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 EL19-027

REPLY OF INTERVENORS ON THE ISSUE OF
"CONFIDENTIALITY OF EASEMENT AGREEMENT"

I. Introduction by Intervenors

This reply is submitted on behalf of Intervenors Garry Ehlebracht, and several others, all residing in the area of Goodwin, South Dakota, each desiring to avoid having their respective property within the project boundaries of Crowned Ridge Wind II, exposed to the adverse affliction of those "Effects" simply because of being too proximately or closely situated to the proposed wind farm of Crowned Ridge Wind II, LLC ("Applicant").

Intervenors, of course, did not make the choice of relative proximity to Applicant's wind farm. Rather, Applicant has come to the Goodwin area with a great number of 485 foot wind turbines that, when and as the wind blows, will crank out a considerable volume and quantity of "Effects" (so named, in part, based on the title to Section 5.2 of the Easement Agreement at issue), to be cast down and upon each of the Intervenors. Intervenors have appeared in this proceeding (as is clearly shown also in the Application for Party Status, filed August 6, 2019) for the special purpose of demonstrating that (a) they, as fee owners, have created or given up *no* servitudes upon their lands, and, just as importantly (b) Deuel County, in the purported exercise of the State's delegated zoning power, and even when acting in tandem with this Commission (if such proves to be the case), has *no* legal authority to either permit or license this Applicant so as to take adversely from Intervenors (namely, an easement for the casting of such "Effects") what

could not be heretofore mutually obtained through an exchange of mere money for privity of contract.

The corrected version of the Application for Party Status was submitted on August 6, 2019, and devoted some part of the text to quoting, followed by a discussion and related arguments, of two specific provisions of a certain Wind Lease & Easement, as proposed in 2013 to Intervenor Laretta Kranz by an agent for a former affiliate or predecessor of Applicant (Crowned Ridge Wind Energy Center, LLC, which appears to have ceased existence on September 20, 2013, about three and one-half years before the Applicant was formed in the State of Delaware). Applicant claims to be a successor-in-interest to whatever contracts were held by the predecessor (according to Mr. Schumacher's letter of August 6, 2019).

The specific provisions quoted in the intervention application (taken from the 2013 proposal) were Section 5.2, "Effects Easement," and Section 11.10, "Remediation of Glare and Shadow Flicker." The full text of these two particular items will not be repeated here.

Based on Applicant's objection, the entirety of pages 3 through 6 of the intervention application have been redacted as now appears within the Commission's electronic docket. The objection is premised on the theory these provisions are a "trade secret" and as such, are entitled to confidentiality. (A different section of the 2013 proposed instrument – Section 17 – is entitled "Confidentiality." Although not quoted in the intervention application here[1], or even directly mentioned by anyone in this docket, until this specific passage, this particular section would seem to have a major bearing on the point of contention: are these quoted provisions truly

[1] Section 17, in addition to Section 5.2, from a 2014 executed but expired version of the Lease & Easement was quoted in the recent unsuccessful efforts of Timothy & Linda Lindgren to intervene in EL19-003, *Crowned Ridge Wind – Codington & Grant Counties*. The Lindgren document did not include Section 11.10. At every turn, Applicant's counsel objected to quoted text as representing trade secrets and confidential matters. As Applicant's own brief and submissions *here* now disclose the text of Section 5.2, our direct quotation *there* of Section 17 must have been the rub, we will assume.

confidential? The first sentence of Section 17 reads: "This Agreement includes confidential and proprietary information relating to Operator and the Wind Farm.")

Applicant has now submitted a brief in support of the proposition that the language of the Crowned Ridge "Easement Agreement" is entitled to confidential treatment, on the premise the document contains (a) "trade secrets, confidential, and proprietary commercial information," and (b) Applicant would be harmed by public disclosure, and (c) competitors of Applicant would obtain economic value from public disclosure, among other grounds. Additionally, Crowned Ridge submits an affidavit of Daryl Hart, and Attachments A (a 2016 decision of the Colorado PUC, bearing on the issue of a protective order), B (a highly redacted, but public form of the "Easement Agreement," bearing the name of Applicant), C (an unredacted form of the Easement Agreement submitted to the Commission, but not to others based on the claim of confidentiality) D (an order of the Iowa Utilities Board, granting confidentiality for certain documents with "detailed descriptions of ITC's easement negotiation procedures, pricing information, and negotiation strategies that were developed by ITC, are specific to ITC, and are closely protected by ITC, making the information trade secrets pursuant to Iowa Code § 550.2(4)"), and E (a protective order issued by the Maine Public Utilities Commission to protect "confidentiality of confidential easement and right-of-way agreements").

