. Crocker's application is compliant with all applicable laws and rules.**

Crocker's application does generally demonstrate compliance with all applicable laws and rules as required by SDCL 49-41B-22. Crocker's application is compliant with the applicable Clark County ordinance. Further, Crocker neither seeks a variance from the Commission as to the Clark County ordinance or the Conditional Use Permit, nor is the Commission empowered to grant such a variance. Finally, the Conditional Use Permit is neither law nor a rule but a permit granted by another agency

with project oversight, with which this Commission would simply order compliance, in the ordinary course of business.

Crocker's application and proposal are compliant with all applicable laws and rules. The statute requires such compliance and the Commission is expected by Applicant and others to apply the statute as written. SDCL 49-41B-22. Interveners allege that the offering of a layout at setbacks smaller than those ordered by the Clark County Board of Adjustment somehow violates the statute. That isn't the case.

Clark County has a specific wind energy ordinance, contained in its planning and zoning ordinance. See Section 4.21, Clark County Zoning Ordinances, at p. 56. The ordinance requires wind towers to be at least 1000' from non participating residences:

> 2. Setbacks
> Wind turbines shall meet the following minimum spacing requirements.
>
> Distance from existing off-site residences, business, churches, and buildings owned and/or maintained by a governmental entity shall be at least one thousand (1,000) feet. Distance from on-site or lessor's residence shall be at least five hundred (500) feet. Distance to be measured from the wall line of the neighboring principal building to the base of the WES tower.
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> Section 4.21(2), Clark County Zoning Ordinance, at p. 58.

That ordinance was adopted by the Clark County Commission, under the proscriptions of statute, in 2014. SDCL 11-2-13. That ordinance is applicable, and as demonstrated above, the application more than meets it. As can also be seen, an application offered at 800' setbacks would not.

State statute empowers a County Commission to appoint a Board of Adjustment to grant conditional use permits under applicable zoning ordinances. SDCL 11-2-60. See also, Sec. 3.03, Clark County Zoning Ordinance, at p. 34 The Clark County Commission did that, appointing themselves as the members of the Board of Adjustment. Id. Thus when the Board of Adjustment acts, it does so as a separate body with distinct and limited powers, and not as the Board of County Commissioners even though the membership is the same. Id. The Board of Adjustment heard the proposal for a Conditional Use Permit, and conditioned its grant on setbacks at 3960' or ¾ of a mile. That condition is viewed by the Applicant as not legal and the matter is currently being litigated. Crocker Wind Farm, LLC v. Clark County Board of Adjustment, 12Civ17-0017, Third Circuit, South Dakota.

Either way, the PUC has not been asked to alter the setbacks as found in either the ordinance or in the CUP. The Applicant has gone out of its way, and does so here again, to say so. Applicant expects the PUC, as in other siting permits for projects of all types, to require the Applicant to comply with the applicable laws, rules, ordinances, and required permits as the agencies and courts determine.

Indeed, the PUC has no authority in this particular instance to determine otherwise. Statute does grant the PUC such authority for transmission projects, and under commonly applied rules of statutory construction, the lack of such a grant in this instance should be seen as determinative that the PUC has no such authority here. SDCL 49-41B-28. See also, generally, SDCL 2-14.

Further, under the same rules of statutory construction, it is pointed out that the applicable statute, 49-41B-22, speaks of "laws and rules." Laws means statutes and ordinances, and rules means the essentially administrative rules. SDCL 2-14-1. SDCL 1-26-1(8).

The first rule in statutory construction is that the language expressed in the statute is the paramount consideration. State v Moss, 754 N.W.2d 626, 2008 S.D. 64. Words and phrases in a statute must be given their plain meaning and effect. See generally, In re Estate of Hamilton, 814 N.W.2d 141, 2012 S.D. 34 When interpreting a statute, courts give plain meaning and effect to words and phrases. In re Montana-Dakota Utilities Co. 740 N.W.2d 873, 2007 S.D.104. Laws and rules are legislative acts, enactments of a body acting legislatively and not administratively or judicially. A conditional use permit is neither a law or a rule. It's an administrative act of an administrative body. The powers of a Board of Adjustment are strictly limited. SDCL 11-2-53.

While Applicant does not seek from the PUC an order contravening the Conditional Use Permit, the statute also doesn't require or permit the PUC to deny or dismiss the application based on these facts and the argument of the interveners. The intervener argument fails and their motion should be denied.

