BEFORE THE PUBLIC UTILITIES COMMISION
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	EL 17-028 **BRIEF IN SUPPORT OF INTERVENORS' MOTION TO DENY AND DISMISS CROCKER WIND FARM'S APPLICATION**

Those intervenors identified in the Application for Party Status submitted by Davenport, Evans, Hurwitz & Smith, LLP ("Intervenors"), through counsel, hereby submit this brief in support of their Motion to Deny and Dismiss Application.

INTRODUCTION

The Facility Permit Application ("the Application") submitted by Crocker Wind Farm ("Crocker") to the South Dakota Public Utilities Commission ("PUC") fails to comply with all applicable laws and rules as required by SDCL 49-41B-22. Namely, the Application assumes a 2,000 foot setback from non-participating residences. The conditional use permit issued to Crocker by the Clark County Board of Adjustment ("Board of Adjustment"), however, requires a ¾ mile (3,960 foot) setback from non-participating residences. In other words, it is apparent from the face of the Application that the proposed facility (the "Project") fails to comply with all applicable laws and rules.

Furthermore, Crocker must establish the Project will not pose a threat of serious injury to the environment. Assessments evaluating whether the Project will pose a threat of serious injury

to the environment will not be completed until the summer of 2018. Thus, asking the PUC to find—in December 2017—that the Project will not pose a threat of serious injury to the environment is premature.

Finally, Crocker's Application does not match the form and content required by ARSD 20:10:22:33.02, which violates Intervenors' due process rights. For any one of these three independently-sufficient reasons, the PUC should deny and dismiss the Application.

BACKGROUND

Crocker submitted its Application to the PUC on July 25, 2017. The Application assumed a 2,000 foot setback from non-participating residences. (Application, p. 16-1.) The conditional use permit issued to Crocker by the Board of Adjustment, however, requires a ¾ mile (3,960 foot) setback from non-participating residences. (*Id.*; *see also* Almond Aff. Ex. A (CUP issued by Clark County Board of Adjustment).)

Crocker has appealed the decision of the Board of Adjustment to South Dakota Circuit Court, seeking, among other things, reversal of the Board of Adjustment's imposition of the ¾ mile setback (the "Appeal"). (Application, p. 16-1.) Crocker moved for partial summary judgment on the setback issue. (Almond Aff. Ex. B (Motion for Partial Summary Judgment and Notice of Hearing).) Crocker argued the Board of Adjustment lacked the authority to increase setbacks, which, as Crocker contended, is a purely legal question ripe for determination at the summary judgment stage. (Almond Aff. Ex. C (Crocker's Brief in Support of Motion for Partial Summary Judgment).) Alternatively, Crocker argued that even if the Board of Adjustment had authority to increase setbacks, there was no factual support in the record for increasing the setbacks. (*Id.* at 17-19.) The Court rejected Crocker's arguments and denied its motion for

partial summary judgment on August 15, 2017. (Almond Aff. Ex. D (Order Denying Petitioner's Motion for Partial Summary Judgment).)

Crocker has acknowledged imposing a setback from non-participating residences greater than 2,000 feet significantly affects the Project as a whole. In that regard, Crocker has made the following admissions regarding setbacks:

- When asked by the Board of Adjustment during a hearing how large of a setback would be workable, Crocker represented to the Board of Adjustment: "I think 2,000 feet is about what we can do." (Almond Aff. Ex. E (3/27/17 Transcript, p. 21).)

- During that same hearing, Crocker stated: "So ultimately we'll see—you know, this project [with a 2,000 foot setback] will probably, from what I've seen on how we lose positions on projects, this project [with a 2,000 foot setback] will probably just barely get enough positions to get everything that we think we need." (Almond Aff. Ex. E (3/27/17 Transcript, p. 29).)

- When asked about a ¾ mile setback by the Board of Adjustment, Crocker stated: "I think we had very deep concerns about being able to get the project done with the size of the setback. It hurts the project pretty severely in terms of engineering, design[.]" (Almond Aff. Ex. F (4/4/17 Transcript, p. 37).)

