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Patricia Van Gerpen  
SD Public Utilities Commission  
500 E. Capitol  
Pierre, SD 57501

**RE: Application to the South Dakota Public Utilities Commission for a Facility Permit for the Crocker Wind Farm EL17-028**  
**Our file: 7101.01**

Dear Patricia:

Attached for filing in the above referenced docket please find a Motion to Reconsider, a representation of the project layout, location by latitude/longitude and Certificate of Service.

Crocker Wind Farm also submits Answers to Commission Staff Data Requests 1 through 7 for filing and consideration by the Commission. I used the Commission's pdf site for submission of the Data Request Answers due to the size of the various documents. Please note, four documents submitted with Data Request 4 are confidential. The documents were labeled as "confidential."

Please contact me with any questions.

Very truly yours,

MAY, ADAM, GERDES & THOMPSON LLP



BRETT KOENECKE  
KARA SEMMLER

STATE OF SOUTH DAKOTA

BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION ) Docket No. EL17-028  
OF CROCKER WIND FARM FOR A )  
PERMIT OF A WIND ENERGY FACILITY ) MOTION TO RECONSIDER  
AND A 345 kV TRANSMISSION LINE )  
)  
)  
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Pursuant to the Commission's Order dated November 1, 2017, and ARSD 20:10:01:29, Applicant petitions the Commission for a new Order:

1. Reconsidering the Commission's Decision to Dismiss the Application filed in the above captioned docket;
2. Amending or Rescinding the Commission's previous order dated November 1, 2017;
3. Accepting the Applicant's waiver of the application of ARSD 20:10:22:33.02(1), with a final Commission decision on the Application extended until May 15, 2018
4. Adopting a procedural schedule as outlined below

Reconsideration of the Commission's action should be granted because the matters identified in the earlier hearing can be addressed to the satisfaction of the Commission and doing so will promote efficient use of the Commission's and the Parties' resources.

In this filing, Applicant:

1. Offers a single proposed tower layout that is in compliance with the Conditional Use Permit obtained from Clark County (3/4 mile setbacks apply).
2. Accepts the Clark County setbacks as final.
3. Files the Answers to Commission Staff's data requests to date in the Docket.
4. Waives its statutory right to a Commission decision in six months and offers an extended procedural schedule with a final Commission decision on the Application extended until May 15, 2018.

### **Commission Standard for Reconsideration**

Applicant, as a party to this docket, can seek rehearing of the Declaratory Ruling because the PUC has adopted an administrative rule allowing any party to seek rehearing of any matter:

A party to a proceeding before the commission may apply for a rehearing or reconsideration *as to any matter determined by the commission* and specified in the application for the rehearing or reconsideration. The commission may grant reconsideration or rehearing on its own motion or pursuant to a written petition if there appears to be sufficient reason for rehearing or reconsideration.

ARSD 20:10:01:29 (emphasis added).

The administrative rule governing the contents of a petition is ARSD 20:10:01:30.01, which states:

An application for a rehearing or reconsideration shall be made only by written petition by a party to the proceeding. The application shall be filed with the commission within 30 days from the issuance of the commission decision or order. An application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error. An application for rehearing or reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order, shall set forth fully the matters relied upon. The application shall show service on each party to the proceeding.

Invoking ARSD 20:10:01:29 and 20:10:01:30.01, Applicant submits this petition for reconsideration of the Commission's action.

### **Procedural Background**

Crocker Wind Farm, LLC (Crocker or Project) filed its Application for a siting permit for a wind energy facility and transmission line on July 25, 2017. Notice of filing was given pursuant to law by both the Applicant and the Commission. A public input hearing was held on Wednesday, September 13, 2017 at the Clark Elementary School gymnasium in Clark, South Dakota. Many people attended the meeting and provided comments to the Public Utilities Commission. A number of persons chose to seek intervention in the docket and the Commission granted Petitions to Intervene. Interveners filed a Motion to Deny and Dismiss the Wind Farm Application filed

by Crocker. The Public Utilities Commission held a hearing on the motion on October 25<sup>th</sup> and granted it the same day. The Order granting the motion is dated November 1, 2017.

### **Argument**

1. Dismissing this application requires all parties to recreate work which retains significant value and which work should be considered and respected. Applicant intends the consideration of the Project to continue to success. Resubmitting a revised application in a new docket creates issues which can be avoided by waiving the timeliness requirements found in statute, which Applicant can and does waive.