Intervenors Garry Ehlebracht, *et al.*, submit this writing in response.

II. The Public Interest in Knowledge of the "Easement Agreement"

To our considerable surprise, Applicant's Attachment B clearly discloses the full (albeit rather brief) text of Section 5.2, entitled "Effects Easement," as contained with the Applicant's current "Easement Agreement." Yes, it is identical to that quoted in the Application for Party Status, dated August 6, 2019, as taken from the 2013 proposal to Ms. Kranz.

Beyond that, the only other provision quoted in our prior writing was Section 11.10, *Remediation of Glare and Shadow Flicker*. With about 85% of the text of the current "Easement Agreement having been redacted from Crowned Ridge's Attachment B, we can't tell whether such a provision is presently used by Crowned Ridge. But, *we're betting not*, and Commission Staff, by resort to Applicant's submitted Attachment C, will be able to confirm that fact. (We are unable to do so, of course.)

It is puzzling why Crowned Ridge would go to such lengths to keep Section 5.2 and Section 11.10 from a proposed 2013 Lease & Easement Agreement out of the public eye. But, we are able to relate *why*, in the view of these Intervenors, a full public discussion, understanding and knowledge of these old provisions is both relevant and important. (Section 11.10 is the subject of further discussion in Part V, *infra*.)

This wind farm proposal has a high degree of involvement with occupied structures – more than 250. In Codington County, more than 74% of the occupied structures within 2 kilometers (or, in American straight talk and true measurement, 6,561.68 feet) are non-participating, and in Deuel County, the ratio for non-participating rises to 79%. Many of these non-participating residences or structures are predicted by Applicant's studies to be hereafter afflicted, to some degree or measure, by enhanced sound (dBA, and also ILFN) and Shadow Flicker. Each of the homes of these Intervenors are in that category.

In the public interest, and in the interest of transparency, the owners and occupants of these non-participating residences – nearly 200 sites – should be made aware that by virtue of the "Effects Easement," Applicant has already dealt with the Participating Owners as to such "Effects" – such owners have surrendered their relevant privileges (as arise under the provisions of property law) to Applicant. These Participating Owners, by privity with Applicant, will have nothing but the applicable provisions of a Zoning Ordinance and the eventual Facility Siting

Permit to protect them as to the untoward results of "Effects" coming their way, once this wind farm begins operation.

Meanwhile, the Non-Participating Owners – these Intervenors included – have willingly given up *nothing* in the way of property rights to Applicant. They have not entered into any privity of contract or title with Applicant.

Yet, in these circumstances, Applicant will now affirmatively deploy the local CUP, issued under the respective Zoning Ordinances, together with this Commission's Facility Siting Permit, as a *means* of taking (or depriving – and the word "stealing" comes to mind, as well) the inherent property rights of these Non-Participating Owners, who have otherwise offered or created no such servitude. Thus, what has been fully purchased from the Participating Owners as an agreed servitude, is now about to be "borrowed" (or stolen, depending on one's point of view) from those who (like Intervenors) are Non-Participating, having entered into no privity with Applicant.

Applicant's business plan depends on the willing assistance of the Boards of Adjustment in the respective counties (acting under Zoning Ordinances that, we assert, transcend the constitutional limits of the State's delegated zoning power), and, finally, of this Commission, too. This reply will return to this discussion (Part V) following a brief review of Applicant's submitted agency rulings from other jurisdictions (Part III) and also whether Applicant has maintained the lease provisions in a confidential manner (Part IV).

III. What Other Agencies May Have Done Proves Nothing Here

Applicant has submitted orders or rulings from other agencies in Colorado, Iowa and Maine. Each seems to offer distinguishable circumstances.

Colorado's ruling (Attachment A) involves extending confidential treatment for "gas price forecast information," data which clearly had commercial value and which could be

otherwise obtained at a price. NextEra also filed a protective order motion, as PUC staff and Office of Consumer Counsel sought to obtain information claimed to be "proprietary, commercially sensitive, and competitively sensitive information." According to paragraph 24, the information to be protected includes "capacity factors, generation patterns, tax benefits and 'free curtailments' for projects under contract with Public Service." How this might relate to the "Easement Agreement" (with Section 5.2, already "out in the open" at this point) in question is a fairly opaque problem for Applicant.

