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	**EL17-055** **CROCKER WIND FARM, LLC'S DECOMMISSIONING ESCROW ACCOUNT PLAN**

INTRODUCTION

Crocker Wind Farm, LLC ("Crocker"), submits this Decommissioning Escrow Account Plan ("Plan") to the South Dakota Public Utilities Commission ("Commission") in accordance with Condition No. 37 of the Commission's Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry ("Order"). In this filing, Crocker identifies the components of its Plan, including the terms of the escrow agreement, to meet the Commission's Order and the steps Crocker will take upon Commission approval of such Plan.

DISCUSSION

I. PLAN OVERVIEW.

Crocker's Plan for an escrow account includes the following structure and agreement terms:[1]

1. Parties.

In accordance with the Commission's Order, Crocker would enter into an escrow agreement ("Agreement") with a financial institution ("Financial Institution") that is able to

[1] Because the elements of the Commission's Order with respect to an escrow agreement are atypical, Crocker anticipates that the specific and detailed terms of the escrow agreement will be dictated by or subject to considerable negotiation with the financial institution that will ultimately agree to serve as the escrow agent.

administer the escrow account and is willing to enter into an agreement that complies with the Commission's Order. Crocker and the Financial Institution would be parties to the Agreement. The Commission would be named as a third party beneficiary and, in addition to the parties thereto, would be allowed to enforce the Agreement.

The Agreement would include terms requiring that, prior to any assignment or transfer of the Agreement by a party thereto, the prior written consent of the other party and the prior written approval of the Commission would be required. The Agreement would be binding upon the successors, transferees, and assigns of the parties thereto.

2. Term.

The Agreement would remain in effect until decommissioning activities were completed or until terminated by Commission Order.

3. Funding.

Crocker would fund the account at $5,000 per turbine annually for a period of 30 years, with Crocker's initial deposit of $5,000 per turbine being made prior to the start of construction on the Project unless otherwise ordered by the Commission.

4. Administration of Account.

The Financial Institution would control the account, and no distribution, transfer, withdrawal, or release of funds from the account would occur, except as expressly authorized in the Agreement. The Financial Institution would invest the escrowed funds in an interest-bearing demand deposit account or in short term money market funds that invest primarily in short-term readily marketable direct obligations of the government of the United States or any agency or instrumentality thereof. All interest earned by the funds would remain in the account until disbursed in accordance with the Agreement. The Financial Institution would provide regular account statements to Crocker, and Crocker would provide the Commission with an account

statement annually. Crocker would be responsible for any taxes related to interest earned on the funds in the account.

5. Disbursement of Funds.

Upon termination of the Agreement, the establishment of a different form of decommissioning security per Commission order, the completion of decommissioning activities, or the failure of Crocker to complete decommissioning activities, the Commission would provide written instruction to the Financial Institution that: (a) the funds should be paid to Crocker; or (b) the Commission has received notice of complaints from landowners that decommissioning activities had not been completed. If the Commission receives landowner complaints, it would notify Crocker of such complaints, and Crocker would have an opportunity to review the complaints and respond. After such opportunity to respond, the Commission would render a decision on the complaint and would have authority to provide the Financial Institution with written direction regarding the disbursement of funds. To the extent there are surplus funds in the account when the Agreement is terminated, those funds would be disbursed to Crocker.

Crocker recognizes that some of this process may be administratively burdensome for the Commission and/or Commission Staff. However, it will be necessary to have an independent third party (that is not Crocker) issue instructions to the Financial Institution, and Crocker has been unable to identify an appropriate third party other than the Commission to serve in this role.

6. Unencumbered Funds.

In the Agreement, Crocker would warrant that the funds placed into the escrow account were not subject to creditors' claims and that Crocker would not use the funds as security for any transaction or pledge the funds as an asset on any application to obtain credit or to obtain any property.

With respect to bankruptcy, as noted by Commission Staff in its post-hearing brief in the Dakota Range proceeding, it is not possible to guarantee that an escrow account is not subject to bankruptcy.[2] This is due to the nature of an escrow account—the depositor always has some type of contingent or remainder interest in the funds, which prevents Crocker from assuring the Commission that an escrow account would not be subject to adverse impacts resulting from a bankruptcy filing. While the risk appears small, the key potential adverse impact of a bankruptcy filing would be that the escrowed funds would be treated as property of the bankruptcy estate, such that the debtor-in-possession or a trustee could control the funds and use them to, for example, pay other creditors of Crocker. We were unable to find precedent applying South Dakota law to determine whether funds previously escrowed by a debtor would be considered property of the estate in a subsequent bankruptcy filing. Accordingly, we cannot say with certainty that funds deposited by Crocker in a decommissioning escrow account would be protected in the event of a bankruptcy filing by Crocker.

