BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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	* * * * * * * *	**STAFF'S RESPONSE TO INTERVENORS' MOTION TO DENY AND DISMISS CROCKER WIND FARM'S APPLICATION** **EL17-028**

COMES NOW the Public Utilities Commission Staff (Staff) and hereby files this Response to Intervenors' Motion to Deny and Dismiss Crocker Wind Farm's Application.

I. Movant claims that Crocker's application is not consistent with the Conditional Use Permit (CUP) issued by Clark County and the application thus fails to establish compliance with SDCL 49-41B-22, and should be denied and dismissed. Staff disagrees that this is grounds for denial and dismissal at this point.

SDCL 49-41B-22(1) provides that "the applicant has the burden of proof to establish that: (1) the proposed facility ***will*** comply with all applicable laws and rules." (Emphasis added). Staff agrees that on its face, the initial application does not comply with the CUP granted by Clark County. The initial application requested setbacks of 2,000 feet even though the CUP required ¾ mile setbacks from non-participating residences. The studies presented support the same 2,000 foot setback and Crocker has filed an appeal to the CUP in district court.

Staff does agree that a change from 2,000 foot setbacks to ¾ mile setbacks could have an effect on whether Crocker has met its burden of proof, but Movant takes this statute out of context. The statute merely codifies the applicant's burden of proof that the facility "will" comply with all laws and rules.

There is no statutory requirement that the permit application made to the Commission must be consistent with a county CUP, or a county ordinance. Nor is there a statutory requirement that an applicant has secured a county permit, or any other permit that may be required prior to construction. This supports the idea that obtaining a PUC permit is just one step in the process to build an energy conversion facility. An applicant must secure numerous permits and approvals, often with overlapping timelines, before beginning construction and none of these permits or approvals supersede another.

Historically, the Commission has recognized this and has issued permits before an applicant has obtained all permits necessary to build a project. The Keystone Pipeline[1] is an example of this. The applicant applied for a PUC permit, and the permit was granted before the applicant obtained the necessary Federal approval for the project. Despite holding a PUC permit, the applicant could not move forward until the Federal permit was obtained. To ensure that this was clear, the Commission included this as a condition to the permit.

At this point, issuing a denial of the application would be premature. Although failing to meet this burden could be grounds for denial of the application, the Crocker filed information on September 5, 2017 which seems to indicate a willingness to comply with the CUP. Specifically, the letter explained that Crocker "doesn't seek any order from the PUC which contravenes the County permits." Based on this information, whether the applicant has met this burden becomes a question of fact for the Commission and the parties should be permitted to argue this issue at an evidentiary hearing.

[1] SD PUC Docket HP14-002

Although Staff does not support a denial or dismissal on these grounds at this time, Staff has not taken a position on whether Crocker has met its burden of proof and reserves the right to present testimony on this issue.

II. Movant contends that without the completion of ongoing environmental assessments, Crocker cannot establish its burden of proving the Project will not pose a threat of serious injury to the environment.

This argument seems to be predicated on the concept that Applicant has failed to state a claim upon which relief can be granted, and therefore, dismissal is merited. Or, simply put, that even if all evidence submitted and statements made by Applicant were assumed as true, there is still no conceivable way in which Applicant could satisfy its burden and receive a permit. Such a motion is provided for by SDCL 15-6-12(b).

Courts have historically disfavored dismissal of actions without affording the applicant the opportunity to go through the full process of a trial, or in this case, an evidentiary hearing. "The motion is viewed with disfavor and is rarely granted." *Thompson v. Summers*, 1997 SD 103, ¶ 5, 567 N.W.2d 387, 390. "Pleadings should not be dismissed merely because the [Commission] entertains doubts as to whether the pleader will prevail in the action." *Id.* at ¶ 7.

