BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF CROWNED RIDGE WIND, LLC FOR A PERMIT OF A WIND ENERGY FACILITY IN GRANT AND CODINGTON COUNTIES	* * * * * * * *	**STAFF'S POST HEARING BRIEF** **EL19-003**

The Commission Staff, by and through its attorneys of record, hereby files this post-hearing brief in the above-captioned siting proceeding:

I. Preliminary Statement.

For purposes of this brief, the South Dakota Public Utilities Commission shall be referred to as the "Commission"; Commission Staff is referred to as "Staff"; Crowned Ridge Wind, LLC is referred to as "Crowned Ridge" or "Applicant." Reference to the transcript of the Evidentiary Hearing will be "EH", followed by the appropriate page number, and prefiled testimony that was accepted into the record will be referred to by its exhibit and page number.

II. Jurisdictional Statement.

The Applicant filed for a permit to construct a wind energy facility. The Commission has jurisdiction over siting permits for wind energy facilities pursuant to SDCL Chapter 49-41B. SDCL 49-41B-25 requires the Commission to make "complete findings" in rendering a decision on whether the permit should be granted, denied, or granted with conditions within six months of receipt of the initial application for a wind energy facility.

III. Statement of the Case and Facts.

On January 30, 2019, Crowned Ridge filed an application for a siting permit, pursuant to SDCL 49-41B-4, to construct the Crowned Ridge Wind Farm (Project), a wind energy conversion facility to be located on approximately 53,186 acres of land in Grant County and Codington Counties, in the townships of Waverly, Rauville, Leola, Germantown, Troy, Stockholm, Twin Brooks, and Mazeppa, South Dakota. The total installed capacity of the Project would be approximately 300 megawatts (MW) of nameplate capacity. The proposed Project would include up to 130 wind turbine generators, access roads to turbines and associated facilities, several underground 34.5-kilovolt (kV) electrical collector lines, several underground fiber-optic cables, a 34.5-kV to 345-kV collection substation, one permanent meteorological tower, and an operations and maintenance facility. The Project will utilize the Crowned Ridge 34-mile 230-kV generation tie line and a new reactive power compensation substation to transmit the generation from the Project's collector substation to the Project's point of interconnection located at the Big Stone South 230-kV Substation, which is owned by Otter Tail Power Company. Applicant has executed a power purchase agreement with Northern States Power Company (NSP) to sell NSP the full output of the Project. The Project is expected to be completed in 2020.

Pursuant to ARSD 20:10:22:40, the Commission established a deadline of April 1, 2019, for submission of applications for party status. Five individual landowners timely submitted applications and were granted party status by the Commission. An Evidentiary Hearing was held on June 11 and 12, 2019. Two additional individuals filed for party status on June 13, 2019. The application for party status of those two individuals was denied by the Commission at its June 25, 2019 meeting.

IV. Statement of the Issues.

The principle issue to be decided in this matter is whether, pursuant to SDCL 49-41B and ARSD 20:10:22, the permit requested by the Applicant for a wind energy facility should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation or maintenance as the Commission finds appropriate. Additionally, the Commission must determine whether the Applicant has met its burden of proof with respect to each element of SDCL 49-41B-22 for the requested permit.

V. Factors Applicant Must Establish and Burden of Proof.

SDCL 49-41B-22 provides that the Applicant has the burden of proof to establish that:

> (1) The proposed 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 the views of governing bodies of affected local units of government.

In addition, the administrative rules state that the Applicant "has the burden of going forward with presentation of evidence…" ARSD 20:10:01:15.01. Therefore, the next question is: What standard shall be applied to determine if the Applicant has met its burden of proof? The general standard of proof for administrative hearings is by preponderance, or the greater weight of the evidence. *In re Setliff*, 2002 SD 58, ¶13, 645 NW2d 601, 605. It is erroneous to require a showing by clear and convincing evidence. *Dillinghan v. North Carolina Dept. of Human Resources*, 132 N.C. App. 704, 513 S.E.2d 823 (1999). "Preponderance of the evidence is

defined as the greater weight of evidence." *Pieper v. Pieper*, 2013 SD 98, ¶22, 841 NW2d 787 (citation omitted). Black's Law Dictionary defines preponderance of the evidence as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black's Law Dictionary (10th ed. 2014).

