BEFORE THE PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

In the Matter of the Application by CROWNED RIDGE WIND II, LLC *for a Permit of a Wind Energy Facility in Deuel, Grant and Codington Counties*	))))	Docket EL19-016

REPLY OF PETITIONERS EHLEBRACHT (AND OTHERS)
TO COMMISSION STAFF'S MOTION TO DISMISS PETITION

By filing dated April 9, 2019, Garry Ehlebracht and five of his neighbors (collectively, therein referenced as "Protestants, and now herein referenced as "Petitioners"), all residing upon their properties within the immediate vicinity of Goodwin (Goodwin Township, Deuel County), South Dakota, have sought party status under SDCL 49-41B-17(3).

Thereafter, on April 15, 2019, these Petitioners submitted a further pleading entitled "Petition of Ehlebracht, et al. to Commission Staff Concerning Applicant's Burden of Proof." By motion dated April 16, 2019, Commission Staff propose outright dismissal of the described petition.

Petitioners now file this brief response, with the understanding the Commission will consider their proposed intervention, and the described petition, on May 2, 2019. Counsel for these Petitioners (or proposed intervenors) will not ask for the opportunity to be further heard at this time.

I. This is Not a Civil Case.

While it is recognized that ARSD 20:10:01:01.02 provides for this Commission to apply the rules of civil procedure, with certain exceptions, we would assert this wind farm application is hardly like a civil case. There is no counterpart in civil law where a plaintiff (now as this applicant) might come before the court (this agency), submit an application for siting approval, and then emerge with the full right and authority to encamp amongst citizens, profoundly changing (infringing, or taking), for decades to come, the setting, environment, viewshed, property values, associated property rights, and quality of life of those who live nearby, all without being called into question to answer for damages. The key hurdle here is the "burden of proof" the State legislature has scattered in applicant's path, an obstacle to be judged in this Commission's discretion. Judging from history, this is a contest that applicants always win, while those relegated to live in the shadows and wasteland emitted by the wind farm always lose.

II. Applicant's Burden of Proof.

Applicant, having no privity of contract with these Petitioners, is subject to the burden of proof of those matters recited in SDCL § 49-41B-22. Petitioners, in particular, maintain the facility will pose a threat of "serious injury to the environment [and] to the social and economic conditions of inhabitants [and property owners]" in addition to a risk of substantial impairment of "the health, safety or welfare of the inhabitants." In this regard, Petitioners submit that the

State itself could not build this wind farm in an exercise of either governmental or proprietary powers, without dealing with these same concerns and interests, which are also subject to statutory and constitutional protections. As such, the State can neither take nor assert itself without paying just compensation. Simply because it wants to build a wind farm, applicant is not entitled to special dispensation. In this same sense, the state legislature cannot delegate to this Commission, within the context of the application process, to rule in favor of a wind farm applicant, notwithstanding the statutory and constitutional rights inherent in title to lands.

III. When Does this Burden Arise?

According to ARSD 20:10:22:39, the applicant's burden is to be maintained in the form of data, exhibits and related testimony – and the regulation suggests this is to be submitted with the application. The fullness of testimony seems to be absent.

For example, Petitioners fully believe and submit to this Commission that the manufacturers of IWT – as will be eventually deployed somewhere within this proposed wind farm – have published guides or manuals establishing a "safety zone." This concern is further referenced, briefly, in Section 11 of the petition (filed April 15, 2019). The petition further endeavors to establish that as important as a "safety zone" might be to the determinations of this Commission, there is no hint of any such concept within the confines of the application thus far.

Likewise, there was no mention (by applicant) of any such concerns or zones before the Deuel County Board of Adjustment. In the current writ of certiorari proceedings, now pending, Petitioners have further submitted information to suggest that this applicant is quite unwilling to say anything about "safety zones" or the like. Applicant has objected to providing any answers, claiming it doesn't know or understand the meaning of, for example, "danger zone" or "keep out area." (See Response of Intervenor Crowned Ridge Wind LLC to Interrogatory 13, within Exhibit A to Petition.)

Within the context of this application, when, if ever, does the burden arise as to "safety zones"? Is this topic of any interest to this Commission? If not now, then later?

IV. When Does the Duty to Come in Candor Arise?

An applicant coming to this Commission – hoping to obtain a siting permit – should be required to approach with all due candor, just as this Commission should be prepared to undetake a robust inquiry into those matters outlined in SDCL § 49-41B-22. At this threshold moment, it seems obvious that if the "safety zone" recommendations of the manufacturer are to be revealed, it will be up to the Petitioners to dig it up and have it placed in the record.

Petitioners, of course, are ordinary landowners, persons of limited economic resources. They are not coming before this Commission to seek essential relief associated with their expediture of hundreds of millions of dollars. Rather, Petitioners are hoping to protect what they now own and have. Granted, it may not be much, in the scale of Applicant's world, but it cannot be taken from them, or infringed, without just compensation. The Commission itself seeks the assistance of consultants, apparently as to topics that are deemed confidential (or at least, not disclosed thus far). If the Applicant does not wish to disclose this kind of information as part of its burden, perhaps the Commission should retain a consultant, one or more, able to gather the

information – of which the manufacturer's recommendation (key to the fashioning of setbacks) is but one relevant item of keen interest.

What is said here applies to other concerns, as well. Petitioners, for example, maintain they have the inherent property right to determine just who might lawfully dispose of, or to cast upon their respective properties, shadow and light, whether the duration of those actions might be for 10 minutes or 10 hours.

Applicant maintains the right to do so for up to 30 hours annually. Deuel County Zoning Ordinance, as most recently amended, proclaims the right to take from these Petitioners the use and enjoyment of their lands and homes for a like period, and to thereafter confer that right upon this Applicant. Neither the Board of Adjustment in Deuel County, nor this Commission, however, have any due legal right to bless or confer this taking upon Applicant. The rights in question belong to Petitioners, and to them alone.

Without belaboring these points, the intent of the Petition (as filed April 15, 2019) was to encourage Commission's Staff to consider (sooner rather than later) how to best address the factual and legal concerns of Petitioners, as property owners who, henceforth, are expected to reside within the project's boundaries (so long as their endurance remains). This Petition deals with when – if ever – must the Applicant come forward to meet the burden of proof and also whether the points mentioned are (or are not) part of that burden?

V. Conclusion.

Petitioners' concerns are not transitory, but are fundamental, germane and abiding. Petitioners intend to vigorously protect their properties and themselves. It would be best if this Commission worked to encourage candid disclosures by this Applicant, and if that is not possible, then to foster the retention of consultants and experts who will carry forward with all that Applicant seems unwilling to bring into this record.

Dated at Canton, South Dakota, this 30th day of April, 2019.

Respectfully submitted,

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