

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

**IN THE MATTER OF THE APPLICATION BY ENGIE NORTH AMERICA, INC. FOR  
A PERMIT FOR A WIND ENERGY FACILITY IN HYDE COUNTY, SOUTH  
DAKOTA, FOR TRIPLE H WIND FARM**

**SD PUC DOCKET EL19-007**

**PRE-FILED DIRECT TESTIMONY OF MATTHEW MCCAULLEY  
ON BEHALF OF ENGIE NORTH AMERICA, INC.**

June 14, 2019

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1 **Q. Mr. McCaulley, can you state your name and address for the record?**

2 A. Matthew S. McCaulley. My business address is 101 North Phillips Avenue, Suite 402,  
3 Sioux Falls, SD 57104. I reside in Lincoln County, South Dakota.

4 **Q. What's your current position with the Applicant or its parent company?**

5 A. I'm a partner of Redstone Law Firm LLP in Sioux Falls, South Dakota. Our law firm  
6 provides government relation services for Engie.

7 **Q. What's the purpose of your testimony?**

8 A. The purpose of my testimony is to support the Applicant's request to guarantee the  
9 financing of decommissioning the Triple H Wind Farm with a parent guaranty or an irrevocable  
10 letter of credit and differentiate between the different guaranty mechanisms. Resolution of the  
11 issue of financial security relative to decommissioning seems to be the Commission's province.

12 **Q. What are your particular qualifications?**

13 A. I've practiced as a lawyer in this state for over 20 years, received an MBA from the  
14 University of Sioux Falls, served in the South Dakota House of Representatives for 4 years, and  
15 have a practice emphasis in both government relations and business law. While I haven't had  
16 any particular experience with decommissioning a wind farm, I am familiar with commercial  
17 transactions as a result of my experience. In my role as a business lawyer, I have provided legal  
18 counsel to over 500 South Dakota business clients, worked on transactions ranging from \$5,000  
19 to \$300 million, and provided advice to clients on secured transactions, escrow accounts, risk  
20 mitigation and risk transference.

21 **Q. What's your experience with escrow accounts, letters of credit, surety bonds, and**  
22 **parent guarantees relative to wind farms?**

23 A. I have reviewed escrow account documents for wind farm permit applicants, reviewed

24 sample letters of credit and surety bonds, and have looked at the proposed parent guaranty for  
25 this project. In addition, since I first served in the Legislature in the 2001 Session, I've listened  
26 to concerns and been part of discussions with policy makers, regulators, landowners and wind  
27 developers.

28 **Q. Do you have any sample documents to share with the commission?**

29 A. I have attached sample documents as Exhibits 1, 2, 3 and 4.

30 **Q. Have you reviewed State law with respect to escrow accounts for decommissioning**  
31 **purposes?**

32 A. I have reviewed State law, including Senate Bill 16 (2019) which takes effect on July 1<sup>st</sup>  
33 with respect to financial security and the decommissioning of wind turbines.

34 **Q. Have you spotted any issues?**

35 A. The permissive language in Senate Bill 16 was a necessary upgrade for those projects  
36 under escrow agreements for decommissioning, but it doesn't fully resolve the questions  
37 concerning ownership of the funds, federal deposit insurance guarantees for amounts above  
38 deposit insurance limits, and also doesn't resolve the use and expenditure of the funds at the  
39 moment of need. It's unclear as to whether the escrow account would be sufficient due to the  
40 uncertainty of future claim amounts and the amount of time it requires to build value. There's a  
41 significant amount of time where the escrow account wouldn't have a sufficient balance to  
42 accomplish the goal.

43 Furthermore, the cost of capital to the wind farm is another factor as cash in a restricted  
44 account is an inefficient investment compared to other investments, and especially inefficient  
45 when compared to the cost of borrowing funds for company operations. Finally, it seems that a  
46 project in financial distress and needing the funds for decommissioning might have other

47 creditors who see the fund as a windfall to be gained through litigation.

48 **Q. Are you familiar with the ownership structure of this wind farm?**

49 A. As I understand it, the ownership structure of this particular wind farm is such that Triple  
50 H Wind Farm, LLC is a wholly owned subsidiary of Engie North America, Inc. The structure  
51 insulates both entities from each other in a business sense.