The South Dakota Legislature has clearly indicated that it intended for the Commission to very carefully and thoroughly scrutinize applications for siting permits. This is evidenced by its enactment of SDCL 49-41B-12, which provides for a deposit and a filing fee to investigate, review, process, and notice the application. Because the Legislature established a fee to support the investigation into permit applications, it is apparent that the Legislature intended for an extensive and complete review of the application to be conducted. It would not have done so if it did not expect this to be a significant investigation of the required factors. Such a high bar protects the land and the citizens of this state, as well as adds legitimacy to all permit applications that are granted.

VI. Argument and Analysis.

1. Post-construction Lek Monitoring.

When considering whether a post-construction lek monitoring condition is necessary for the Crowned Ridge project, the Commission must first understand why leks are important to prairie

grouse.[1] Leks are locations where males display to attract females for mating and the same locations are often used year after year. EH 193:7-13, EH 504:23-25, and EH 505:1. Staff's witness, Game, Fish and Parks (GF&P) Director Tom Kirschenmann testified that "leks are a vital component of both sharp-tailed grouse and prairie chicken population" and "they're a key element to the retention and sustainability of populations of grouse." EH 505:1-14. Based on this information, Staff contends that the Commission should be concerned about prairie grouse leks and consider any potential impacts by the construction or operation of wind turbines when making its decision on Crowned Ridge's Application.

Since we know, as the record has clearly shown, that leks are important for maintaining prairie grouse populations, the Commission needs to understand the potential impacts to leks from wind turbine construction and operation. Unfortunately, this important information has yet to be studied and addressed by the scientific community. Crowned Ridge acknowledged this through a response to Staff data request 6-1 stating that "[t]he Applicant is unaware of any empirical per-reviewed [sic] data looking at the effects of wind turbine development on greater prairie-chicken or sharp-tailed grouse activities at lek locations in the Upper Great Plains (including South Dakota, North Dakota, and Minnesota)." Exhibit S6. In addition, both SD GF&P and Crowned Ridge testified that the effect of wind turbines on leks is not well known. EH 198:11-16 and EH 508:2-10.

Because the impacts to prairie grouse are not well known today, there is no evidence in the record demonstrating that wind turbine construction or operations will or will not pose a serious threat of injury to leks and, in turn, to the prairie-grouse population residing in the Coteau des

[1] Prairie grouse is a term that includes sharptail groups, sage grouse, and greater prairie chickens, along with other upland game

Prairies in northeastern South Dakota. It is Staff's position that this lack of information does not mean that the Commission should do nothing regarding leks in this docket. The SD GF&P recommended that Crowned Ridge implement a two-mile buffer from active leks for construction activities taking place in the breeding season, which Crowned Ridge agreed to. EH 197:25 and EH198:1-8. Additionally, the SD GF&P recommends that wind turbines be sited at least one-mile from active leks, which Crowned Ridge did not accept. EH 506:10-18 and EH 196:14-19. By siting wind turbines within one mile from active leks, Crowned Ridge has created an opportunity to study the impacts of wind turbine operations on leks. This opportunity to collect important scientific data is the genesis for the SD GF&P's recommendation for post-construction monitoring of known lek sites.

Unfortunately, Crowned Ridge has taken the position that it is not willing to conduct post-construction lek monitoring. Crowned Ridge instead argues that lek monitoring is not necessary because no active leks were found during the 2017 and 2018 avian use surveys. EH 199:9-18. These surveys were point count surveys and "[t]he purpose of these studies is to characterize the activity, spatial distribution, and relative abundance of diurnal raptors and other large bird species using the study area." Exhibit A1-E. Staff could not find a specific methodology for finding and documenting active leks in the avian use surveys. Further, Mr. Kirschenmann testified that avian use surveys and lek surveys are two different things. EH 534:20-23. Staff does not take issue with the findings of the avian use surveys; however, we do take issue with applying the results of those surveys to conclude active leks are not in the area as implied by Crowned Ridge. Thus, Staff posits that Crowned Ridge's rationale for not conducting post-construction lek monitoring lacks merit. In fact, Figure 6 of Exhibit A1-A and Crowned Ridge's testimony identify that wind turbines are sited at least 0.3 miles from leks which rebuts their own stated position.

