

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

<b>IN THE MATTER OF THE</b>	)	
<b>APPLICATION OF CROWNED</b>	)	
<b>RIDGE WIND, LLC FOR A</b>	)	<b>RESPONSE TO INTERVENORS</b>
<b>PERMIT OF A WIND ENERGY</b>	)	<b>SECOND MOTION</b>
<b>FACILITY IN GRANT</b>	)	<b>TO DENY AND DISMISS</b>
<b>AND CODINGTON COUNTIES</b>	)	
		<b>EL-19-003</b>

**RESPONSE OF  
CROWNED RIDGE WIND, LLC AND MOTION TO STRIKE**

**I. Introduction**

1. Crowned Ridge Wind, LLC (“CRW”) hereby responds to Intervenor’s Second Motion to Dismiss the CRW application filed May 17, 2019 (“Second Motion to Dismiss”). For the reasons explained herein, the Motion is without merit and should be denied. Additionally, the Affidavit of Patrick Lynch and references to the Affidavit of John Thompson should be stricken from the record.

**II. Intervenor’s Second Motion to Dismiss is without merit and should be denied**

2. In their Second Motion to Dismiss, Intervenor claim that CRW has not timely updated the CRW Maps which: (1) results in an Application that is not generally in a form and context required by SDCL 49-41B-13 and (2) violates due process. Intervenor acknowledge that CRW filed Map 3, the land status map, on February 7, 2019.<sup>1</sup> Intervenor, however, assert that CRW has failed to timely and in good faith update the CRW Maps to reflect the status of the Thompson properties.<sup>2</sup> This assertion is incorrect.

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<sup>1</sup> Second Motion to Dismiss at 4.

<sup>2</sup> *Id.* at 15-17.

3. As set forth in the attached Affidavit of the CRW Project Manager, Tyler Wilhelm, when the Cattle Ridge Wind Farm, LLC (“Cattle Ridge Wind”) was acquired by CRW, Cattle Ridge Wind represented to CRW that the Thompson properties were participating in the project. Affidavit of Wilhelm at ¶ 2. As also explained in the Affidavit of Mr. Wilhelm, although James Thompson stated in an email message that the CRW planning map should not show the Thompson properties as participating and hosting collector lines, Mr. Wilhelm received a voice mail message from Cheryl Thompson, James Thompson’s mother, expressing an interest in participating in the project. *Id.* at ¶ 3. Mr. Wilhelm and John Thompson also discussed participation in the project. *Id.* at ¶ 8. In response to these inquiries, Russel Lloyd, a land agent for CRW, sent draft easement option documents to the Thompson. On March 5, 2019, John Thompson emailed Mr. Lloyd and thanked him for sending the documents. *Id.* ¶ 7, Attachment 2.

4. On April 4, 2019, as a follow-up, Mr. Lloyd sent an email to James, John, and Cheryl Thompson seeking to have a call to discuss the easement material. John Thompson emailed back “I don’t think we are interested and are busy.” *Id.* at ¶ 11. It was at that time that Mr. Wilhelm understood the Thompson’s were not interested in participating. He then started working with the CRW team to re-locate the planned collector lines off of the Thompson’s properties. *Id.* Mr. Wilhelm also worked with the CRW team to conduct an overall update of the CRW Maps, including Map 3, for land status changes and minor adjustments to project infrastructure to accommodate participating landowners. *Id.* The task of moving the collector lines off the Thompson’s properties was completed on May 14, 2019 and the task of updating the

CRW Maps was completed on May 23, 2019. *Id.* On May 23, 2019, the CRW Maps<sup>3</sup> were filed in the docket, which showed the Thompson properties as not participating, and, also, that there will be no collector lines located on the Thompson's properties. *Id.* CRW completed the updating of the CRW Maps 18 days prior to the start of the evidentiary hearing on June 11, 2019. Therefore, CRW updating of the CRW Maps was timely.

5. Further, Intervenors' Second Motion to Dismiss infers that CRW was obligated to update Map 3 in response to Intervenors first set of discovery.<sup>4</sup> This is incorrect. Intervenors first set of discovery did not request an update to Map. 3. Instead, it was Staff in its Data Request 5-5 served on May 13, 2019 that first requested an updated Map 3. CRW responded to Staff Data Request 5-5 on May 23, 2019. Therefore, contrary to Intervenors' assertions, CRW has timely and in good faith updated the CRW Maps, including Map 3, in advance of the evidentiary hearing at which Intervenors will have the opportunity to cross-examine witnesses. Accordingly, the Second Motion to Dismiss should be denied.

6. There is no impact on Intervenors' legal rights. The procedural schedule adopted by the Commission affords Intervenors discovery rights, the ability to file testimony, and to cross-examine witnesses. In short, the updating and filing of the CRW Maps on May 23, 2019 is not a violation of due process, as the evidentiary hearings do not start until June 11, 2019.

7. Further, Intervenors citation to case law is not instructive. To the contrary, in the *In re Midwest Sec. Transfer* appeal,<sup>5</sup> the Supreme Court of South Dakota affirmed the South Dakota Public Utilities Commission order granting a company the authority to operate as a Class

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<sup>3</sup> The updated maps associated with sound levels and shadow/flicker will be filed on May 24, 2019 as part of the Rebuttal Testimony of CRW witness Jay Haley, responding to the Direct Testimony of Staff witness Darren Kearney and Intervenor witness John Thompson.

<sup>4</sup> Second Motion Dismiss at 6.

<sup>5</sup> 345 N.W. 2<sup>nd</sup> 728 (S.D. 1984).

