

THE LAW PRACTICE OF ARVID J. SWANSON, P.C.

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May 13, 2019

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Kristen N. Edwards, Staff Attorney  
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION  
Pierre, South Dakota

Re: File 6184-002. •  
*In re Docket EL19-016, Crowned Ridge Wind II*

Dear Counsel:

This letter concerns Applicant's Request for Consent to Withdraw Application, dated May 7, 2019. Mr. Schumacher's request, of course, is premised on the action being "without prejudice," and the request stems from a non-curable procedural error on the part of Applicant. Please present this letter to the Commissioners as outlining the position of Garry Ehlebracht and others, intervenors, on this particular matter.

In the face of a procedural error, there may be no choice but to do what Mr. Schumacher seeks. If Applicant were to seek dismissal of every application, that would be fine with us, but at some point, they always press ahead, seeking approval. The point of this letter is to ask - when is the Commission free to do so in the face of other non-compliance?

Attached (marked as Appendix 1) is a one-page excerpt of the prepared, filed testimony of Jay Haley of Grand Forks, one of Applicant's experts. Highlighted in yellow (on Appendix 1) is what this writer believes is the entire and complete sum and substance of Applicant's testimony on the issue of "ice throw." Did you catch it? It is easy to miss.

These intervening parties believe nearly all – if not all – of the industrial wind turbine (IWT) sites proposed for the Goodwin area (my clients live within a short distance of Goodwin, to the northeast, and also to the south) are within a described safety zone. A specific publication of General Electric (the manufacturer whose products are said to be used in this proposed wind farm) advises: "[Locate] turbines a safe distance from any occupied structure, road, or public use area." This quote appears in a publication of GE Energy, marked GER-4262 (04/06).

Just what distance might that be? Applicant Crowned Ridge Wind II, LLC did not mention the fact of this publication – or such concerns – in the evidence submitted to the Deuel County Board of Adjustment. As you can further discern from the opening discovery attempts attached to the so-called "Petition of Ehlebracht, et al. ("Petitioners") to Commission Staff Concerning Applicant's Burden of Proof," dated April 15, 2019, Crowned Ridge Wind II is not willing to disclose *any* such information to the Circuit Court, in connection with the pending case

(19CIV118-000061, *Garry Ehlebracht, et al. vs. Deuel County Planning Commission, sitting as Deuel County Board of Adjustment, et al.*), contending that any such “information . . . is irrelevant and is not reasonably calculated to lead to admissible evidence.” (See Response to INT-13, part of Exhibit A to the Petition, dated April 15, 2019.)

Likewise, despite having on board an expert (Haley) who testifies on “ice throw” in what the witness says are “adjudicatory hearings [in] front of local boards and in judicial proceedings” (see Appendix 1, attached, just after the yellow highlighted words “ice throw”), it seems pretty clear that Applicant thinks General Electric’s precautionary publications, or the subject of “ice throw,” or other like safety concerns, are of no import in this proceeding before this Commission. Applicant’s current submission in EL19-016 is devoid of any such information, beyond the highlighted words “ice throw.”

The Commission’s order in EL19-016, considered May 2, 2019, was served May 10, 2019, specifically allowing party status to Garry Ehlebracht and his several neighbors around the small community of Goodwin, in addition to dealing with several details of the application. The Ehlebracht “petition” to Commission staff, dated April 15, 2019, does not appear to be mentioned in the order.

However, according to Bob Mercer’s article appearing on KELOLAND ([www.keloland.com/meet-the-team/bob-mercero/1512772054](http://www.keloland.com/meet-the-team/bob-mercero/1512772054)), you urged the Commission to dismiss the petition, and at least two of the Commissioners are quoted by Reporter Mercer as viewing the petition in a negative light (this writer’s interpretation). Commissioner Hanson was quoted as “nuisance and trespass issues should be first handled at the county level,” while Commissioner Nelson is said to have said “zoning issues covered in the petition should be resolved at the ballot box or in circuit court.”

These observations are quite true (while pausing to observe the local Boards of Adjustment are appointed, not elected, and claim to be endowed with incredibly broad legal powers, capable of leaping tall buildings notwithstanding gravity) – but what happens when the Applicant (Crowned Ridge Wind II, LLC) does not submit relevant evidence to the Board of Adjustment? Is the matter of “safety” inherently a zoning concern, and only a zoning concern, of no interest whatsoever to this Commission? If “ice throw” (along with other potential incursions to the personal safety and property interests of these intervenors, and all other members of the public) is of interest to this Commission, when – exactly - does it become a subject on which this Applicant – itself - is required to come forward with the evidence?