52 **Q. Have you formed any conclusions as to the propriety of any of the guaranteed**  
53 **facilities?**

54 A. I haven't. As I said earlier, that is the Commission's province. Additionally, it seems  
55 like what is appropriate for one wind farm might not be appropriate for another based on a host  
56 of factors like location, county requirements, size, financial depth, length and terms of power  
57 purchase agreements, and experience of the developer in the wind or power industry.

58 **Q. Many of the wind farms have a county permit as well as a state permit to construct**  
59 **and operate. Are the counties using a uniform, standard guarantee?**

60 A. Not at all. The county permits for wind farms have different requirements. Hyde County  
61 Ordinance 9-106(F) states: "The Board of Adjustment shall require performance bond, surety  
62 bond, letter of credit, corporate guarantee or other form of financial assurance that is acceptable  
63 to the Board of Adjustments to cover the anticipated costs of decommissioning the LWES  
64 facility within any of the first ten (10) years of the project. Unless required prior to the tenth year  
65 by the Board, the LWES facility owner or operator shall file the assurance no later than the 10th  
66 tenth anniversary of its conditional use permit approval."

67 Deuel County Ordinance 1215.03(9)(a) requires "a bond or other adequate security  
68 sufficient to pay the entire cost of the decommission process." Clark County Ordinance  
69 4.21.03(9)(d) requires "After the tenth (10<sup>th</sup>) year of operation of a WES facility, the Board may

70 require a performance bond, surety bond, letter of credit, corporate guarantee or other form of  
71 financial assurance that is acceptable to the Board to cover the anticipated costs of  
72 decommissioning the WES facility.” Brookings County ordinances don’t appear to specify.  
73 23.01(9)(a). Proposed ordinances in Hand County are similar. 1603(11)(a).

74 The quoted portions of these county ordinances are attached as Exhibit 5.

75 **Q. With respect to escrow account format preferred by the Public Utilities**  
76 **Commission, how would those funds be distributed or utilized?**

77 A. According to the project specific escrow document and state law. The documents  
78 available on the PUC website for other projects seems to indicate that the Commission would  
79 decide, but they don’t appear to specify how the funds would be administered or in what way the  
80 Commission would accomplish the decommissioning process and claim disbursements. It  
81 appears that under Section 5 of the 2018 Crocker agreement posted on the South Dakota PUC  
82 website (EL 17-055) that landowners would be able to seek funds to repay costs incurred but it  
83 doesn’t describe how competing claims would be handled.<sup>1</sup>

84 **Q. You’ve provided a form of surety bond. What issues might arise with the use of the**  
85 **surety bond? What might be the advantages?**

86 A. An issue might arise where the bond is insufficient to cover the costs. It’s also possible  
87 that a bond might require annual payments and somehow expire due to nonpayment in an  
88 insolvency setting. One of the advantages of a bond would be that the terms for collection would  
89 be set and avoid the claims of the wind farm's other potential creditors. It seems like it would be  
90 more difficult for a creditor to obtain bond proceeds than an escrow account.

91 **Q. You’ve also provided a letter of credit. What issues might arise with respect to that**

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<sup>1</sup> The agreement referred to is entitled “Escrow Agreement” which is attached as Exhibit 1 and is available at this site address: <https://puc.sd.gov/commission/dockets/electric/2017/el17-055/agreement.pdf> (accessed 06-14-2019)

92 **form of guarantee? What might be the advantages?**

93 A. It would be possible for a Letter of Credit to expire prematurely relative to the project life  
94 span, or for some clause to appear in a form that does not trigger an obligation under the  
95 instrument. However, the cost would seem to be an advantage as well as being able to prescribe  
96 the terms under which the Letter of Credit is accessible by others.

97 **Q. Finally, you've provided a form of parent guaranty for consideration. What issues**  
98 **might arise with respect to a parent guaranty? What might be the advantages?**

99 A. The parent could experience financial difficulties, and that factor would make a parent  
100 guaranty more appropriate for stronger and healthier companies, as opposed to perhaps smaller  
101 or less well capitalized developers. The strength of the guaranty depends on the strength of the  
102 guarantor relative to the actual or perceived risk, and a strong corporate guaranty may provide  
103 landowners much more security than an escrow account.

104 **Q. Anything further?**

105 A. No, not at this time.

106  
107 Dated this 14<sup>th</sup> day of June 2019.

108  
109 

110 Matthew McCaulley