
STAFF MEMORANDUM SUPPORTING REVISED SETTLEMENT STIPULATION

TO: COMMISSIONERS AND ADVISORS
FROM: AMANDA REISS, DARREN KEARNEY, AND JON THURBER
RE: DOCKET EL18-059 – IN THE MATTER OF THE APPLICATION OF LOOKOUT SOLAR PARK I, LLC FOR A PERMIT OF A ENERGY FACILITY IN OGLALA LAKOTA COUNTY
DATE: JANUARY 21, 2020

Commission Staff (Staff) submits this Memorandum in support of the Revised Settlement Stipulation in the above-captioned matter.

BACKGROUND

On December 17, 2018, the South Dakota Public Utilities Commission (Commission) received an Application for an Energy Facility Permit (Application) from Lookout Solar Park I, LLC (Lookout Solar or Applicant). Lookout Solar proposes to construct and operate a 110-megawatt (MW) solar generation facility to be located in Oglala Lakota County, South Dakota, known as the Lookout Solar Project (Project). The Project is located approximately 22 miles east of Buffalo Gap, South Dakota, on 810 acres of privately owned land in Township 41 North, Range 48 West, Section 36 and the southern portion of Section 35 on individually-owned Indian trust land on the Pine Ridge Reservation (Project Area). The Project includes up to 500,000 solar panels, an energy storage facility, access roads, underground 34.5 kilovolt (kV) electrical collector lines, an underground fiber-optic cable, a collection substation, an operations and maintenance facility, and temporary construction areas. The Project would interconnect to the high-voltage transmission lines owned by the Western Area Power Administration (WAPA) near Cottonwood Cutoff. The Project is expected to be in-service by the second quarter of 2021. Applicant estimates the total construction cost to be \$100 million.

On December 20, 2018, the Commission electronically transmitted notice of the Petition and the intervention deadline of February 15, 2019, to interested individuals and entities on the Commission's PUC Weekly Filings electronic listserv. On December 26, 2019, the Commission issued a Notice of Application; Order for and Notice of Public Input Hearing; Notice of Opportunity to Apply for Party Status. On January 4, 2019, the Commission issued its Order Assessing Filing Fee; Order Authorizing Executive Director to Enter into Consulting Contract. On February 6, 2019, the Commission held a Public Input Hearing in Hermosa, South Dakota. No applications for Party Status were received by the Commission. On July 1, 2019, the Commission issued an Order Granting Local Review Committee's Request to Hire Consultant. On November 1, 2019, the Final Report of the Local Review Committee was filed with the Commission. On December 2, 2019, the Commission issued an Order Granting Motion to Extend Deadline for Commission Action pursuant to SDCL 49-41 B-24.1 by two months to February 17, 2020. On December 9, 2019, Staff and Lookout Solar filed a Joint Motion for Approval of Settlement Stipulation.

On January 21, 2020, Staff and Lookout Solar filed a Joint Motion for Approval of Revised Settlement Stipulation (Revised Stipulation). The Revised Stipulation addresses the concerns raised by Commissioners regarding the Settlement Stipulation at the December 10 commission meeting and incorporates some small grammatical changes.

STAFF'S ANALYSIS AND SETTLEMENT RESOLUTIONS

Staff reviewed the contents of the Application as it relates to the Energy Facility Siting statutes, SDCL Chapter 49-41B, and Energy Facility Siting Rules, ARSD Chapter 20:10:22. Staff then identified information required by statute or rule that was either missing from the Application or unclear within the Application and requested Lookout Solar to provide or clarify that information.

For approval, pursuant to SDCL 49-41B-22, Lookout Solar must show that:

- (1) The facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government.

Lookout Solar and Staff (jointly the Parties) positions were discussed thoroughly at several settlement discussions. As a result, some Party positions were modified and others were accepted where consensus was found. The Parties ultimately agreed that the permit should be granted with 37 conditions on the construction, operation, or maintenance of the facility.

APPLICATION TIMELINE

Within seven months after the application is filed, the Local Review Committee is required to file a final report with the Public Utilities Commission which includes the recommendations of the committee as to mitigation measures and minority reports (SDCL 49-41B-10). The Local Review Committee final report was filed on November 1, 2019, over three months past the statutory deadline. After Staff considered the Local Review Committee's findings and recommendations, Commission Staff provided Lookout Solar with a draft settlement proposal on November 22, 2019, roughly 20 days after the report was provided. The delay in the Local Review Committee report impacted the timeframe in which this docket could be processed.

ADDITIONAL PERMITS

The Project must comply with federal, state, and local laws requiring permits. In response to Staff discovery request 2-1 provided on March 21, 2019, the Applicant updated its anticipated construction start date from December 2019 to the Spring 2020. In response to Staff's third set of discovery requests provided on November 19, 2019, the Applicant provide an updated timeline for the following permits:

- Oglala Sioux Tribe ordinance – currently in discussions;
- Southwest Power Pool Definitive Interconnection System Impact Study – Phase I of the DISIS in Spring of 2020; and
- Oglala Sioux Tribal Business License – currently in discussions.