- Crocker has made similar representations to the PUC: "The conditions on the CUP create major challenges for the project that other projects that compete in the market don't have to comply with. . . . The setback imposed by Clark County from non-participating residence[s] . . . creates significant economic harm to the project including making the energy from the project more expensive to generate." (Almond Aff. Ex. G (Written Testimony of Jay Hesse, p. 6).)

- Crocker has also stated: "The current CUP limits the project's access to the highest wind speed sites within the project area, and creates engineering and siting issues throughout the project. . . . The reduction in power production and increase in engineering costs places a significant cost burden on the project. The setback in the CUP is larger than any operating project in the Midwest faces. We have significant concerns about Crocker competing in the market under the currently granted CUP." (Almond Aff. Ex. H (Written Testimony of Barry Fladeboe, pp. 3-4).)

- When asked in a PUC Staff Data Request to discuss the impact on the Project if the relief sought is not granted in Circuit Court, Crocker responded: "If relief sought is not granted in Circuit Court the Project will suffer impacts to production and construction efficiencies resulting in an increase to the price of energy produced. Further coordination and evaluation will be required to ensure the Project meets the market demand and is

economically viable." (Almond Aff. Ex. I (Crocker's Answers to Staff's Second Set of Data Requests to Crocker Wind Farm, LLC, 2-4(c)).)

- Similarly, Crocker has stated a 1 mile setback is totally unworkable: "Multiple unsigned non-participants have requested a 1-mile setback from their residence. . . . Imposing a setback five times greater than required by the County zoning ordinance causes the Project to have generation and construction inefficiencies that are so great it would no longer be competitive and therefore ultimately making the Project unable to be constructed." (Almond Aff. Ex. J (3/20/2017 Letter to Clark County Commissioners).)

The Application contained four separate configurations for the wind energy facilities, all of which assumed a 2,000 foot setback. (Application, Figures 2a, 2b, 2c, 2d.) Notwithstanding the above-stated admissions, Crocker submitted a new map to the PUC showing how a ¾ mile setback would affect one of the four originally-submitted configurations. (PUC Docket, 9/5/17 Filing.) Noticeably, 35 towers are affected by the ¾ mile setback. (*Id.*) No other "updates" have been made to the Application to take into account the ¾ mile setback. (*See generally* PUC Docket.)

The Application also contains certain environmental information. (Application § 10 through § 14.) Notably, the United States Fish and Wildlife Service ("USFWS") is performing an Environmental Assessment for the Project to ensure the Project complies with the National Environmental Policy Act. (Application p. 2-1.) Crocker has indicated that the process will not be completed until the summer of 2018. (Almond Aff. Ex. J (3/20/2017 Letter to Clark County Commissioners).)

LAW AND ARGUMENT

I. Crocker's Application Does Not Apply a ¾ Mile Setback from Non-Participating Residences and Thus Fails to Comply with All Applicable Laws and Rules

In order to receive a permit from the PUC, Crocker must establish compliance with SDCL 49-41B-22, which requires Crocker to establish, among other things, that the Project "**will**

comply with all applicable laws and rules." (emphasis added). One such applicable law/rule here is the ¾ mile setback from non-participating residences imposed by the Clark County Board of Adjustment. The Application, however, assumes only a 2,000 foot setback from non-participating residences. (Application, p. 16-1.) Therefore, on its face, the Application does not comply with all applicable laws and rules. Accordingly, it should be denied.

Intervenors anticipate Crocker will argue the ¾ mile setback does not materially affect the Application, given that is the position Crocker has taken in response to a Data Request from PUC Staff. (Almond Aff. Ex. I (Crocker's Answers to Staff's Second Set of Data Requests to Crocker Wind Farm, LLC, 2-4(d)).) Such an argument flies in the face of Crocker's past representations and common sense.