**2. The project poses generally no threat of serious injury to the environment, nor does the current process with respect to the Programmatic Agreement implicate serious injury to the environment.**

Crocker poses no threat of serious injury to the environment. The towers are made of inert materials, produce only electricity and do not emit waste of any kind. They can be taken down and removed and the land put back to different uses. They are mechanical and not chemical. Any abnormal operation can be remedied fairly inexpensively.

The footprint of the project contains a substantial amount of land belonging to private parties, and which has grassland easements placed upon it, in favor of the US Fish and Wildlife Service. See Prefiled Testimony of Melissa Schmit, p10,14. The landowners previously sold these grassland easements to USFWS. Those easements do not provide for the use of the easement lands for wind energy purposes. However, USFWS recently issued the Upper Great Plains Programmatic EIS (https://www.fws.gov/mountain-prairie/pressrel/2015/UGPFinalPEISVol.1-April2015.pdf) to help accommodate wind development in the region. This EIS specifically allows for such use, under prescribed conditions. The Interveners have somehow confused this federal agency approved process of using (and replacing) grassland easements, with a threat of serious injury to the environment. It is not such a threat, and if it were, the federal agencies involved would likely acknowledge that. Further, recent transmission projects in South Dakota have utilized this process, including the Big Stone South to Ellendale project. EL13-028, Application, at 55.

The Applicant has proposed utilizing the Upper Great Plains Programmatic EIS in order to host a portion of the towers required for the project. USFWS is currently assessing whether the Applicant's proposal meet the requirements which were set forth in the programmatic agreement. No part of this process with USFWS relates or transates in any way, shape or form, to a serious injury to the environment. Rather, the process is one in which Crocker approaches USFWS to release certain easements in exchange for easements elsewhere, purchased by Crocker to offset impacts. Further, the Commission cannot transfer its statutory duty to determine serious injury to the environment to another agency including USFWS. Pesall v. SDPUC, 2015 S.D.81. The Applicant has requested no action from the PUC on use of the grassland easements, nor is any action by the PUC warranted or possible. Intervener's argument is illogical and misplaced and should be regarded as such.

**3. The potential layouts are not somehow violative of due process. This is the process.**

Finally, the Interveners argue that the proposed potential layouts for the project are somehow violative of the due process rights of the Interveners. Notwithstanding the question whether the

Interveners enjoy due process rights, which conclusion is disputed, Applicant is following the permit process outlined in statute and rules. This is the process. The Commission is not a Court and does not have either the expertise or authority to declare a process as somehow violative of notions of "due process". Further, "due process" is a guarantee of notice and an opportunity for hearing. Nothing more. The Interveners got notice, as provided in the statute, opted into the process as Interveners, as provided in the statute, and get to call witnesses and examine them and cross examine other witnesses at the hearing in December, as provided in the statute and rules. The Interveners are receiving all process to which any person would be entitled under the applicable statutes and rules.

The application includes four potential layouts. The V110 layout has the maximum number of turbine and turbine locations which would be installed, up to 200. The other layouts contain no different or new turbine locations. The other layouts simply include fewer of the same locations from the V110 layout. Some of those locations will go unused if the other turbines are selected for use. See, Testimony of Melissa Schmit, p. 9 to 14.

"Due process" is defined as notice and opportunity for hearing, generally spoken of in conjunction with a government action taking away someone's life, liberty or property. See, Fifth Amendment to the U.S. Constitution. See also, Art VI, S.D. Constitution, Sec. 2. The Applicant seeks to take nothing away from the interveners and so it becomes difficult to understand how the interveners can speak about being denied due process. The term "due process" as defined and used doesn't generally extend to someone in their position. They're not entitled to "due process" as a matter of constitutional law, nothing is being taken from them.

By statute, however, they're entitled to this process, THE process, which the Legislature and the PUC have set forth in statutes and rules, respectively. See generally, SDCL 49-41B. It is pointed out that the rules set forth by the PUC for use in siting dockets have been approved by the Legislature's Rules Review Committee. SDCL 1-26-1.2. It follows then, that the interveners have sought and obtained party status in this matter. They have and will have notice of all proposed actions, of all hearings and an opportunity to respond, to be heard, to call and confront witnesses and to take all actions which a party might take, including appeal from the orders of the PUC. They are getting all the process. No part of the process is being or is threatened to be withheld from interveners.