Staff's witness Mr. Kirschenmann explained during the evidentiary hearing that there is value in conducting post-construction lek monitoring where that data and information can then be used to inform the Commission and the public regarding future wind farm siting decisions. EH 510:7-25. Not only will the information be helpful for discussions around future projects, but it will also be useful for the Crowned Ridge project. As the Commission is aware, Crowned Ridge is preparing a Wildlife Conservation Strategy (WCS) and Wildlife Response and Reporting System (WRRS) Manual for the project that will be submitted to the Commission prior to construction. EH 201:24-25; EH 202:1 and Exhibit A1, P. 69. It is Staff's understanding that the WCS and WRRS will be implemented for the life of the project. Results of post-construction lek monitoring could easily be incorporated into the WCS and operational adjustments to certain turbines could be detailed in the WCS if the lek monitoring results support making such operational changes. This is not a new concept to Crowned Ridge as they will already be doing something similar for bird and bat mortality, as part of the WRRS. Exhibit A1, P. 69.

Given the feasibility of incorporating post-construction lek monitoring results into the WCS and the value of collecting additional information on wind turbine impacts to leks, the only other argument Crowned Ridge could base its position on (i.e. not requiring post-construction lek monitoring) is cost. Staff acknowledges there will be an additional cost to Crowned Ridge for conducting the lek monitoring survey. However, when Crowned Ridge's environmental expert was asked how much lek monitoring would cost an answer could not be provided. EH 201:10-14. The only evidence in the record on the question of the expected cost for conducting post-construction lek monitoring is from Mr. Kirschenmann who stated that such a study would not be complicated or expensive. EH 509:9-12. Based on this evidence in the record, an argument can

not be made that the cost of requiring the post-construction lek monitoring would be overly burdensome for Crowned Ridge.

Should the Commission find Staff's arguments persuasive, Staff proposes the Commission adopt the following findings of fact in support of requiring post-construction lek monitoring for the project:

1) Prairie grouse leks are the locations at which male prairie grouse make displays to attract females in order to mate. EH 193:7-13. Prairie grouse are known to historically use the same areas for leks year after year. EH 504:23-25, EH 505:1, and EH 193:16-19. Crowned Ridge acknowledges that "sharp-tailed grouse and greater prairie-chicken could be affected by Project development if Project infrastructure disturbs or displaces grouse from leks or areas of preferred habitat (grasslands)." Exhibit S2, P. 430.
2) Crowned Ridge observed several active greater prairie-chicken leks during a spring survey in 2007-2008 and four active leks were recorded during a spring 2016 survey in, or near, an earlier iteration of the Project Area, including two greater prairie-chicken leks and two unknown leks. Exhibit A1, P. 61. The SD GF&P recommended Crowned Ridge place a one-mile buffer around leks when siting and placing infrastructure and that a two-mile buffer should be placed around known leks for construction occurring during the lekking period (March 1 to June 30). Exhibit S2, P. 440. Crowned Ridge agreed to follow the SD GF&P's construction buffer recommendation of 2-miles during the lekking period, however Crowned Ridge elected to use a reduced buffer from project infrastructure and sited wind turbines as close as 0.3 miles from known lek locations. Exhibit S2, P. 440 and Exhibit A1-A, Figure 6, P. 25.

3) Both the SD GF&P and Crowned Ridge wildlife experts testified that the effect of wind turbines on leks is still not well known. EH 198:11-16, EH 508:2-10, and Exhibit S6. In order to gain additional information on the effect of operating wind turbines on leks, to aide with future discussions around cumulative effects of wind energy development on prairie grouse, the SD GF&P recommended 2 years of post-construction grouse lek monitoring of confirmed leks less than 1 mile from proposed turbines. Exhibit S3, P. 20:7-14. Based on this recommendation from the SD GF&P, PUC Staff drafted a proposed condition for Commission consideration. EH 563:19-21 and Exhibit S7.
4) The Commission finds that Crowned Ridge decided to site wind turbines less than 1 mile from known leks and not implement the SD GF&P's recommendation for siting project infrastructure at least 1 mile from known leks. Further, the Commission finds that the effects of wind turbines on prairie grouse leks is still not sufficiently understood. Therefore, in order to add to the scientific knowledge on the impact operating wind turbines may have on prairie grouse leks, if any, the Commission adopts PUC Staff's proposed condition found in Exhibit S7 and incorporates the condition into the conditions attached to this permit.

2. Participating receptor over 30 hours of shadow flicker.

The shadow flicker ordinances for both Codington and Grant Counties limit the maximum number of hours of shadow flicker to thirty hours per year at occupied structures. Exhibit A1, P. 85. Both counties allow the maximum to be exceeded if the landowner has signed a waiver. Exhibit A1, P. 85.