Further, if Applicant has the duty to be self-disclosing on topics for which it has the burden of proof (SDCL § 49-41B-22), and to approach this Commission on the multi-faceted subject of “health, safety or welfare” with all due candor, then we further ask, just when does that duty arise in the conduct of a facility-siting permit? At the time of filing – or some other, subsequent date, somewhere on down the road - when time constraints then likely hamper the ability of these neighbors to review, understand and to perhaps challenge what has been adduced to that point?

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We urge this Commission to not allow Crowned Ridge Wind II, LLC to dismiss and simply re-file a duplicate version of the application now docketed as EL19-016, without further requiring this heavily-funded, skillfully-represented, and expert-witness rich Applicant to address the issues inherent in our petition to Staff, dated April 15, 2019, or in my prior letter to you, dated May 4, 2019, or this current missive. Doing so only serves to further cripple the abilities of South Dakota landowners and citizens – these intervening parties – to defend themselves from an unwelcomed embrace of and proximity to this so-called “wind farm.”

Applicant is an expert in the design, development and operation of wind farms. Unless the Commission is at the point of quickly concluding (in line with the statutory timeline) that, simply because Applicant thinks this area around Goodwin is the right place and proper design, it must be so – Applicant should be required self-disclose matters bearing on safety concerns, even when such is adverse to Applicant’s interests. Being in compliance with local county ordinance setbacks does not end the inquiry required of this Commission, nor does such compliance render moot countervailing information produced by the IWT manufacturer itself.

As far as this Commission is concerned (based on Mercer’s reporting, not the Commission order served May 10 in this specific docket, which does not rule on the April 15, 2019 petition), is the matter of public health, safety and welfare exclusively vested with the local Board of Adjustment, so much so that even when the local board has made a determination (favorable to Applicant) without such adverse evidence being adduced (General Electric’s own setback admonitions, as an example), is this agency fully eager to embrace that result as controlling, and without further quarrel, despite knowing (or at least suspecting, if not fully appreciating) the infirm nature of such findings before the local board? This Commission is not charged to ignore evidence simply because such is inconvenient to Applicant’s sought permit.

Thank you.

Very truly yours,  
ARVID J. SWANSON P.C.



A.J. Swanson

*Attachment:* (Appendix 1 – Excerpt of Jay Haley testimony – “ice throw”)

c: Miles Schumacher, Esq. (via Email Only)  
LYNN JACKSON SHULTZ & LEBRUN, PC  
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All other Staff and interested persons as reflected in  
Certificate of Service, dated May 13, 2019

**INTRODUCTION AND QUALIFICATIONS**

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**Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

A. My name is Jay Haley. My business address is 3100 DeMers Ave., Grand Forks, ND, 58201.

**Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

A. I am a Partner in EAPC Wind Energy and work as a Wind Engineer.

**Q. WHAT ARE YOUR RESPONSIBILITIES?**

A. My responsibility was to conduct the sound and shadow flicker studies for Crowned Ridge Wind II, LLC (“CRW II”).

**Q. PLEASE DESCRIBE YOUR BACKGROUND AND QUALIFICATIONS**

A. I have more than 30 years of experience in wind farm design. My experience includes financial feasibility studies, technical due diligence, wind farm design, energy assessments, visual simulations, ice throw studies, noise studies, and shadow flicker studies. I have performed more than 60 noise impact assessments and shadow flicker studies in over 15 states across the U.S. I have also worked on wind energy projects in Australia, Puerto Rico, Argentina, Chile, Uruguay and Venezuela. I am also the North and South American sales and support representative for windPRO, which is the world’s leading software tool used for the design of wind farms including noise and shadow flicker studies. I have trained hundreds of engineers and environmental consultants on the proper use of windPRO with regard to wind farm design, energy assessments, visual simulations, and noise and shadow flicker studies. I have provided expert witness testimony on noise impacts, shadow flicker issues, ice throw and visual impacts in adjudicatory hearings front of local boards and in judicial proceedings.

I have a Bachelor of Science degree in Mechanical Engineering from the University of North Dakota. I am a participating member of the International Electrotechnical Commission (IEC) Technical Committee TC88, Working Group 15 as a Technical Advisor for the U.S. National Committee. The purpose of this group is to develop an International Standard for the