The interveners are confused as to the meaning of "permit the box." The applicant does not seek authority to emplace towers and structures anywhere within the project footprint as outlined in the Interveners motion. Applicant has never sought that. Rather, what the applicant seeks and what is known as "permit the box" is this: Applicant should be generally allowed to place towers and structures within the project footprint, SO LONG as those towers and structures meet all the requirements and conditions set forth in the permit(s) and the conditions as to noise, setbacks from structures, and roads, and the like.

Wind turbines are not standalone structures. They are connected to each other and to transmission and to the grid. See, Testimony of Melissa Schmit, Rob Coupouls. Sometimes planned tower locations do not work out for reasons such as landowner preference, constructability, weather/schedule concerns, high water at the time of construction, results of soil borings, unanticipated discoveries of cultural objects or human remains, etc. If a certain tower location or locations don't work out, then the surrounding towers more closely connected to that particular tower might need to be moved as well. Those few towers might not be economical or practical to construct and operate unless the whole subset is constructed. This type of analysis isn't confined or restricted to windfarms either. Pipelines and transmission lines are similar, in that shifts of the line in discreet locations, for such reasons, can cause other connected parts of the line to require shifts as well.

Recent dockets for pipelines, transmission lines and windfarms have all gotten such treatment from the PUC. See, e.g. Stipulation, SDPUC Docket EL08-031; SDPUC Docket EL13-028 Condition 23; SDPUC Docket HP14-002 Condition 5; SDPUC Docket EL14-061 Condition 22. Why has the Commission so acted? Because doing so is efficient and gives full effect to the PUC process and permit. As long as a particular tower placement doesn't bring the tower into noncompliant effects from its location, it shouldn't matter. In fact, it doesn't matter. The towers must all comply and it's on the Applicant to make sure that they do. For example, a condition requiring all towers to cause no more than 50dBA of noise must have compliance from the Applicant, no matter where the individual towers are sited. No ill effects from such orders have been logged to date, as the PUC is not known to have made such orders in siting dockets.

Post permit and prior to construction, applicants engage in micrositing. Micrositing is the final step in the process when all of the data gathered from all of the inquiries and investigations and all of the permits are considered to create a final layout for construction. Without such a condition, allowing

towers to be finally placed by the applicant so long as they do not violate the conditions set by the PUC, Applicant would be forced in a practical sense to either expend huge amounts of resources in micrositing and then seek a permit from affected agencies or to somehow come back to the PUC for a final order on the siting, to no positive result. Those who seek to stop the projects would be thus empowered, which is their goal. This is not the Legislature's intended result. The legislature has said that siting dockets for wind energy projects must be complete in six months. SDCL 49-41B-25. A requirement to come back after micrositing and prior to construction may well violate that statutory mandate.

Finally, the Applicant reminds the PUC that it is not a court. It's a quasi-judicial body and part of the administrative branch of state government. It lacks authority under the state constitution and the statutes to declare either statute or rule to be violative of due process. We also acknowledge that "[t]his [C]ourt has previously stated that the PUC is deemed to be an administrative tribunal with expertise," *Northern States Power Co.*, 489 NW2d at 370 (citing *In re* Jack Rabbit Lines, Inc., 283 NW2d 402 (SD 1979)), and that we give "appropriate deference to PUC's expertise and special knowledge in the field of electric utilities." *Id.* at 372. However, "[w]hile the expertise of the administrative agency is recognized, the agency must lend credence to the guidelines established in the statutes." *Northwestern Public Serv. Co.*, 1997 SD 35, ¶29, 560 NW2d at 929-30 (further citations omitted). "The PUC is not a court, and cannot exercise purely judicial functions." *Id.* ¶30 (citing *In re* Dakota Transportation, Inc., 67 SD 221, 291 NW 589, 594 (1940)). "Defining and interpreting the law is a judicial function . . . ." Bandy v. Mickelson, 73 SD 485, 488, 44 NW2d 341, 342 (1950).

## Conclusion

For the reasons stated, and on the points and authorities cited herein, the Interveners arguments fail and their motion must be Denied.

Dated this 20 day of October, 2017.

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**CERTIFICATE OF SERVICE**

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 20 day of October, 2017, he served via email, a true and correct copy of the foregoing in the above-captioned action to the following at their last known address, to-wit:

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