According to Applicant's updated shadow flicker table, one receptor, CR1-C10-P, will experience 36 hours and 59 minutes of shadow flicker per year. Exhibits A67 and A68. This receptor is a participant in Codington County. However, the county ordinance applies to both participants and non-participants. Therefore, Applicant must either mitigate the amount of shadow flicker at this residence or obtain a waiver from the affected landowner and record the waiver with the Codington County Zoning Officer. With respect to this receptor, Staff recommends the following Findings of Fact:

1. Grant and Codington County ordinances limit the amount of shadow flicker at an occupied structure to thirty hours per year unless the landowner has signed a waiver. Exhibit A1, P. 85.
2. Receptor CR1-C10-P is a participating landowner in Codington County. Exhibit A1, P. 85
3. Receptor CR1-C10-P will experience 36 hours and 59 minutes of shadow flicker per year. Exhibit A1, P. 85.
4. Nothing in the record indicates that Receptor CR1-C10-P has signed a waiver.

If the Commission grants a permit to Applicant, Staff recommends that the following condition be attached to the permit:

1. Prior to construction, Applicant shall obtain and file with the Commission and the Codington County Zoning Officer a waiver for any occupied structure which will experience more than thirty hours of shadow flicker per year. If no waiver is obtained, Applicant shall file a mitigation plan with the Commission prior to construction and obtain Commission approval of the mitigation plan.

3. Impacts to intervenors in this project.

Five individuals were granted party status in this docket. The sound and shadow flicker effects for the residences owned by those five individuals are set forth in Exhibit A58. Sound and shadow flicker effects upon some Intervenors were mitigated throughout the processing of this docket by a number of changes to the project layout that were made as a result of cumulative impact analyses, land status changes (such as expired leases), and Staff negotiations. Seven turbines were removed as a result of discussions between Staff and Applicant in an effort to mitigate sound impacts. Those seven turbines became known during the evidentiary hearing as the "Hessler 7" adjustments. The greatest benefactor of the Hessler 7 was Amber Christianson, as the two turbines nearest her residence were dropped. EH 265:3-6. Because of their distance from the project area, Intervenors Kristi Mogen and Allen Robish did not directly benefit from any of the layout changes.

With the project layout as originally filed, the highest sound level at any intervenor's residence is 41.4 dBA, and the highest shadow flicker amount is approximately seven hours per year. See Exhibit A58. With the removal of the Hessler 7 wind turbines, as well as the changes made to account for expired leases and cumulative impacts, the highest sound level was reduced to 38.6 dBA and one of the receptors with seven hours of shadow flicker per year was reduced to zero, while another remained essentially unchanged. Exhibit A58. Finally, after the changes, the closest turbine to an Intervenor's residence would be 4,675 feet. See Exhibit A58.

When Staff's sound witness, David Hessler was cross-examined by Intervenors' attorney, much was made of Mr. Hessler's consistent 40 dBA design goal recommendation to policy

makers. EH 60:11-18. Thus, it is worth noting that with the current layout, the sound level at each Intervenors' residence meets this stated design goal for noise.

Additionally, the following table depicts the Project's direct effects on the Intervenors. In the table, the current layout is referred to as "CL".

Name	Shadow flicker as filed (Hr/yr)	Shadow flicker CL (Hr/yr)	Sound as filed (dBA)	Sound CL (dBA)	Nearest turbine as filed (miles)	Nearest turbine CL (miles)
Allen Robish	0:00	0:00	28.8	29.3	2.4	2.4
Amber Christenson	6:54	6:56	41.4	38.6	0.4	0.9
Kristi Mogen	0:00	0:00	28.6	28.8	2.5	2.5
Melissa and Patrick Lynch	6:58	0:00	40	37.3	0.3	1.2

4. Intervenor involvement in developing permit conditions.

After the Intervenors were given party status, Staff requested in a data request that the Intervenors provide Staff with any proposed condition they would deem appropriate. On or about April 25, 2019, the Intervenors sent Staff a data response which listed 38 proposed conditions for granting of the permit. Exhibit S2, P. 655. Staff requested that the Intervenors provide evidence and support for their conditions in data request 1-3 to Intervenors. *Id*. Staff also passed on to Crowned Ridge and the Commission the Intervenors' proposed conditions through the direct testimony of Darren Kearney. *Id*. Nothing more was proposed, nor was further justification provided, by the Intervenors regarding their conditions.