Crocker has acknowledged on several occasions that the ¾ mile setback materially and, in fact, significantly affects the Project, and thus logically, the Application. For example, Crocker has stated that a ¾ mile setback "hurts the project pretty severely in terms of engineering [and] design," which "**creates engineering** and **siting issues throughout the project**." (Almond Aff. Ex. F (4/4/17 Transcript, p. 37); Almond Aff. Ex. H (Written Testimony of Barry Fladeboe, pp.3-4 (emphasis added)).) The ¾ mile setback also "creates a significant economic harm to the project including making the energy from the project more expensive to generate." (Almond Aff. Ex. G (Written Testimony of Jay Hesse, p. 6).) It reduces power production and "places a significant cost burden on the project," such that Crocker has "significant concerns about . . . competing in the market[.]" (Almond Aff. Ex. H (Written Testimony of Barry Fladeboe, pp.3-4).) Crocker has also acknowledged that "[f]urther coordination and evaluation will be required to ensure the Project meets the market demand and is economically viable." (Almond Aff. Ex. I (Crocker's Answers to Staff's Second Set of Data

Requests to Crocker Wind Farm, LLC, 2-4(c)).) Perhaps most notable is **Crocker's representation that any setback larger than 2,000 foot would be unworkable from Crocker's perspective**. (Almond Aff. Ex. J (3/27/17 Transcript, pp. 21, 29).) Put simply, Crocker cannot now claim the ¾ mile setback does not materially affect the Project or the Application.

Moreover, much of the analysis contained in the Application would change if a ¾ mile setback is used. To be sure, all four configurations proposed by Crocker have towers affected by the ¾ mile setback. (*Compare* ¾ Mile Residential Setback Vestas V110 Map (PUC Docket, 9/5/17 Filing) *with* Figures 10a, 10b, 10c, and 10d of the Application.) This means a number of towers will need to be removed from the Project entirely or relocated, regardless of the configuration. The ramifications depend on whether the affected towers will be removed or relocated.

If affected towers are *removed* from the Project, here are just a few of examples of how the Application will be affected:

- The Project will no longer have a 400 MW nameplate capacity. Several parts of the application utilize a 400 MW nameplate capacity as an underlying assumption.
- Fewer payments will be made to landowners and the community fund, meaning the amount of revenue to the "community" will decrease.
- Tax consequences will change.
- Crocker's ability to satisfy market demands will change.
- Employment estimates may change.
- Noise levels will change.

Similarly, here are just a few of examples how the Application will be affected

if towers are *relocated*:

- Crocker stated it picked the current turbine locations "based on wind resource analysis, efficient design, initial site inspection, topography, known environmentally-sensitive areas, and communications with local, state and federal agencies." (Application § 9.1.) And "[t]he preliminary layout has been modeled to help ensure cumulative [noise] impacts from all wind turbines[.]" (Application p. 15-7.) More specifically, Crocker represented "[h]abitat assessment work has informed the turbine siting process to minimize impacts to quality habitats." (Application p. 13-10.) Indeed, according to Crocker, the "current layout of up to 200 turbines reflects the optimal configuration to best capture wind energy while meeting required setbacks from residences and other local features, avoiding cultural resources and wildlife habitat." (Application § 9.2.)

  Relocating towers will logically result in a sub-optimal configuration. The same type of thorough review process, including environment, noise, and habitat assessments, described by Crocker should be performed for any new configuration that incorporates a ¾ mile setback before seeking PUC approval.

- How will relocating towers affect the cultural resources and wildlife habitat? (Application §§ 13, 14) Electromagnetic interference? (§ 15.4.5.) Shadow flicker? (§ 15.4.1) Noise levels? (§ 15.5.3.) Location of collection lines? (§ 8, Figures 2a-2d.) Access roads?

- Will additional towers be relocated onto USFWS wetland/grassland easements? If so, how many? How does that affect coordination with USFWS and South Dakota Game Fish and Parks?