Applicant next presents the Iowa Utilities Board ruling (Attachment D), concerned confidential treatment of "detailed descriptions of ITC's easement negotiation procedures, pricing information" and so forth. How this ruling is of assistance to Applicant is difficult to understand. To be clear, not knowing much of the contents of Attachment B, and knowing nothing whatsoever as to the contents of Attachment C (except to the limited extent of being exposed via Attachment B), Intervenors do not propose to reveal (let me be fully direct on that point – *we will not reveal*) any pricing information or "easement negotiation strategies" that might be in their hands.

But, to the extent that the 2013 proposal (to Intervenor Kranz), or the several other, more recent iterations of the "Easement Agreement" known to exist, have a *focus* on the Applicant's purchased rights in and to a Participating Owner's land, and concern Applicant's right to exploit and use such land and to create and emit Effects that then also spill over onto the lands (and residence) of a Non-Participating Owner (noise and Shadow Flicker being known as not obeying property lines), this language of the Easement Agreement should be open and public in nature. If the Commission follows the lead of Applicant, these actions merely render the agency complicit in an attempted heist of property rights, this point being the central theme of Intervenors (as is - or would have been - quite clear from the intervention application, prior to the brutal redaction

that has transpired at Applicant's urging, remaining to this date on the Commission's electronic filing).

Last to be considered is the ruling from Maine's Public Utilities Commission, a protective order concerning confidential easement and right-of-way agreements. The order lacks factual context, and is focused on the ordering of confidentiality and a process to be employed during the course of the proceeding. It is decidedly not helpful here.

We have no doubt that Applicant hopes to keep virtually all of the text of the "Easement Agreement" as confidential, as such a label renders public disclosure and discussion of the underlying concept more difficult. What is that underlying concept? That Applicant – having spent funds to acquire an overwhelming scope of easements upon and across the lands of Participating Owners – now fully intends to simply *take* similar easements upon and across the lands and residences of Non-Participating Owners. What's more, Applicant expects this Commission to facilitate that taking, much like Deuel County has already done.

This will be accomplished in the name of, and under the cover afforded by, Conditional Use Permits (or Special Exception Permits) and this Commission's Facility Siting Permit, subject only to the constraints imposed by the Zoning Ordinance or this Commission's order regarding noise on a dBA scale and Shadow Flicker. In the case of Participating Owners, those who have already given this Applicant all of the relevant rights by virtue of Section 5.2, Effects Easement, the Zoning Ordinance and CUP, together with this Commission's forthcoming final order for Facility Siting Permit, collectively, are as a prophylactic device, a stop-gap measure to protect the Participating Owners from the inherent dangers of their risky behavior ("foolishness" works, too).

However, as to the Non-Participating Owners, the very same official licenses and permits are as a sword, collectively taking and surrendering over to Applicant what Applicant itself could

not obtain (or, perhaps, didn't even look to gather) by means of privity. These licenses and permits have then become as a *de facto* easement, final and accomplished, a defensive mechanism warding off future claims, where Applicant can assert, with a shrug of the shoulders *and* a straight face, "It's all legal and everything." (Except, of course, it's not.)

IV. If this is a Trade Secret, Applicant Seems a Bit Careless

Initially, it must be noted that Intervenor Kranz never signed the Easement Agreement (distributed by a company that seems to have been disbanded some years before Applicant was formed), and thus she never came into a confidential relationship with that moribund entity.

As defined in South Dakota's version of the Uniform Trade Secrets Act, SDCL § 37-29-1(4), a trade secret is "information, including a formula, pattern, compilation, program, device, method, technique, or process . . ." That an Easement Agreement – describing the land use rights of Applicant upon and over the lands of a Participating Owner, including a wind easement and the "Effects" of the cast-offs of an operating wind farm – might meet this definitional test seems unlikely to this writer.

Again – being also aware that certain exhibits or attachments might involve economic considerations or payment amounts – those items or topics are not the focus of our interest. What is of keen interest is *this*: when Applicant makes use of the land of a Participating Owner, and the "Effects" flowing from that use then spill over onto the adjoining or nearby lands of a Non-Participating Owner, *that* is where the distinct interest and concern of these Intervenors begins. That is also where their property lines, and property rights, begin. Those property rights, however, are not for sale, not now and not ever (as Intervenors have each assured this writer).