Movant contends that because the US Fish and Wildlife Service is currently conducting an Environmental Assessment (EA) which will not be completed until summer 2018, several months after the deadline for a decision in this docket, it is not possible for Applicant to establish the Project will not pose a threat of serious injury to the environment. (Movant's Brief at 8).

Historically, Staff has taken the position that it is not imperative that an EA or EIS be completed prior to the processing of a siting application. Staff does not feel it necessary to deviate from that position at this time. Although Staff has previously advocated for any permit to

be conditioned upon compliance with any EA or EIS required by another agency, and will continue to do so should this permit be granted, much of the information that is provided in the EA is similar to what is required as part of a siting application before the Commission. Thus, the lack of a complete EA is not fatal to the Applicant's ability to meet its burden of proof.

Although Staff does not advocate denying or dismissing the application due to a lack of a completed EA or EIS, at this time Staff has not taken a position on whether Crocker has met its burden of proof with respect to the Project not posing a threat of serious injury to the environment. Staff reserves the right to present testimony and take a position on this issue. Of particular concern to Staff at this time are: 1) the lack of information regarding mitigation measures with respect to environmental issues[2], and 2) the Application only containing a Draft of the Bird and Bat Conservation Strategy (Draft BBCS)[3].

Regarding mitigation measures to ameliorate negative environmental impacts, Crocker Wind Farm LLC. (Crocker) identifies in its Application that it will continue to coordinate with wildlife agencies to determine adequate mitigation measures. However, the Commission does not know what those measures will be. Crocker should at a minimum identify how it intends to mitigate environmental impacts. The specific mitigation measures can then be used to support any finding issued by the Commission. Without this information, the Commission would need to outsource this finding to another agency and rely on promises from the developer to coordinate in good faith with those agencies.

The Draft BBCS identified certain subjects of moderate concern (including Breeding Bird Collision, Waterfowl and Water birds, state Species of Greatest Conservation Need and

[2] See Application page 13-26.
[3] See Appendix C of the Application

Special Concern bird species, Grassland Bird and Waterfowl Habitat Displacement, and listed butterflies). The study identifies a moderate concern as "without avoidance, minimization or mitigation, the Project is likely to pose a moderate risk to the topic of concern." The Application appears to identify that some form of mitigation will be taken for these moderate concerns, however it does not identify what mitigation measures will be implemented.

The Draft BBCS also states that "these conclusions and recommendations will be reevaluated upon completion of Tier 3 assessments at the Project site, as well as upon the completion of the Section 7 ESA reviewed by the USFWS" (Draft BBCS, page 19). Therefore, without seeing the Tier 3 studies, the Commission is left to make its determination based on impacts identified in the Draft BBCS that may, or may not, change. The Draft BBCS also identified that it will be updated to reflect all avoidance, minimization and mitigation measures included in the EA. Given this, the Commission is currently left to determine that the future mitigation measures and revised BBCS will result in the project not posing a threat of serious injury to the environment.

The above are areas of concern will likely addressed by Staff in prefiled and oral testimony. Crocker is free to rebut Staff's stated concerns with its rebuttal testimony and through additional evidence at an evidentiary hearing. Thus, while Staff acknowledges certain challenges to Applicant's ability to meet its burden of proof under SDCL 49-41B-22 at this time, the Court has made it clear that doubts alone do not merit dismissal. *Id.*

The six-month time frame in which to process a wind siting application presents a unique and, in many cases, unfortunate set of challenges for all involved. One such challenge is that it is often not feasible to complete an EA or EIS prior to the final decision on the application.

However, if the Commission is given an Application that addresses every rule set forth in ARSD Chapter 20:10:22, it is possible for the Commission to make a determination regarding the Project's threat to the environment and, if needed, craft conditions such that serious risk to the environment can be avoided. As to this particular issue, Staff advocates testing the sufficiency of evidence through testimony and, if a permit is issued, crafting conditions as in previous siting dockets.

