

**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**

EL 17-055

**CROCKER WIND FARM, LLC'S
EXEMPTION REQUEST AND REQUEST
FOR MODIFICATION OF ESCROW
ACCOUNT PLAN AND ESCROW
AGREEMENT**

INTRODUCTION

Crocker Wind Farm, LLC (“Crocker”), submits this Exemption Request and Request for Modification of Escrow Account Plan and Escrow Agreement (“Request”) to the South Dakota Public Utilities Commission (“Commission”) in accordance with Condition Nos. 26 and 37 of the Commission’s Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (“Order”). As set forth in more detail below, this Request is made to avoid duplicative and potentially conflicting decommissioning financial security requirements to the Commission and the U.S. Fish and Wildlife Service (“USFWS”) related to nine turbines constructed on USFWS grassland easements.

BACKGROUND

In accordance with Condition No. 37 of the Order, on July 16, 2018, Crocker filed a plan (“Plan”) with the Commission setting forth a proposed structure and proposed terms for a decommissioning escrow account (the “Escrow Account”). On August 3, 2018, the Commission issued an Order Approving Escrow Plan, in which the Commission approved Crocker’s Plan and set forth certain additional conditions with which the Escrow Account and Escrow Agreement must comply. On November 29, 2018, the Commission issued an order Approving Escrow

Agreement. Thereafter, on December 5, 2018, Crocker entered into the Escrow Agreement, and a copy of said agreement was filed with the Commission on April 30, 2019.

Since that time, Crocker completed construction of the Crocker Wind Farm (“Project”). The Project includes nine wind turbines and associated facilities on parcels on which the USFWS holds grassland easements (the “USFWS Easement Turbines”). The USFWS Easement Turbines are depicted on the maps attached as Exhibit A; a legal description of the underlying parcels (“Turbine Host Parcels”) is included in the Memorandums of Land Lease and Wind Easement attached as Exhibit B.

In connection with authorizing Crocker to develop facilities on the USFWS grassland easements, the USFWS conducted a National Environmental Policy Act (“NEPA”) review, which resulted in the development of an Environmental Assessment (“EA”) and the issuance of a Finding of No Significant Impact (“FONSI”). As a condition of the approval, the USFWS requires Crocker to enter into an easement exchange agreement with the USFWS whereby Crocker has the use of the Turbine Host Parcels for the life of the Project in exchange for providing funds to the USFWS to secure replacement easements.

Currently, the USFWS and Crocker are working on finalizing the easement exchange documentation. Although Crocker initially understood that the USFWS would not require separate decommissioning financial assurance, the USFWS recently informed Crocker that separate decommissioning financial assurance will be required for the USFWS Easement Turbines. The agreement will also contain specific decommissioning requirements for facilities on the Turbine Host Parcels.

Crocker engaged in discussions with the USFWS regarding the possibility of the USFWS being added as a beneficiary to the existing Escrow Agreement. However, the USFWS has

indicated that this proposal is not possible due to some of the unique requirements of USFWS. Instead, consistent with prior agency practices, the USFWS is requiring Crocker to provide a letter of credit to cover decommissioning financial assurance for the USFWS Easement Turbines. Per the letter of credit terms proposed by the USFWS, Crocker will be authorized and intends to name the owners of the Turbine Host Parcels as the primary beneficiaries of the letter of credit, with the United States of America as an additional beneficiary under specified circumstances. The USFWS provided a letter dated May 6, 2022 to accompany this filing, which is attached as Exhibit C.

DISCUSSION

I. REQUEST FOR EXEMPTION.

To avoid duplicate and competing obligations, Crocker submits this Request and asks the Commission to authorize the modification of the Escrow Agreement Plan and Escrow Agreement to remove the USFWS Easement Turbines from the Escrow Agreement. Condition No. 26 of the Order provides that Crocker may submit a written request for exemption from a particular Order condition; “[a] request for exemption shall clearly state which particular condition should not be applied to the property in question and the reason for the requested exemption.” Pursuant to Order Condition No. 26, Crocker requests an exemption from Order Condition No. 37 in so far as it requires a decommissioning escrow account plan covering the USFWS Easement Turbines, as depicted and described on Exhibits A and B. Attached as Exhibit D-1 is an Amended and Restated Escrow Agreement, which reflects Crocker’s requested modifications; Exhibit D-2 is a redline of that agreement showing changes from the Escrow Agreement. With the exception of removing the USFWS Easement Turbines, all other substantive terms of the Escrow Agreement would remain unchanged.

II. REASON FOR REQUEST FOR EXEMPTION.

Crocker makes this request to avoid duplicative and potentially conflicting decommissioning financial assurance requirements to two separate agencies. Although Crocker explored the possibility of adding the USFWS to the existing Plan and Escrow Agreement, that was not workable for the USFWS because of that federal agency's unique requirements. For example, the USFWS indicated it needed to be able to specify a third-party recipient (such as a contractor) to receive decommissioning funds under the Escrow Agreement, as funds received directly by the USFWS must be deposited in the General Fund and then appropriated by the Federal Government to the USFWS for a specified purpose. Further, the USFWS indicated that the funds needed to be available in advance of completing decommissioning activities, which conflicts with Order Condition No. 37 (providing that funds are to be paid out as decommissioning costs are incurred and paid).

Requiring the USFWS Easement Turbines to be subject to both the Escrow Agreement and a USFWS letter of credit would require Crocker to provide duplicative decommissioning financial assurance for the nine turbines and associated facilities at issue. In addition, since the two forms of financial assurance would be wholly separate obligations subject to the separate oversight of two different agencies, there is the risk that Crocker would be subject to conflicting requirements as between the Commission and the USFWS. Further, there is the potential for both forms of decommissioning financial assurance to be drawn on for the same decommissioning obligations.

To avoid these issues, Crocker requests that the Commission allow the removal of the USFWS Easement Turbines from the Escrow Agreement. Crocker's decommissioning obligations with respect to the USFWS Easement Turbines will still be ensured (and the underlying landowners, as the primary beneficiaries, will be protected) through the USFWS

letter of credit. To verify the USFWS Easement Turbines are subject to decommissioning financial assurance, Crocker would not execute the proposed Amended and Restated Escrow Agreement until it has secured and filed a copy of the USFWS letter of credit with the Commission.

CONCLUSION

For the reasons set forth above, Crocker respectfully requests that the Commission grant its Request and authorize execution of the proposed Amended and Restated Escrow Agreement upon filing with the Commission a copy of the USFWS letter of credit for the USFWS Easement Turbines.

Dated: May 23, 2022

CROCKER WIND FARM, LLC

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