

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

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

**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’s 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’s acknowledge that CRW filed Map 3, the land status map, on February 7, 2019.¹ Intervenor’s, however, assert that CRW has failed to timely and in good faith update the CRW Maps to reflect the status of the Thompson properties.² This assertion is incorrect.

¹ Second Motion to Dismiss at 4.

² *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 Maps³ 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, Intervenor's Second Motion to Dismiss infers that CRW was obligated to update Map 3 in response to Intervenor's first set of discovery.⁴ This is incorrect. Intervenor's 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 Intervenor's assertions, CRW has timely and in good faith updated the CRW Maps, including Map 3, in advance of the evidentiary hearing at which Intervenor will have the opportunity to cross-examine witnesses. Accordingly, the Second Motion to Dismiss should be denied.

6. There is no impact on Intervenor's legal rights. The procedural schedule adopted by the Commission affords Intervenor 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, Intervenor's citation to case law is not instructive. To the contrary, in the *In re Midwest Sec. Transfer* appeal,⁵ the Supreme Court of South Dakota affirmed the South Dakota Public Utilities Commission order granting a company the authority to operate as a Class

³ 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.

⁴ Second Motion Dismiss at 6.

⁵ 345 N.W. 2nd 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 Intervenor 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, Intervenor's citation to *In re Midwest Sec. Transfer* provides no support for their Second Motion to Dismiss.

8. Similarly, Intervenor's citation to *South Dakota v. United States DOI* is without merit.⁶ 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, including Map 3, were updated and refiled on May 23, 2019, Intervenor 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 Intervenor.

9. Intervenor cites 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.⁷ 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,

⁶ 787 F. Supp. 2nd 981 (D.C. S.D. 2011).

⁷ 308 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.⁸ 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 receipted 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.

⁸ 424 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

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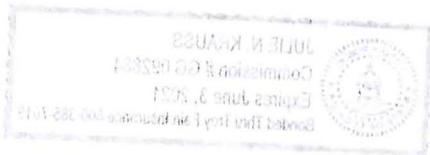
IN THE MATTER OF THE)
APPLICATION OF CROWNED)
RIDGE WIND, LLC FOR A) AFFIDAVIT
PERMIT OF A WIND ENERGY)
FACILITY IN GRANT)
AND CODINGTON COUNTIES)
EL-19-003

1. I am the Project Manager for the Crowned Ridge Wind, LLC (“Crowned Ridge Wind”) wind facility that is proposed for approval in South Dakota Public Utilities Commission (“Commission”) Docket No. EL19-003. I am responsible for the development of the proposed wind facility, which includes working with the Crowned Ridge Wind land team to execute easement option agreements to support the wind facility.
2. On November 22, 2017, Cattle Ridge Wind Farm, LLC (“Cattle Ridge Wind Farm”) was acquired as a wholly-owned indirect subsidiary of NextEra Energy Resources, LLC. At the time of the acquisition, Cattle Ridge Wind Farm provided a land status data package that showed John Thompson as a participant. See Attachment 1.
3. On February 27, 2019, Cheryl Thompson left a message for me expressing an interest in placing wind turbines on her property in Grant County, South Dakota. On the same day, I asked the land team to contact her.
4. On March 5, 2019, Cheryl Thompson emailed Russel Lloyd, a land agent for Crowned Ridge Wind, providing John and James Thompson’s contact information. See Attachment 2.
5. On March 5, 2019, James Thompson emailed me to indicate that the Crowned Ridge Wind planning map incorrectly identified his family farm as hosting a collection line for the Crowned Ridge Wind facility. See Attachment 3.
6. As of March 5, 2019, while I understood the map as filed with the Commission indicated that the Thompson property was participating, and James Thompson indicated that no participation easement was executed, it was also my understanding that Cheryl Thompson was interested in participating, and, therefore, prior to changing the land status map with the Commission, I endeavored to understand whether or not the Thompsons would participate.
7. On March 6, 2019, Russel Lloyd, a land agent for Crowned Ridge Wind, emailed Cheryl, James, and John wind farm easements for their review. That same day, John Thompson wrote back thanking Russel Lloyd for the information. See Attachment 2.

