

MAY ADAM

— Since 1881 —

ROBERT B. ANDERSON
TIMOTHY M. ENGEL
MICHAEL F. SHAW
BRETT KOENECKE
JUSTIN L. BELL
DOUGLAS A. ABRAHAM
TERRA M. LARSON
CODY L. HONEYWELL

WWW.MAYADAM.NET

November 17, 2020

WARREN W. MAY 1920-2018
THOMAS C. ADAM 1935-2019
BRENT A. WILBUR 1949-2006

TELEPHONE
605 224-8803
FAX
605 224-6289
E-MAIL
brett@mayadam.net

Patricia Van Gerpen
Executive Director
Public Utilities Commission
500 E Capitol Ave
Pierre SD 57501

RE: In the Matter of the Application of Triple H Wind Farm, LLC for a Permit of a Wind Energy Facility and a 345-kV Transmission Line in Hyde County
PUC Docket: EL19-007
MAGT File: 7446

Dear Ms. Van Gerpen:

At hearing on Thursday, November 12th, the commissioners expressed some concern over whether the level of commission control over the proposed escrow agreement between Citibank and Triple H wind farm was sufficient. My client and I appreciate the discussion. I felt at the time that the understanding was likely found by reading several documents together and reasoning to a legal conclusion. I wish I had discussed statute more directly at the time, I think we'd have reached a favorable conclusion.

Below, I have produced state statute, emphasized by my underlining, and also the relevant parts of condition 40 for ease of reference. The escrow agreement as proposed meets the requirements of Condition 40. The other documents necessary to be read together would be the decommissioning plan and the escrow agreement itself, both of which have been previously submitted. The parties expressly agreed that the escrow agreement is subject to and controlled by South Dakota statute, by its own terms at Section 10.

The statute reads:

“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.” SDCL 49-41B-39.

“The form, term, and conditions of the financial security are subject to the approval of the commission.” Id.

Thus it is equally and crystal clear that statute gives the commission full authority over the escrowed funds. The document is subject to state law, and by its own terms says so, although it needn't in order to be subjected to the requirements of Section 39.

Finally, I write to confirm to the Commission that the account was funded with \$460,000 on November 6, 2020, and an additional \$10,000 in bank fees was also paid at that time.

Very truly yours,

MAY, ADAM, GERDES & THOMPSON LLP



BRETT KOENECKE
BK | jrw

Enclosure

49-41B-39. Financial security for decommissioning of wind turbines.

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 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.

Any financial security provided under this chapter may not be pledged or used as security for any other obligation of the wind turbine owner, and is exempt from attachment or mesne process, from levy or sale on execution, and from any other final process issued from any court on behalf of third party creditors of the owner of the wind turbines. Any commission decision based on any claim made by the owner of the wind turbines for refund or return of the financial security, or for actual expenses of decommissioning, or any related agreements may be appealed.

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. The commission may not require any financial security from an owner of wind turbines who is also a public utility as defined in subdivision 49-34A-1(12).

Source: SL 2019, ch 202, § 1

Condition 40

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 Triple H Wind and the escrow agreement shall include terms providing that the agreement binds Triple H Wind'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 be a South Dakota chartered state bank or a nationally chartered bank with 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 Triple H Wind agreed to the creation of the escrow account;
 2. Triple H Wind exercises no (or the least amount possible of) control over the escrow;

3. The initial source of the escrow account;
 4. The nature of the funds put into the escrow account;
 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, 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 Permit Conditions, the account is payable to the landowner who owns the land on which associated Project facilities are located as the landowner incurs and pays decommissioning costs.