B common carrier. In so affirming, the Court declined to find a due process violation simply because the Commission denied a party the ability to cross-examine a witness. In this docket, counsel for the Intervenors will have an opportunity to cross-examine each CRW witness. Therefore, citation to *In re Midwest Sec. Transfer* lacks even a tangential factual or procedural relationship to the current proceeding. Accordingly, Intervenors citation to *In re Midwest Sec. Transfer* provides no support for their Second Motion to Dismiss.

8. Similarly, Intervenors' citation to *South Dakota v. United States DOI* is without merit.<sup>6</sup> The due process claim in that case turned on the Regional Director of Department of Interior basing her decision on 23 documents that were not provided to the plaintiffs. The Commission in the instant case has not issued its decision on the merits of CRW's proposed wind project, and, therefore, there is no factual or legal parallel between the CRW proceeding and the ruling in *South Dakota v. United States DOI*. Moreover, in the current proceeding, because Map 3 was originally filed on February 7, 2019, and, all the CRW Maps, included Map 3, were updated and refiled on May 23, 2019, Intervenors will have an opportunity to cross-examine Mr. Wilhelm on the CRW Maps during the upcoming evidentiary hearings. Accordingly, *South Dakota v. United States DOI* is not instructive on the assertions raised by Intervenors.

9. Intervenors cite to *In re Union Carbide Corp.*, which involved resolving whether a petition to intervene was timely, and, if so, did the South Dakota State Conservation Commission provide sufficient notice and opportunity to the intervenor to participate at the hearing.<sup>7</sup> In this case, the Commission granted all requests to intervene, and on April 5, 2019 the Commission set forth a procedural schedule with ample notice of the deadlines for discovery,

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<sup>6</sup> 787 F. Supp. 2<sup>nd</sup> 981 (D.C. S.D. 2011).

<sup>7</sup> 308 N.W.2d 753 (S.D. 1981).

testimony, and the June 11-14 hearing dates. On May 10, 2019, the Commission also issued an order noticing the location and time of the evidentiary hearing. Therefore, there can be no serious question that the parties were adequately informed of the hearing and procedural schedule in this case.

10. In *Mathews v. Endridge*, the U.S. Supreme Court considered whether the *Due Process Clause of the Fifth Amendment* required a hearing prior to the termination of a recipient's Social Security disability benefits.<sup>8</sup> The U.S. Supreme Court held that a hearing was not required prior to terminating the disability benefits, because (1) the recipient of the benefits had the opportunity to seek reconsideration of the termination decision; and (2) the reconsideration process required a hearing, and allowed for the retroactively reinstatement of benefits, if the recipient prevailed on reconsideration. As with all the other cases cited by Intervenor, *Mathews v. Endridge* is far afield from the Commission's review of CRW's proposed wind facility, in which evidentiary hearings will be conducted prior to the Commission ruling on the merits of CRW's proposed wind facility. Accordingly, *Mathews v. Endridge* is not instructive to the assertions in the Second Motion to Dismiss.

### **III. Motion to Strike**

11. Intervenor's Second Motion to Dismiss was accompanied by the Affidavit of Patrick Lynch. This Affidavit should be stricken as pure hearsay. There is no representation in the Affidavit that Mr. Lynch has first-hand knowledge of the conversations between CRW and the Thompson family. He simply repeats the assertions in the Second Motion to Dismiss and quotes excerpts of emails between James Thompson and CRW, as well as emails between his Attorney, Mr. Ganje, and Commission Staff. Mr. Lynch was not a recipient or sender on the emails, and was not involved in any of the conversations between CRW and the Thompsons.

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<sup>8</sup> 424 U.S. 319 (1976).

Further, both the Second Motion to Dismiss and the Affidavit refer to an Affidavit of John Thompson. However, that affidavit was only provided to affirm John Thompson's direct testimony; it is not an affidavit filed in support of the Second Motion to Dismiss. Accordingly, the references to a "Thompson Affidavit," and emails by Mr. Lynch in his affidavit and the Second Motion to Dismiss are hearsay. Hearsay is not admissible in Commission proceedings. SDCL 1-26-19 and SDCL 19-19-802. Therefore, these references and quotations of emails should be stricken from the record, or, in the alternative, given no weight. Accordingly, the following references by Intervenors in their Second Motion to Dismiss to a "Thompson Affidavit," and emails by Mr. Lynch and the Second Motion to Dismiss are hearsay, and, therefore, should be stricken, or, in alternative, provided no weight: in the Second Motion to Dismiss, ¶¶ 6, 7 (last sentence), 10, 11, 14 (last sentence) and 15; in the Affidavit of Patrick Lynch ¶¶ 2 (last sentence); 3 (last sentence); 6, 7, 11, and 13.

#### **IV. Conclusion**

12. For the reasons set forth herein, the Second Motion to Dismiss should be denied, the Affidavit of Patrick Lynch should be stricken, and references to the John Thompson Affidavit should be stricken.

May 23, 2019

/s/ Miles Schumacher

Miles Schumacher  
Lynn, Jackson, Shultz & Lebrun, P.C.  
110 N. Minnesota Ave., Suite 400  
Sioux Falls, SD 57104

Brian J. Murphy  
Managing Attorney  
NextEra Energy Resources, LLC  
700 Universe Boulevard  
Juno Beach, Florida 33408

Brian.J.Murphy@nee.com  
Office (561) 694-3814  
Admitted Pro Hac Vice

*Attorneys for Crowned Ridge Wind, LLC*