Applicant comes before this Commission, however, with the clear intent of infringing upon, and in making free use of those property rights for Applicant's own commercial purposes, while invoking the assistance of this Commission towards that very end. Every one of the nearly

two hundred Non-Participating Owners should have the opportunity to discover, by searching the files of this Commission, what Applicant intends to accomplish here, not only as to the lands of Intervenors but many of the affected homes and properties of that broad, affected category. Wholesale redactions of the "Easement Agreement" (Attachment B being a classic example) clouds, if not totally obscures, Applicant's intended purpose and mission. The public, of which these many Non-Participants are a part, deserves to know, or at least deserves the opportunity to discover, how this modern-day heist is close at hand, and about to unfold.

A final point on Applicant's conduct in keeping the "Easement Agreement" close to its vest. This writer understands that a complete, unredacted blank version of the document was submitted in the Grant County Board of Adjustment proceeding, the CUP which underlies the current effort. Several persons involved in that case (this writer was not) claim to have possession of the proposed instrument, and it is believed a copy was submitted also to the Zoning Officer as part of the CUP filing. This version is believed to conform to that which is now in the hands of this Commission as Attachments B and C, rather than the old 2013 version of the defunct entity, who was then attempting (without success) to negotiate a deal with Intervenor Laretta Kranz. Is that so, Mr. Schumacher? A further response would be welcomed.

As an aside, we further note that while the current Applicant will not be placing any turbines on Ms. Kranz' property, they will be close enough to emit elevated levels of sound on the dBA scale, while casting Shadow Flicker, too. The "Effects Easement" would have covered those legal bases, of course; now, Applicant intends to take the right for doing so. Deuel County has already approved, [2] even as Applicant awaits further word from this Commission.

[2] Intervenors have petitioned for review by writ of certiorari, filed November 15, 2018, 19CIV18-000061, *Ehlebracht, et al. vs. Deuel County Planning Commission, sitting as Board of Adjustment, et al.,* pending in the Circuit Court as of this date. The grounds for challenge raised there are very much the same as will be presented here.

V. Why the Old, Unsigned Lease & Easement Yet Matters

Since the beginning of EL19-027, just a short time ago, these Intervenors, as neighbors in and around Goodwin, have attempted to make clear the fact their opposition is not merely based on the tests outlined in SDCL § 49-41B-22. Their opposition is based *also* on their individual rights and liberties as property owners (fee owners, having all the sticks associated with title in a bundle), as protected by South Dakota law and constitutional provisions.

We would observe that the statute cited seems actually based on a Legislative assumption that, before coming to this Commission, the Applicant has already gathered up all of the leases, easements and land use or access rights otherwise required in order to accomplish the proposed facility. Nothing in SDCL § 49-41B-22 (or companion statutes) purports to give this Commission the authority to "clear land" or to "obtain land" (property rights, whether by decree or by condemnation) for the benefit of Applicant's wind farm project. Yet, this is precisely what Applicant is seeking from this Commission, to the extent Applicant's agents have failed to negotiate land-based rights.

What's more, the 2013 document, as proposed to Ms. Kranz, supports these bold claims as set forth above. The text of Section 11.10 of the 2013 Lease & Easement has already been quoted at page 4 of the *Application for Party Status* in this Docket EL19-027.[3] It is titled "Remediation of Glare and Shadow Flicker." We are quite certain this section no longer exists in the Easement Agreement deployed by this Applicant for this wind farm. Assuming such is the case, then why is this obsolete provision important today? It is an example of this defunct predecessor assuming some responsibility to address one of the "Effects" (Shadow Flicker being encompassed by Section 5.2, albeit in the rather odd, attenuated reference of "light, flicker, . . .

[3] The text at 4, being one of those pages that, thus far, is redacted and rendered entirely black. At the risk of drawing further ire of Applicant, and more blacked-out pages, we will attempt to make the point without lengthy quotations of Section 11.10.

shadow") if it proves to be problematic for the "Participating Owner." How was the problem to be addressed? *By planting trees or the installation of awnings.* (Whether such measures would have offered a measure of relief for a Shadow Flicker affliction is one question the experts will eagerly address, we suppose, while the Zoning Ordinance duration ceiling obviates any need for trees.)