To date, the Applicant and Commission have notified residents of the Application and the hearings in conformity with the law. Those are significant undertakings in and of themselves. Sending hundreds of notices by certified mail, return receipt requested is expensive and time consuming and requires the recipients to sign for the mail and send back the card, which takes their time and resources.

The parties have scheduled and attended a lengthy public hearing in Clark, which consumed preparatory time and attendance time and expense for all. A number of comments were taken and a transcript was prepared. The comments in the original hearing are still applicable because the original hearing included comments on all facilities that are being proposed in this reconsideration with the difference being that many of the concerns raised in the hearing have been addressed with the removal of some turbine locations from the application. New comments offered in writing are accepted in the docket regardless.

The intervenors would need to reapply for their party status at some level of inconvenience and expense as well. The intervention process takes time although a potential party can still prepare for discovery and hearings while awaiting action on his petition to intervene.

The Applicant has already filed testimony which admittedly needs some revisions as a result of the actions taken by Applicant and described in this Petition. Perhaps more importantly, Commission Staff is thought to have prepared testimony as well which was not yet filed.

The protections found in SDCL 49-41B-25 are for the Applicant to ensure that its application docket is acted upon in a timely manner. It's worthy to note that the Commission itself offered the six-month timeline to the 2005 Legislature in Senate Bill 17.

Parties can and do waive statutory and constitutional rights frequently. Criminal defendants frequently waive constitutional rights against self-incrimination and for access to counsel, and they also waive statutory entitlements to have criminal matters disposed by the Courts within 180 days. People waive rights for the same reasons of convenience and economy as found here.

A waiver is voluntary and intentional relinquishment of a known right, claim or privilege. 28 AmJur 197. The doctrine of waiver is applicable where one in possession of any right, whether conferred by law or contract, and with full knowledge of the material facts, does or forebears doing something inconsistent with exercise of the right. *SubSurfco, Inc. v. B-Y Water Dist*, 337 N.W.2d 448, appeal after remand, 369 N.W.2d 129. The three requirements or elements necessary to establish an effective waiver are an existing right, knowledge of the right and actual intention to relinquish the right. Waiver is an act of understanding that presupposes that a party has knowledge of its rights but chooses not to assert them. 28 AmJur 202. Waiver requires a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right. *Culhane v. Michels*, 615 N.W.2d 580, 2000 SD 101. There can be no waiver unless so intended by one party and so understood by the other. *McCroden v. Case*, 602N.W.2d 58, 1999 SD 143.

The doctrine of waiver from its nature applies ordinarily to all rights or privileges to which a person is legally entitled. While a person may waive an advantage of law intended for his or her benefit the doctrine of waiver does not apply to transactions that are forbidden by statute, violate the public's interest or contrary to public policy that infringe upon the rights of others. 28 AmJur 210. As a general proposition, rights guaranteed by the state or federal constitution may be waived. 28 AmJur213.

Parties can waive statutory rights and protections in both substantive and procedural manners. Statutory rights may be waived. 28 AmJur 214. Examples of statutory rights that maybe waived include the right of a creditor to written notice from the surety to sue the principle in order to discharge the surety, the rights of stockholders to notice of corporate meetings, statutory requirements to protect shareholders, and statutory time limits. 28 AmJur215. A waiver has been sustained with respect and notice of an application for the appointment or receiver, for timely refileing of a referee's report, for the right to findings of fact, for splitting a cause of action, for the failure to exhaust administrative remedies before bringing a title 7 action and for timely

rendition of judgment by a justice of peace. Rules of Court may be waived by the party benefitted by the rule. 28 AmJur 218.

The six-month requirement for the PUC to act on a wind farm siting application is a legislative enactment. SDCL 49-41B-25. The statute is silent on the question of waiver. Our Supreme Court has refused to supply such language against waiver. "Finding no language within the statutory framework precluding the possibility of waiving the furnishing of a disclosure statement, we refuse to supply omitted language to achieve such result. Therefore, we conclude that under the statutory framework, waiver is not precluded. However, this does not end the inquiry. In order to decide whether waiver is allowable, we must determine whether private or public interests are at issue. "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Loughrin v. Superior Court, 15 Cal.App.4th 1188, 1193, 19 Cal.Rptr.2d 161, 163 (1993) (quoting Cal. Civ.Code § 3513 (West 1998)). See also, Tunkl v. Regents of University of California, 60 Cal.2d 92, 32 Cal.Rptr. 33, 39, 383 P.2d 441 (1963). See also, Kobbeman v. Oleson, 1998 SD 20, ¶ 22, 574 N.W.2d 633, 640 (concluding statute of limitations could not be waived because of the combined private and public interests involved)." Lucero v. VanWie, 1999 SD 109, 598 NW2d 893.