In sum, Crocker's Application fails to comply with all applicable laws and rules as required by SDCL 49-41B-22. Specifically, it fails to comply with the ¾ mile setback from non-participating residences. And it cannot be disputed that a ¾ mile setback from non-participating residences significantly and materially affects the Project and the Application. Indeed, Crocker has even admitted that "[f]urther coordination and evaluation will be required to ensure the Project meets the market demand and is economically viable." (Almond Aff. Ex. I (Crocker's Answers to Staff's Second Set of Data Requests to Crocker Wind Farm, LLC, 2-4(c)). Such further coordination and evaluation should be performed by Crocker *before* the PUC is asked to

conduct its evaluation in accordance with SDCL ch. 49-41B. Therefore, the PUC should deny the Application for failure to comply with SDCL 49-41B-22.

II. Without the Completion of Ongoing Environmental Assessments, Crocker Cannot Establish Its Burden of Proving the Project Will Not Pose a Threat of Serious Injury to the Environment

Crocker also has the burden of proof to establish that the Project "will not pose a threat of serious injury to the environment[.]" SDCL 49-41B-22. Crocker cannot meet its burden on this element, as crucial assessments of how the Project will affect the environment have not been completed and, in fact, will not be completed until 2018—long after the PUC evidentiary hearing. Therefore, the PUC should deny the Application for this reason as well.

Crocker must establish the Project will not pose a threat of serious injury to the environment. SDCL 49-41B-22. In doing so, Crocker's Application must provide:

> . . . a description of the existing environment at the time of the submission of the application, estimates of changes in the existing environment which are anticipated to result from construction and operation of the proposed facility, and identification of irreversible changes which are anticipated to remain beyond the operating lifetime of the facility. The environmental effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction.

ARSD 20:10:22:13. Sections 10 through 14 of the Application touch on environmental issues. It is evident from Crocker's own admissions that it is too early to determine how the Project will affect the environment.

The USFWS is performing an Environmental Assessment for the Project to ensure the Project complies with the National Environmental Policy Act. (Application p. 2-1.) This Environmental Assessment focuses on site-specific issues and is designed to assess the environmental risks of project development. (Application p. 2-1.) As Intervenors understand

that process, part of it will entail whether Crocker will be authorized to construct Project facilities on USFWS grassland easements.[1] Crocker has indicated that the process will not be completed until the summer of 2018. (Almond Aff. Ex. J (3/20/2017 Letter to Clark County Commissioners).)

Relatedly, the Application indicates there are ongoing studies (i.e., Tier III studies) analyzing the Project's effect on wildlife conditions. (Application pp. 13-7 – 13-8.) As explained by Crocker, Crocker is utilizing the Land-Based Wind Energy Guidelines ("WEG") issued by the USFWS. (Application p. 13-7.) The WEG, using a five-tier approach, assesses the Project's impacts to wildlife and their habitats and is designed to assess whether the developer has "sufficient information, **whether and/or how to proceed with development**, or whether additional information . . . is necessary to make those decisions." (*Id.* (emphasis added).) Crocker completed Tier I and Tier II studies. (Application p. 13-8.) Based on the results of those studies, "Tier III studies are in progress for the Project." (*Id.*) That means there was insufficient data from the Tier I and Tier II studies "to make a decision to abandon the project, modify the project, or proceed with and expand the project." (*Id.*) Crocker has not indicated when the Tier III study will be complete.

Because there are ongoing studies still analyzing the impact the Project will have on the environment and because those studies will not be completed until 2018—after the PUC evidentiary hearing—Crocker is unable to satisfy its burden of proof to establish that the Project "will not pose a threat of serious injury to the environment[.]" SDCL 49-41B-22. Indeed, how can the PUC perform a thorough and complete analysis of the environmental issues surrounding

[1] A total of 41 turbines are sited within USFWS grassland easements. (Almond Aff. Ex. J (3/20/2017 Letter to Clark County Commissioners).)

this Project without having the results of these highly relevant and important studies? The fact is: it cannot. Thus, the PUC should deny the Application now.