III. Movant contends the application violates Intervenors' due process rights.

a. Movant argues Crocker's application fails to meet the form and content required by ARSD 20:10:22)33.02 and thus violates the Intervenor's due process rights.

Movant contends that the Application fails to meet the form and content required by ARSD 20:10:22:33.02. (Movant's Brief at 10). The language of that administrative rule provides the information that is required of an applicant when filing for a wind siting permit. SDCL 49-41B-13 provides in relevant part that an "application may be denied, returned, or amended at the discretion of the Public Utilities Commission for…failure to file an application generally in the form and content required by [Chapter 41B] and the rules promulgated thereunder." Thus, the Commission has the discretion to deny an application if the application does not generally conform to ARSD 20:10:22:33.02. Notably, the statute allows for general conformity, rather than mandating strict conformity, and affords the Commission the discretion as to whether to deny, return, require amendment, or take no action.

It is the general practice of Staff to conduct a completeness review upon receipt of any siting application and communicate any issues to the Applicant in the form of data requests. To date, Staff has sent Crocker seven sets of discovery requests. With the information included in the Application, received through data request responses, and obtained through testimony, Staff

believes we will have enough information to process the docket and anticipates being able to develop testimony and take a position in this case.

Staff does not know what issues the Intervenors intend to call witnesses on and cannot speak for them as to whether or not additional information would assist them in the preparation of their testimony. Staff cannot speak to whether or not another party's due process rights have been violated, as we cannot substitute our judgment for theirs as to whether they were given enough information to avoid prejudice in their ability to process the docket.

Although Staff has largely been able to work with the information it has at this time, and anticipates being able to formulate testimony, Staff does acknowledge some outstanding issues. The following are areas in which the Application, testimony, and responses to data requests seem to be lacking:

a. Cumulative impacts need to be addressed pursuant to ARSD 20:10:22:13. (See Attachment 1, Data Requests 2-35 and 4-18).
b. ARSD 20:10:22:12 requires an evaluation of alternative sites considered by the applicant for the facility. (See Attachment 1, Data Requests 2-11, 4-9, and 4-11)
c. ARSD 20:10:22:15(4) requires information on: if aquifers are to be used as a source of potable water supply, specifications of the aquifers to be used and definition of their characteristics, including the capacity of the aquifer to yield water, the estimated recharge rate, and the quality of the ground water. The Application does identify the aquifers and the capacity, but does not include an estimated recharge rate.
d. ARSD 20:10:22:16 requires biological studies to be provided and planned measures to ameliorate negative biological impacts. The Application does provide some studies and planned measures, however, it does not identify specific mitigation measures regarding grassland easements.
e. ARSD 20:10:22:33.02(7) requires a map of the proposed wind energy site and major alternatives as depicted on overhead photographs and land use culture maps. No map with alternatives was provided.

Moreover, Staff agrees with the Intervenor's position that the Configuration required by ARSD 20:10:22:33.02 requires one specific turbine layout. As such, in its analysis and

testimony, Staff will rely on the Vesta 110 layout based on Crocker's request. (Application Chapter 22.0, page 22-1). Any desire on the Applicant's part to move turbines can be fleshed out through testimony and during the evidentiary hearing. It is Staff's intention at this time to take a position on siting the Vesta 110 layout contingent upon the recommendation that the Commission require the Applicant to obtain approval or review for any material modifications, in the event the permit is granted.

b. Analysis of procedural due process

Procedural due process mandates that "certain substantial rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." *Tri County Landfill Ass'n, Inc. v. Brule County*, 2000 SD 148, ¶ 13, 619 N.W.2d 663, 668 (quoting *Michigan Envtl. Resources Assocs., Inc. v. County of Macomb,* 669 F.Supp. 158, 159 (E.D.Mich.1987)). "Procedural due process is flexible and requires only such procedural protections as the particular situation demands." *Id.* Examples of procedural due process claims include the guarantees of the "Equal Protection, the Contracts Clause, the Just Compensation Clause, and other protections of the Bill of Rights." *Id*. at ¶18 (internal citations omitted).