As is our common practice, Staff sent Applicant an email setting forth the conditions that had been approved for the most recent wind siting permit granted by the Commission. Every single one of these conditions required Crowned Ridge to agree to do something to receive its

permit. The proposed conditions do not require the Intervenors to do anything or release Applicant from any duty as required by law. Only the Applicant can obligate itself to self-impose the proposed conditions. If Crowned Ridge agrees, it is great, but if they refuse a condition, the Intervenors or Staff cannot impose a condition without Commission approval. This is not a give and take discussion as is sometimes had in a civil lawsuit. The Intervenors suffered no prejudice by not being a part of this accepted standard practice.

Finally, the Intervenors were certainly free to contact Applicant to discuss their own desired conditions. To the best of Staff's knowledge, no such attempt was made by the Intervenors.

5. Decommissioning.

While Staff and Applicant agreed to a number of permit conditions, enumerated in Exhibit A-61 (Stipulated Conditions), a condition requiring funding for decommissioning was not one of the agreed upon conditions. Staff contends Applicant should be required to provide funding for decommissioning of the Project if granted a permit. SDCL 49-41B-35(3) authorizes the Commission to adopt rules to require bonds, guarantees, insurance, or other requirements to provide for the funding for decommissioning. See ARSD 20:10:22:33.01, which provides

> The applicant shall provide a plan regarding the action to be taken upon the decommissioning and removal of the wind energy facilities. Estimates of monetary costs and the site condition after decommissioning shall be included in the plan. The commission may require a bond, guarantee, insurance, or other requirement to provide funding for the decommissioning and removal of a wind energy facility. The commission shall consider the size of the facility, the location of the facility, and the financial condition of the applicant when determining whether to require some type of

> funding. The same criteria shall be used to determine the amount of any required funding. (emphasis added)

With the exception of those projects which will be owned and operated by a rate-regulated South Dakota electric utility, every recent wind energy siting permit that has been granted by this Commission has included a requirement that Applicant submit an escrow account to provide for the decommissioning of the proposed Project.[2] It is appropriate and necessary for the Commission to do so in this wind energy siting docket, as well.

The Project includes land in both Codington and Grant Counties. Therefore, as testified to by Staff witness Darren Kearney, deferring to the counties to establish their own decommissioning conditions could very easily result in different decommissioning requirements for different portions of the same Project. EH 553-554. This is certainly not a desirable result.

Furthermore, Staff would submit that any decommissioning security ordered by a body other than the Commission, would *not* be subject to the safeguards afforded in Senate Bill 16 (SB16), of which the Commission has taken judicial notice.[3] SB16 (which took effect on July 1, 2019) provides, in relevant part

> All right and title in any financial security ***required by the commission*** for the decommissioning of wind turbines ***shall be controlled by the commission*** in accordance with the terms of the financial security agreement or instrument ***until the commission by order releases the security***. The financial security of the person required to provide it may not be cancelled, assigned, revoked, disbursed, replaced, or allowed to terminate without commission approval.
>
> The commission may require, accept, hold, or enter into any agreement or instrument for the provision of financial security, including any funds reserved or held by any person to satisfy or

[2] See Docket Nos. EL17-055, *In re Application of Crocker Wind*; EL18-026, *In re Application of Prevailing Wind Park*; EL18-046, *In re Application of Dakota Range III*; and EL18-053, *In re Application of Deuel Harvest Wind*.
[3] https://sdlegislature.gov/docs/legsession/2019/Bills/SB16ENR.pdf

> guarantee the obligation of an owner of wind turbines permitted under this chapter, to decommission and remove the wind turbines. The form, term, and conditions of the financial security ***are subject to the approval of the commission***. The commission shall determine any claim upon the financial security made by any landowner for decommissioning and removal of turbines.
>
> …
>
> In any case, the commission may appear in court and defend the integrity and viability of the financial security for purposes of decommissioning and removal of wind turbines. …
>
> (emphasis added)

It is apparent from the above statute that the protections and rights set forth in the statute only apply to a financial security required by the Commission and which are subject to the approval of the Commission. If the Commission does not approve, control, and, ultimately, release the security, the Commission would also forfeit the bankruptcy protections, and may also lose the right to "appear in court and defend the integrity and viability of the financial security." The Commission should not engage in such a risky proposition.