III. Crocker's Application Fails to Match the Form and Content Required by ARSD 20:10:22:33.02, which Violates Intervenors' Due Process Rights

Crocker has effectively submitted five different possible configurations of its wind energy facilities—Figures 2a, 2b, 2c, 2d, and the map of the Vestas V110 layout showing a ¾ mile setback. (PUC Docket, 9/5/17 Filing.) Because doing so fails to meet the form and content required by ARSD 20:10:22:33.02, the Application should be denied. *See* SDCL 49-41B-13 ("An application may be denied . . . at the discretion of the [PUC] for . . . [f]ailure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder.")

Crocker has indicated in the past that the PUC needs to only "permit the box," meaning the PUC should only look at the outer footprint of the Project and not concern itself with the specific placement and configuration of the turbines. Intervenors disagree. ARSD 20:10:22:33.02 provides in pertinent part:

> If a wind energy facility is proposed, the applicant shall provide the following information:
>
> (1) **Configuration** of the wind turbines, including the distance measured from ground level to the blade extended at its highest point, distance between the wind turbines, type of material, and color[.]

(emphasis added). Noticeably, ARSD 20:10:22:33.02 does not allow an application to submit "configurations" in the plural. Just one configuration is mandated. And that makes sense, because otherwise the PUC would be essentially analyzing multiple different permit applications under the guise of just one application, thereby imposing a greater burden on PUC resources and also circumventing the imposition of application fees.

Moreover, this game of "guess the configuration" Crocker is proposing raises due process issues. Intervenors, by statute and following the PUC's order granting them party status, are parties to this proceeding. SDCL 49-41B-17. As parties, Intervenors "are accorded procedural rights that are consonant with due process." *Application of Union Carbide Corp.*, 308 N.W.2d 753, 758 (S.D. 1981). "The constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings, particularly where such proceedings are specifically classified as judicial or quasi-judicial in nature." *Id.* "Due process requires notice and the right to be heard in a meaningful time and manner." *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 29, 785 N.W.2d 272, 282. To be heard in a meaningful matter requires a fair hearing such that "even the probability of unfairness" should be avoided. *Strain v. Rapid City School Bd.*, 447 N.W.2d 332, 336 (S.D. 1989).

Crocker's submission of five different configurations violates Intervenors' due process rights. Without knowing the location of and configuration of the turbines, it is nearly impossible to adequately assess the environmental impacts, safety concerns, and setback issues surrounding the Project. For example, Comsearch, the entity hired by Crocker to perform a microwave study, noted that "turbine locations were not provided; thus we could not determine if any potential obstructions exist between the planned wind turbines and the incumbent microwave paths. If the latitude and longitude values for turbine locations are provided, Comsearch can identify where a potential conflict might exist." (Application App'x F, Microwave Study p. 4.) The same can be said with other types of analysis. Indeed, if the specific configuration of the turbines did not matter, then ARSD 20:10:22:33.02 would not require the configuration to be provided. By producing five separate configurations, Crocker has not provided the essential "notice," nor will the evidentiary hearing be "fair." Crocker has effectively provided notice to Intervenors that

maybe one of the five configurations will be used, or perhaps an entirely different configuration. This materially impairs Intervenors' ability to adequately prepare for the evidentiary hearing, which will result in an unfair hearing. As a result, Intervenors' due process rights are being violated.

For the reasons set forth in this section, the PUC should deny Crocker's Application. *See* SDCL 49-41B-13 ("An application may be denied . . . at the discretion of the [PUC] for . . . [f]ailure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder.")

CONCLUSION

The PUC should deny Crocker's Application for three separate and independently-sufficient reasons. First, the Application, on its face, fails to comply with applicable laws and rules. Second, Crocker is unable to establish its burden of proof that the Project will not pose a threat of serious injury to the environment. And third, Crocker's Application fails to match the form and content required by ARSD 20:10:22:33.02.

Dated at Sioux Falls, South Dakota this 9th day of October, 2017.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mitch A. Peterson
Reece M. Almond
206 W. 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030
Phone: (605) 336-2880
Fax: (605) 335-3639
Attorneys for Intervenors