The Court has stated that "one purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly." *Daily v. City of Sioux Falls*, 2011 SD 48, ¶ 18, 8202 N.W.2d 905 (quoting, *Carey v. Piphus*, 435 U.S. 247, 262, 98 S.Ct. 1042, 1051, 55 L.Ed.2d 252 (1978). In *Daily*, the Court held that determining due process in a particular case requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

> Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (internal citations omitted).

Thus, the appropriate analysis begins with a determination of what interest is at stake, followed by an examination of what can or has been done to protect that interest. While Staff is optimistic that its interest is adequately protected by the ability to cross examine witnesses, ask data requests, and make a recommendation at the conclusion of the evidentiary hearing, Staff cannot speak for the interests of the Intervenors.

c. Movant argues the Application violates the Intervenor's right to notice and the opportunity to be heard.

Movant goes on to claim that Crocker's submission of numerous siting maps along with Crocker's request to site the box interferes with Intervenor's due process rights by violating the Intervenors' right to notice and the opportunity to be heard. (Brief at 11). On its face, it appears that the Intervenors were given notice of the proceeding through the required newspaper advertisements and Crocker's mailing to landowners. The Intervenors are parties in the docket and do have the opportunity to participate and be heard in this docket with the opportunity to engage in discovery, submit testimony, and cross examine witnesses at the evidentiary hearing.

The Movant also argues that the opportunity to be heard includes the right to be heard in a meaningful time and manner and that opportunity has not been afforded to the Intervenors in this docket. (Brief at 11). Staff does note that this Application does present some challenges. Significantly, Crocker's testimony was filed two months after the initial application was filed and Staff has noted that there are several deficiencies in the application. Moreover, Crocker did submit numerous turbine layout maps and has requested that a permit be granted on a "site-the-

box" concept. Staff recognizes these issues, coupled with the fact that there is six month statutory timeline for the Commission to issue a final decision, do present challenges in processing this docket. However, Staff cannot take a position as to whether these challenges interfere with the Intervenors' due process rights or whether the Intervenor's opportunity to participate in the proceeding is sufficient to protect their due process right to be heard.

IV. Conclusion

As explained above, Staff disagrees that the Application's failure to comply with the CUP granted by Clark County is grounds for denial of a permit and dismissal at this time. Staff also disagrees that lack of a complete EA or EIS is grounds for denial and dismissal at this time. These are processes that Crocker must complete and comply with before constructing the facility. Crocker has requested a PUC permit and Staff believes the information presented is sufficient for Staff to review the application and take a position on whether the Applicant has met its burden of proof on these issues.

Staff does agree with Movant that the Application does not wholly comply with ARSD 20:10:22:33.02 and is deficient in other areas. But, Staff does not believe the failure to comply with ARSD 20:10:22:33.02 is grounds for immediate denial or dismissal under SDCL 49-41B-13 as these issues can be supplemented and clarified and addressed through discovery, testimony, and cross examination.

Staff takes no position on whether the Application's deficiencies interfere with the Intervenors' due process rights. Staff has been able to participate in the proceeding and does expect to have adequate information to take a position on the granting or denial of the permit at

the conclusion of the evidentiary hearing. However, Staff cannot speak for whether the Intervenors' due process rights have been violated.

Staff also notes that the Motion does not specify whether it applies to the entirety of the Application, or merely the wind siting portion. Notably, ARSD 20:10:22:33.02 does not apply to the permitting of the electric transmission line. In the event that the Commission grants the motion with respect to the wind farm permit, Applicant has the ability pursuant to SDCL 49-41B-22.1 to reapply for a permit. Because the timeline for processing the transmission line permit is different from that of a wind farm, Applicant may well prefer to maintain that portion of the Application.

Dated this 20th Day of October, 2017.

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