

**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 ESCROW
PLAN
EL17-055**

Staff has reviewed the escrow plan submitted by Crocker on July 16, 2016. Upon review of the plan, Staff has the following comments.

1. Staff recommends that the escrow agreement, when drafted, be submitted to the Commission for its approval prior to commencement of construction activities.
2. Staff requests the financial institution with whom the escrow account is established be located in South Dakota and the agreement be governed by the laws of this state. This is preferable not only from a legal prospective, but it also protects potential claimants from the risk of having to obtain out of state counsel.
3. Staff recommends it be clarified in the order approving any plan that the thirty-year time period is consecutive and begins on year one of construction. However, Staff notes that if the Project is constructed in phases as buyers for the power are determined, the amount in the account may be different at year thirty than anticipated.
4. Crocker or any future owner of the Project should be responsible for the payment of taxes incurred on the interest in the account. Staff notes that this statement does not trump any federal law on who is legally liable to the Internal Revenue Service. This should only be an issue if the escrow is an interest-bearing account.
5. Staff agrees with Crocker’s statements on bankruptcy.

Staff does not take a position on granting Crocker the requested relief from the requirement of filing the plan sixty days in advance of construction. The applicable statute is SDCL 15-6-60(b)(6). The Court has held that relief from an order is warranted only in exceptional circumstances. *In re Ibanez*, 2013 SD 45, ¶ 35, 834 NW2d 306, 316. Historically,

Courts have strongly emphasized that this statute is to be used sparingly so as not to circumvent a parties' right to appeal. See Eighth Circuit example *Woods Bros. Const. Co. v. Yankton County*, 54 F2d 305 (CCA 8, 1931) (Court noting the sanctity of the final judgment). While it would be preferable for Applicant to have requested relief from the sixty-day requirement prior to missing that deadline based upon its construction schedule, there is likely little to be gained in penalizing them at this point. However, Staff does have great concerns if Applicant were to be dilatory in securing timely approval for the public liaison.

CONCLUSION

Staff reviewed the decommissioning plan for compliance with the order and believes it generally complies with Condition 37, except to the extent that it does not provide guaranteed protection from bankruptcy. Staff also recommends the Applicant supplement its filing addressing staff comments (1) through (4) prior to the start of construction.

Dated this 19th day of July 2018.



Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us