However, if the issue arose and the bankruptcy court followed the majority approach, the escrowed funds would be protected (absent any condition occurring that entitled Crocker, under the terms of the Agreement, to return of the funds). A majority of courts addressing whether funds previously deposited in escrow by a debtor constitute property of the bankruptcy estate have held that (assuming the debtor's right to the funds in escrow has not vested pursuant to the escrow agreement) the funds themselves are *not* property of the estate, and that the estate holds only the contingent remainder interest that the debtor held upon filing pursuant to the escrow agreement (for example, the right to receive excess funds once all required amounts were paid out of escrow). *See, e.g., LTF Real Estate Co., Inc. v. Expert South Tulsa, LLC (In re Expert*

[2] *See* Staff's Post-Hearing Brief, Docket No. EL18-003 (July 2, 2018) at 13-14.

South Tulsa, LLC), 456 B.R. 84, 88 (Bankr. D. Kan. 2011), *aff'd* 619 Fed. Appx. 779 (10th Cir. 2015). Part of the analysis to reach that result, however, requires not only an analysis of the facts and language of the escrow agreement (which alone can introduce some uncertainty as to consistency of results), but also an analysis of a depositor's property interest in escrowed funds under applicable state law. As noted above, it appears that no court has yet addressed this issue applying South Dakota law. In addition, we were unable to locate precedent that gave clear direction regarding more generally how South Dakota law would define a depositor's property interest in funds deposited in escrow. Accordingly, it is possible that, if this issue arose, a court applying South Dakota law may instead follow the minority approach, which—while dependent on the facts and language of the escrow agreement—could result in the court determining that the funds in escrow are property of the estate and thus "reachable" by the debtor or trustee.

To minimize that risk as much as possible, Crocker can apply guidance and facts considered by courts that have held that escrowed funds themselves are not property of the estate. Specifically, Crocker would work with the Financial Institution to structure the Agreement such that the following factors are clearly reflected:

- that Crocker agreed to the creation of the escrow;
- that Crocker exercises no (or the least amount possible of) control over the escrow;
- the initial source of the escrow;
- the nature of the funds put into the escrow;
- the recipient of its remainder (if any);
- the target of all its benefit; and
- the purpose of its creation.

Essentially, the language of the Agreement would make it as clear as possible that Crocker is not entitled to invade, use, or control the escrowed funds while the purpose of the escrow's creation has not yet been fully achieved.

Finally, aside from this key bankruptcy issue, there may be other adverse effects of a bankruptcy filing by Crocker that, depending on the timing and facts, cannot be fully protected against. While such risks also appear to be small, they may include that the deposit of the funds in escrow could be viewed as a preferential transfer, or that the Commission would need to seek relief from the automatic stay in order to access funds in escrow that would otherwise have been accessible absent a bankruptcy filing.

As also noted by Commission Staff in its Dakota Range post-hearing brief, given the lack of ability to provide certainty of protection of the escrowed funds in a bankruptcy situation (due primarily to the nature of an escrow account, the lack of relevant case law applying South Dakota law, and the fact-specific nature of the inquiry), an alternative to an escrow arrangement, such as a letter of credit, may be better able to accomplish the result sought while minimizing or eliminating any bankruptcy risks.[3] Letters of credit are not considered property of the estate (see *American Bank of Martin Cnty. v. Leasing Serv. Corp. (In re Air Conditioning, Inc. of Stuart),* 845 F.2d 293, 296 (11th Cir. 1988); *Kellogg v. Blue Quail Energy, Inc.* (*In re Compton Corp*.), 831 F.2d 586, 589-90 (5th Cir. 1987)), and a beneficiary can draw upon a letter of credit—which is funded by the issuer's funds, not the applicant's—even after a bankruptcy filing by the applicant. Such alternative may provide bankruptcy protections to the Commission and landowners without the administrative burdens on the Commission associated with an escrow

[3] Letters of credit are also typically lower-cost. *E.g.*, Evid. Hrg. Tr. (May 9, 2018) at 107-08 (Fladeboe).

account.[4] Crocker notes that, as discussed at the evidentiary hearing, a surety bond is another potential form of financial security.[5]

II. PLAN COMPLIANCE WITH COMMISSION ORDER.

As set forth in the following table, the Plan complies with Condition No. 37:

Condition No. 37 Requirement	Plan
Funded by turbine owner annually at a rate of $5,000 per turbine for a period of 30 years.	Crocker shall make the required payments to the Escrow Fund.
All interest earned by the account remains in the account.	The Agreement shall include terms to ensure that all earned interest remains in the account (i.e., no distribution, transfer, withdrawal, or release of earned interest from the account would occur, except upon completion of decommissioning requirements and/or termination of the Agreement).
An account statement is provided annually to the Commission and becomes a public record in this docket.	Crocker shall provide an annual account statement to the Commission.
The account follows ownership of the wind turbines.	The escrow obligations are those of Crocker and the Agreement shall include terms providing that the Agreement binds Crocker's successors, transferees, and assigns. Also, a sale of project assets would be expected to include the associated Permit which would require Commission approval per SDCL § 49-41B-29.
The account is not subject to foreclosure, lien, judgment, or bankruptcy.	While Crocker cannot guarantee that the escrow account will not be subject to bankruptcy, Crocker will work with the Financial Institution to structure the Escrow Agreement to minimize the associated risk.
Beginning in year 10 following the beginning of operation and each fifth year thereafter, the turbine owner shall submit to the Commission an estimated decommissioning date, if established, and estimated decommissioning costs and salvage values. Based on the verification of the information in this filing the Commission may change the annual escrow	Crocker shall comply with this obligation and submit the required decommissioning reports.

[4] *See* Staff's Post-Hearing Brief, Docket No. EL18-003 (July 2, 2018) at 13-14.

[5] *E.g.*, Evid. Hrg. Tr. (May 9, 2018) at 107-08 (Fladeboe).

Condition No. 37 Requirement	Plan
funding rate to more closely match the estimated amount needed for decommissioning.	
Account funds are to be paid to the turbine owner at the time of decommissioning to be paid out as decommissioning costs are incurred and paid.	The Agreement will include terms consistent with this requirement.
If the turbine owner fails to execute the decommissioning requirement found in Section 36 of the Conditions, the account is payable to landowners as the landowner incurs and pays decommissioning costs.	The Agreement will include terms consistent with this requirement.

III. PLAN EXECUTION.

Upon Commission approval of this Plan, Crocker will enter into an escrow agreement with a financial institution that will agree to administer the escrow account and carry out the duties and obligations of the Financial Institution as set forth herein. Consistent with Condition No. 37 and the Commission's Order, Crocker will fund the first year of the escrow account prior to commencing construction and will file confirmation of such funding with the Commission.

IV. REQUEST FOR REDUCTION OF 60-DAY FILING REQUIREMENT.

Crocker notes that the Commission's Order requires Crocker to submit this Plan at least 60 days prior to the start of construction. Because the form of escrow funding contemplated by the Commission's Order is atypical, it has taken Crocker longer than initially expected to develop a plan that complies with this Order. Crocker hopes to start construction by early September (September 4) to make full use of this year's remaining construction season to limit the impacts of on landowners. The current plan is to complete roads and foundations this fall so that construction can occur during fall, winter, and spring, which will help to minimize damages to crops. A September 4, 2018 start would avoid any delay in beginning Project operations and

operation payments to landowners.[6] As such, Crocker respectfully requests that the Commission reduce the 60-day filing requirement to 45 days. There is still ample time to discuss this Plan before construction and, given Crocker's commitment (and the Order's requirement) to fund the account prior to construction, Crocker submits that there is no harm or prejudice in varying this timeframe.

CONCLUSION

Crocker submits that its proposed Plan complies with the Commission's Condition No. 37 and provides the protections ordered by the Commission with respect to the decommissioning of the Project. Crocker looks forward to further discussion regarding how best to structure financial assurances related to decommissioning to best protect the Commission and landowners, and also limit administrative burdens on the Commission.

Dated: July 16, 2018

CROCKER WIND FARM, LLC

By: *Lisa M. Agrimonti*

Mollie M. Smith
Lisa M. Agrimonti
FREDRIKSON & BYRON, P.A.
Attorneys for Crocker Wind Farm, LLC
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Phone: (612) 492-7270
Fax: (612) 492-7077
E-mail: msmith@fredlaw.com

AND

[6] *See* Application at § 2.3.1 ("The landowners in the Project footprint will receive payments based on acres in the activated Project Area. Additionally, the landowners who host turbines will receive annual lease payments for each turbine sited on their property.").

Brett Koenecke
Kara C. Semmler
MAYADAM
503 S Pierre St
Pierre SD 57501
Phone: 605-224-8803
E-mail: brett@mayadam.net

64355085