In the rebuttal testimony of Tyler Wilhelm and Sam Massey, it is stated the Applicant "will engage with Grant and Codington Counties about establishing a uniform escrow account." Exhibit A 44, P. 5. It is unclear from the record whether this has been done or would be done before construction of the Project. Nonetheless, in order to ensure that the financial security for the decommissioning of the Project is adequately protected, the Commission should order its own decommissioning security as a condition of the permit.

At this time, it is Staff's recommendation that the decommissioning security be in the form of an escrow account, similar to those approved for other recent wind facilities permitted by this Commission. While SB16 and ARSD 20:10:22:33.01 do not specify a form of security, recent Commission precedent has been to order an escrow account be established.

For the issue of decommissioning, if a permit is granted, Staff recommends the following Finding of Fact:

1. With respect to financial security for decommissioning, an escrow account is an appropriate financial assurance to cover decommissioning costs.
2. Crowned Ridge agreed to fund an escrow account at $5,000 per turbine per year and enter into an escrow agreement. See Exhibit A1-L, P. 13. However, Crowned Ridge requested that the Commission afford flexibility in a permit condition to approve a uniform escrow agreement if an escrow agreement is required by a county. See Exhibit A44, P. 5.
3. Commission Staff identified that an escrow agreement set up by a county may not include all terms in the escrow agreement the Commission desires and the county agreement is not subject to protections created by a recent change in legislation. Exhibit S2, Page 24, Lines 25-32.
4. The Commission finds that it is in the best interest of the State if the Commission maintains approval, control, and ultimately the release of an escrow agreement. Therefore, the Commission orders a decommissioning escrow account and agreement be established pursuant to the conditions of the Permit.

If a permit is granted, Staff recommends the following condition be placed upon the permit:

1. At least 60 days prior to commencement of commercial operation, Applicant shall file an escrow agreement with the Commission for Commission approval that provides a decommissioning escrow account. The escrow agreement shall incorporate the following requirements:

a) The escrow account is funded by the turbine owner annually at a rate of $5,000 per turbine per year for the first 30 years, commencing no later than the commercial operation date.

b) Beginning in year ten following commercial operation of the project 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 the filing the Commission may determine that funds in escrow are sufficient to cover the costs of decommissioning and that reduced or no additional deposits are required. The Commission also may determine that additional funding is required and may require additional funding equal to the estimated amount needed for decommissioning.

c) All revenues earned by the account shall remain in the account.

d) An account statement shall be provided annually to the Commission and become a public record in this docket.

e) The escrow account obligations will be those of Applicant and the escrow agreement shall include terms providing that the agreement binds Applicant's successors, transferees, and assigns. A sale of project assets shall include the associated Permit that requires Commission approval per SDCL § 49-41B-29.

f) The escrow account agent shall have an office located in South Dakota.

g) The escrow agreement shall be subject to the laws of South Dakota and any disputes regarding the agreement shall be venued in South Dakota.

h) To minimize the risk that the escrow account would be subject to foreclosure, lien, judgment, or bankruptcy, the escrow agreement will be structured to reflect the follow factors:

1) That Applicant agreed to the creation of the escrow account;

2) Applicant exercises no control over the escrow;

3) The initial source of the escrow;

4) The nature of the funds put into the escrow;

5) The recipient of its remainder (if any);

6) The target of all its benefit; and

7) The purpose and its creation.

i) Account funds are to be paid to the project owner at the time of decommissioning, and are to be paid out as decommissioning costs are incurred and paid.

j) If the project owner fails to execute the decommissioning requirement found in this section of the Conditions, the account is payable to the landowners who own the land on which associated project facilities are located as the landowners incur and pays decommissioning costs.

VII. Conclusion.

After the introduction of evidence at the evidentiary hearing, the question before the Commission is: whether it is more likely than not that the Applicant has satisfied each requirement of SDCL 49-41B-22 by a preponderance of the evidence. While there were frustrations throughout the processes regarding the timeliness of updating and filing information, those issues were dealt with in two motions to deny and dismiss and because the motions were denied, are not relevant to the ultimate decision before the Commission.

With the inclusion of the conditions set forth in this brief, the Project will not pose a significant threat to the health, safety, welfare, or orderly development of the region or the environment. Therefore, Staff recommends approval subject to the conditions detailed in Exhibits A61, A63, and S7, as well as the conditions included in this brief.

Respectfully submitted this 2nd day of July 2019.

Kristen Edwards
Mikal Hanson
Amanda Reiss
Staff Attorneys
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201