8. On March 6, 2019, John Thompson and I had an approximately 30 minute phone conversation. During that conversation, I apologized for the confusion resulting from the project map showing him as hosting collection. In an attempt to understand why the Cattle Ridge Wind Farm documents identified the Thompson property as participating, I inquired whether the family had at some time committed to execute an agreement with Cattle Ridge Wind Farm. We also discussed if the Thompson family had any interest in participating in the proposed Crowned Ridge Wind Project moving forward. There was no indication on this call that the Thompsons would not be interested in executing an easement agreement. A large part of the conversation focused on the possibility for a turbine(s) to be sited on the Thompson property and whether we could re-align the collection routing on the property in a manner that would be agreeable to the family. The conversation was cordial, and, it is my understanding that John Thompson wished to continue the conversation at a later date and possibly participate in the Crowned Ridge Wind Project.
9. On March 19, 2019, James Thompson emailed me requesting that I follow-up on his concern that their farm was identified as participating. See Attachment 3. On March 19, 2019, I emailed John and James Thompson and I explained that they were correct and the map showing them as a participant was incorrect, and that Crowned Ridge Wind had no rights to perform any work on their land. I also provided an overview of the current status of the review of the Crowned Ridge Wind application before the Commission, and offered to discuss with them an opportunity to participate in the Crowned Ridge Wind Project.
10. On March 20, 2019, in response to a question from Commissioner Nelson at the Public Input Hearing, I indicated that there had been no land status changes from the map filed on February 7, 2019 with the Commission. At that time, it was my understanding that the Thompsons were interested in continuing to discuss the potential to participate in the Crowned Ridge Wind Project.
11. On April 4, 2019, Russel Lloyd emailed the Thompsons in an attempt to understand the status of the Thompson family's consideration of participating in the Crowned Ridge Wind Project. On the same day, John Thompson emailed back "I don't think we are interested and are busy. What did you need?" See Attachment 4. After Mr. Lloyd conveyed that message to me the same day, I started working with the Crowned Ridge Wind team to analyze where the proposed underground collection could be relocated off of the Thompson's property, so that any updated maps would: (1) show the Thompson's property as non-participating; and (2) show the collection line as being located outside the boundaries of the Thompson family's property. That analysis was completed on May 14, 2019. Also, I worked with the Crowned Ridge Wind team to understand whether there were any other instances for which the land status map needed updating. While I did not find another situation similar to the Thompson family's, I did find that six easement options had expired, and, therefore, the updated map shows those properties as

pending rather than as participating. I also updated the maps to show minor adjustments to infrastructure to accommodate the requests of participating landowners. The updated land status map and all other maps were completed on May 23, 2019, and submitted to be posted on the Commission's web site in Docket No. EL19-003, with the exception of the sound level and shadow/flicker maps which will be included in Jay Haley's Rebuttal Testimony.

12. I understand that the Crowned Ridge Wind facility can only be constructed, operated, and, maintained on land in which Crowned Ridge Wind has the necessary rights to use the land to construct, operate, and maintain the facility. Therefore, Crowned Ridge Wind commits to keep the Commission updated on land status rights, including, if the Commission approves the facility permit, during the pre-construction compliance phase of the project.



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Tyler Nixon

Subscribed and sworn to before me this 23th day of May 2019.

Julien Krauss

JULIE N. KRAUSS
Commission # GG 092884
Expires June 3, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

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

IN THE MATTER OF THE APPLICATION)	
BY CROWNED RIDGE WIND, LLC FOR A)	EL19-003
PERMIT OF A WIND ENERGY FACILITY)	
IN GRANT AND CODINGTON COUNTIES)	CERTIFICATE OF SERVICE
)	

I hereby certify that true and correct copies of the Response to Intervenor's Second Motion to Deny and Dismiss and the Affidavit of Tyler Wilhelm in this matter were served electronically to the parties listed below on the 23rd day of May, 2019, addressed to:

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