In addition, the Applicant is awaiting the following approvals before constructing the facility:

- U.S. Bureau of Indian Affairs (BIA) Lease Approval – pending, waiting for signatures; and
- WAPA Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) – pending, anticipated in January.

SITE-SPECIFIC FACTS TO CONSIDER

While this Application is the first solar energy facility the Commission has considered for siting, there are some site-specific considerations that make this Application unique and should not be considered as a precedent for future solar energy facility filings. First, the Project is located on individually-owned Indian trust land on the Pine Ridge Indian Reservation. The BIA has jurisdiction over trust land, and the lease between the Applicant and the landowner must be approved by the BIA. The federal BIA regulations, set forth in 25 CFR Subpart E (Wind and Solar Resource Leases), provides an additional layer of oversight for this Project.

In addition, the Project is located in rural South Dakota with few residences located nearby. In response to Commission Staff data request 3-5, the closest residence, the Rapp Ranch, is located approximately 1.25 miles from the solar array. There are two other residences located approximately 1.5 miles from the solar array. The construction of the Project would convert grazing land to a solar energy facility, and the surrounding area is primarily pastureland. As such, the impact of the solar energy facility to land use is low, and the Revised Stipulation did not include conditions regarding land use that may be necessary for other solar energy facility locations.

Finally, the Project was required to complete two EAs and receive the associated FONSI at the federal level. One EA was completed as a result of the solar easement being subject to BIA jurisdiction, and the second EA was completed as a result of the Project interconnecting with a WAPA transmission line.

DECOMMISSIONING

Lookout Solar discusses its decommissioning policy and decommissioning cost estimate in Section 23.0 of the Application. Lookout Solar submitted a detailed engineering analysis in response to Staff discovery request 3-5 to support the decommissioning cost estimate of \$1,414,331 (Attachment A).

In addition to the decommissioning commitments made through the Application and responses to Staff discovery, the Applicant also has decommissioning obligations pursuant to the lease with the landowners. The applicable section of the lease is provided below:

7.4 Lessee's Obligation to Restore the Leased Property. Lessee shall do the following with respect to any portions of the Leased Property disturbed by Lessee in the course of Solar Development Operations: (a) within six (6) months after completion of construction of Lessee's Energy Facilities, Lessee shall restore the surface of such portions of the Leased Property to a condition reasonably similar to its condition as of the Effective Date, except for any parts of the Leased Property that Lessee determines it needs for continuing Solar Development Operations and (b) within twelve (12) months after the expiration, surrender or termination of this Lease, Lessee shall (i) remove from the surface of such portions of the Leased Property any Energy Facilities owned or installed by Lessee thereon and (ii) restore the surface of such portions of the Leased Property to a condition reasonably similar to its condition as of the Effective Date, as reasonably approved by the Bureau of Indian Affairs; provided, however, that with regard to any Energy Facilities located beneath the surface of the Leased Property, including footings and foundations, Lessee shall only be required to remove the same to a depth of four (4) feet below the surface. Lessee shall have a continuing easement to enter the Leased Property for such purpose during such twelve (12) month period. The Parties agree that the scrap value of the Energy Facilities is likely to exceed the cost of demolition

and restoration required under this Section 7.4, and the Lessor therefore waives any requirement or obligation of the Lessee to provide a bond or other security. (emphasis added)

The Applicant asserts that it is subject to BIA regulations governing solar leases under 25 CFR § 162. Section 162.559 states a lessee must provide a performance bond or alternative form of security, except as provided in paragraph (f) of the section. Paragraph (f) of the section states that the BIA may waive the requirement for a performance bond or alternative form of security if the Indian landowners request it and the BIA determines a waiver is in the Indian landowners' best interest. According to the Applicant, the landowners requested that the performance bond requirement be waived, and the BIA has verbally agreed to waive it. Since the Applicant and the landowner has not received BIA's signed approval, Staff incorporated the following condition into the Settlement Agreement:

Applicant shall comply with any performance bond or other decommissioning requirement the U.S. Bureau of Indian Affairs imposes.

Staff had concerns about the lease language stating that the scrap value of the facility is likely to exceed the cost of demolition and restoration when the current decommissioning cost estimate is approximately \$1,400,000. In order to ensure the landowner was aware of the change in cost estimate, Staff requested that the Applicant have the landowners review the Dismantling Analysis Report and provide an affidavit indicating that the landowners still desires to waive the bonding requirement. Please see Attachment B for the signed affidavit.

In this specific case, Staff believes that additional decommissioning security is unnecessary because this Project impacts one family of landowners (which have provided feedback through the Application), and the BIA is responsible for approving the removal of the facility and restoration of the land pursuant to the lease.

RECOMMENDATION

Staff recommends the Commission grant the Joint Motion for Approval of Revised Settlement Stipulation and adopt the Revised Stipulation without modification.