

**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**

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**STAFF’S RESPONSE TO CROCKER
WIND FARM’S MOTION TO
RECONSIDER**

EL17-028

COMES NOW the Public Utilities Commission Staff (“Staff”) and hereby files this Response to Crocker Wind Farm’s Motion to Reconsider.

Background

On November 9, 2017, Crocker Wind Farm LLC. (“Crocker” or “Movant”) filed with the Public Utilities Commission (“Commission”), a Motion to Reconsider stemming from the Commission’s November 1, 2017 order Denying and Dismissing Crocker’s Application for a Wind Energy Facility Permit. Specifically, Movant requests the Commission reconsider the November 1, 2017 decision, amend or rescind the order, accept Movant’s waiver of ARSD 20:10:22:33.02(1) with a final Commission decision on the Application extended until May 15, 2018, and adopting a procedural schedule outlined in the motion. With the Motion, Movant filed a single proposed tower layout in compliance with the Clark County Conditional Use Permit’s ¾ mile setbacks along with information that supplements the initial application. Additionally, Movant waives its statutory right to a Commission decision in six months.

Analysis

I. Reconsideration of the November 1, 2017, Order would be appropriate in this case.

ARSD 20:10:01:29 does permit a party to apply for reconsideration on any matter determined by the Commission and specifies that the Commission may grant reconsideration if there appears to be a sufficient reason. Specifically, ARSD 20:10:01:30.01 provides that an application for reconsideration may be based upon consequences resulting from compliance with the order, newly discovered evidence, or facts and circumstances arising subsequent to the hearing.

In this case, the Commission Order specified that application failed generally in the form and content required under ARSD 20:10:22:33.02 by including numerous turbine configurations and due to uncertainty surrounding the programmatic agreement between the U.S. Fish & Wildlife Service and Crocker regarding location of turbines on grassland easements. In response, Movant filed with the Motion information that both supplements the completeness of the initial application and addresses many of Staff's concerns with the application.

Specifically, on November 9, 2017 Movant filed a new map with one turbine configuration which also complies with the setback requirement imposed by the county Conditional Use Permit and filed responses to Staff's data requests, providing a more complete application. Additionally, the new configuration does remove a number of turbines from grassland areas, minimizing concerns with the uncertainty surrounding the federal easement process.

Staff believes at this time Movant has substantially complied with the application requirements and has provided ample information for Staff to process the docket. As Staff indicated in its response to Intervenors Motion to Deny and Dismiss, Staff is not concerned that a grassland easement agreement is not finalized between Movant and the US Fish & Wildlife

Service. Staff considers that a separate process, in addition to the PUC permit process, that must be completed before any turbine is constructed in the grassland easement. Any remaining concerns can be addressed through additional discovery, the evidentiary hearing, and conditions on any permit granted.

II. Staff does not agree that Movant can unilaterally waive the six month deadline for the Commission to issue a decision.

Movant requests the Commission accepts its waiver of the application of ARSD 20:10:22:33.02(1) and extend the deadline for the Commission to issue a decision until May 15, 2017. Movant cites numerous authorities regarding the ability to waive rights afforded by statute, however Movant's argument rests on the assumption that the protections of SDCL 49-41B-25 are only for the Applicant and Movant alone can waive the six-month deadline. Staff agrees that the Commission can grant a request of a waiver of deadline for permit applications. The Commission granted a similar waiver of a time deadline in docket EL05-023. However, Staff notes in that docket, the applicant and Staff were the only two parties involved and both agreed to the waiver.

Staff agrees that the time limit does provide a benefit of a quick decision for the applicant, but Staff is not convinced that the time deadline is for the sole benefit of the applicant. The Commission Staff and the Intervenors may also receive benefit from the time deadline as it ensures that permit applications are acted on quickly and do not continue for an unknown amount of time. Because it is not clear that Movant receives the sole benefit of the six-month deadline, Staff is not convinced that Movant may unilaterally waive the deadline. If the Commission were to approve a waiver, Staff believes it would be most appropriate for all parties to agree to the waiver.

If the Commission reconsiders the order and Crocker Wind Farm's application moves forward in this docket, Staff is agreeable to waiving the six-month deadline.

III. If the Commission grants Movant's requests, Staff recommends complying with notice requirements associated with an application for a facility permit.

Should the Commission grant Movant's request for reconsideration and approve a waiver of ARSD 20:10:22:33:02(01), allowing the Movant to supplement its initial application or file a full amended application in the Docket at hand, Staff does not have any major objection to Movant's proposed schedule. The proposed schedule appears reasonable and allows five full months to process the docket before a decision must be issued. However, Staff does note that the proposed schedule does not include a Public Input Hearing date or other statutory notice requirements associated with the filing of an application for a facility permit. Based on Movant's motion, it appears it is Movant's position that these notice requirements are unnecessary.

Staff notes that the notice requirements are required upon the filing of an application and are statutory and not waivable by the parties. ARSD 20:10:22:04 does specifically allow amendments to the application, however the statutes do not address whether notice is required upon amendment to the application. In Docket EL13-028, the Commission did require additional notice be provided and an additional public input hearing be held when the applicant amended the route of the project. In that case, the change to the route did result in additional affected landowners. Although the changes made to the application do not wholly change the project and do not necessarily affect additional landowners, the changes are significant. Additionally, the law does not prohibit publishing additional notice in the newspaper or holding additional public input hearings. As such, if the Commission does grant Movant's request for reconsideration and the waiver of the six-month deadline for a decision, Staff recommends the Commission hold an additional public input hearing and publish additional newspaper notice of the public input hearing and the project.

Dated this 29th Day of November, 2017.

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