Applicant can identify no prejudice to the other parties from its waiver of the rule. The proposals in this Petition meet the objections of the intervenors as squarely as can be done. The proposed timeline found below gives all parties more time to react and respond to the proposal. The rights of the intervenors are not diminished in any way by the waiver and extension of timelines. The filing of a completely new application for the Project would cost all parties including the other parties more money and create more inconvenience.

2. The applicant has submitted one revised layout and the revised layout attached is the only one for which applicant seeks consideration.

As outlined in the July application, the Project will be up to 400 MW. The newly offered layout containing 132 turbine locations complies with the Clark County Conditional Use Permit setbacks, and proposes 15 turbines on U.S. Fish and Wildlife Service (USFWS) managed grassland easements. The prior layout proposed 41 turbine locations on grassland easements and the Applicant unilaterally chose to remove 26 . Should the USFWS find any of the remaining 15

locations unacceptable, the unacceptable location(s) will not be constructed and will not be relocated.

While some tower locations may not be constructed, none will be added. Applicant intends to introduce evidence at hearing intended to lead to the Commission granting a condition allowing non-material shifts in turbine locations of less than 325' without further Commission action. It is understood by the Applicant that associated facilities (collection and access roads) will qualify as non-material shifts as well. In summary, the proposed tower locations will not change materially as a result of post permit planning or construction without commission approval.

Applicant submitted four layouts previously, intending to have essentially one set of locations with four potential tower configurations. Staff has reported to Applicant that overlaying the four layouts resulted in some confusion over the locations. The submitted layout of 132 turbine locations in this Petition is intended by Applicant to be the sole pictographic representation of potential tower locations, no matter the turbine selected for the Project. The submitted GPS coordinates are represented on the layout and no other locations are under consideration. Note the turbine numbers are not sequential.

Applicant does require some ability to react to unanticipated discoveries of conditions at each location. Applicant intends to introduce testimony at hearing which indicates that a unilateral ability to shift a tower location up to 325' in any direction is required in order to proceed with construction. More flexibility is desirable but 325' is required. Discoveries from excavation could occur in the project area. If construction crews are held up awaiting commission action, unanticipated and unreasonable expense could be incurred as a result. All non-material shifts will comply with state and county setback rules.

Applicant does need the Commission to consider the potential use of different turbine models and the Applicant asserts that any differences between them will not create difficulties for any of the parties.

This is due to the fact that the information and effects on the surrounding area from each of the four turbines under consideration are not materially different from one to the other, and each turbine configuration complies fully or will comply fully with all Commission rules and Clark County determinations with respect to setbacks, noise and other parameters.

In addition, the Applicant would be economically harmed and prejudiced from a Commission action requiring the use of only one of the four. The Project has not yet signed a turbine supply agreement to guarantee a specific turbine. Most, if not all, wind farm projects will not have a signed turbine supply agreement prior to submitting an application to the SD PUC. Signing a turbine supply agreement is the largest financial commitment of a project and in most cases financing to enable the signing of such a contract is not committed prior to having the state permit. Applicant intends to let bids for turbines and seek advantageous pricing from the vendors. Regulatory selection of a turbine model will serve only the interests of a single vendor to the detriment of the applicant and the others.

3. The Applicant has filed all the Staff Data Request answers in the Docket. Some are filed confidentially to protect trade secret information which belongs to non-party manufacturers.

Given these facts and circumstances and arguments, Applicant requests that the Commission reconsider its previous order, reinstate the docket, and establish a new schedule along these suggestions:

Applicant file all necessary revisions to Application and Testimony by December 15.  
Reopen interventions and act as necessary and appropriate on any by December 28.  
Intervenors and Staff file testimony by March 1.  
Applicant file rebuttal by March 20.  
Discovery Deadline April 1.  
Hearing in April.  
Decision and Order by May 15.

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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

|  |   |                               |
|--|---|-------------------------------|
| <b>IN THE MATTER OF THE</b>            | ) |                               |
| <b>APPLICATION TO THE SOUTH DAKOTA</b> | ) | <b>EL17-028</b>               |
| <b>PUBLIC UTILITIES COMMISSION</b>     | ) |                               |
| <b>FOR A FACILITY PERMIT FOR THE</b>   | ) | <b>CERTIFICATE OF SERVICE</b> |
| <b>CROCKER WIND FARM</b>               | ) |                               |

9 Kara C. Semmler of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 9 day of November, 2017, she served electronically, a true and correct copy of the Applicant's Motion to Reconsider on following:

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