This is what is noteworthy – Section 11.10 was deployed as a solution in 2013, which is just after NARUC's study[4] was released proposing the "best practices" zoning solution for Shadow Flicker, that being the 30 hours per year and 30 minutes per day limitation. Like wildfire, the desire to update the respective Zoning Ordinances seems to have struck the officials of Codington, Deuel and Grant Counties all at about the same time. Each now has a Zoning Ordinance that dutifully incorporates the "30 hours per year" limit for Shadow Flicker. And, just like that, the perceived need to perpetuate Section 11.10 was obviated.

What lies behind the NARUC report and the amendments to the Zoning Ordinance changes is this rather major assumption – that the constitutional limits of the delegated zoning power actually permits or allows the burden of Shadow Flicker (to say nothing of noise at this stage) to be imposed on Non-Participating Owners. The viability of Applicant's project, at this stage, depends – since the burden is being imposed on a great number of Non-Participating Owners with whom Applicant has no privity – on the State's zoning power being deemed *that* broad. That seems to be a very dubious proposition, based on Euclidean zoning law norms.

That very issue is about to be tested, whether in this proceeding or on appeal to the Circuit Court, or in other cases now beginning to unfold. Having been involved in zoning law cases since Congress decided the Interstate Commerce Commission had outlived its purpose, this writer can only express his personal doubts as to the validity of that assumption. I can think of

[4] As cited in n. 2 of Application for Party Status herein.

no other zoning endeavor – other than a Conditional Use Permit (or Special Exception Permit, as Deuel County choses to term it) for a wind farm project – where an applicant invokes the jurisdiction of the Board of Adjustment for relief, and then, in addition to the right to conduct a unique and noisy form of commercial or industrial enterprise in the rural area, is awarded license *also* to share the negative aspects of the enterprise's operations with the lands and lives of all the adjoining neighbors (neighbors who never invoked the jurisdiction of the Board, beyond resisting the effort to take their lands and to affect their lives for such purposes). The resulting, fully-blessed operation not only transforms their lives into the need to endure the annoyance for decades to come, but thwarts the inchoate rights of the neighbors, as land owners, to otherwise use and develop their rural lands for such purposes as are otherwise permissible under the Zoning Ordinance. A rural land which is truly rural is one thing; a rural land nonvolitionally quartered inside or near the borders of a wind farm parcel – by virtue of zoning or similar governmental edicts, all invoked at the instance of the Applicant - is quite another.

Even if this Commission were to conclude, under SDCL § 49-41B-22, that the health and welfare of these neighboring Non-Participating Owners is not substantially impaired, this does not resolve the issue as far as the vested and protected *property rights* of these same owners are concerned. Intervenors do *not* consent to the use of their lands for such purposes as Applicant has clearly envisioned (and as is contemplated for Participating Owners by virtue of Section 5.2, Effects Easement), and also do *not* concede that this Commission has jurisdiction to ratify Applicant's efforts to do so.

VI. Conclusion

Intervenors do not quarrel with Applicant's efforts to keep hidden the financial details of the Easement Agreement with the dozens of Participating Owners willing to take mere money

for the surrender of the fee simple bundle of sticks (to the extent such are citizens and not otherwise acting under a conflict of interest as decision makers for local governments).

However, these efforts, the endeavor to keep hidden the non-financial provisions (well, to the tune of 85%, more or less) of the text of the Easement Agreements bearing on Applicant's claimed right and privilege to cast Effects or other deleterious results upon the lands of each Participating Owner, when such Effects then have the propensity to continue, both adversely and in a hostile manner, over and onto the adjoining lands of Non-Participants, should fail. The interests of the public, the hundreds expected to endure living in or near the boundary of this wind farm for years to come, are deserving of the opportunity to discover (and then come to fully appreciate) what is afoot here: a rather brazen attempt to take or convert land-based rights and interests by this Applicant, with the County's Zoning Ordinance and the Facility Siting Permit process of this Commission each being invoked, in sequence, as cover for the efforts.

As is the case with the Application for Intervention, the position here has been extended so that both Commission and Applicant will know and understand, if not yet fully appreciate, the full grounds for the opposition of these parties.

Dated at Canton, South Dakota, this 28th day of August, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of *Reply of Intervenors on the Issue of "Confidentiality of Easement Agreement,"* dated August 28, 2019, addressed to the Commission's Executive Director, submitted on behalf of Garry Ehlebracht, and others ("Invervenors"), has been transmitted (the date below) by undersigned, as counsel for said proposed Intervenors upon each of the following presently appearing on the Commission's Service List in this matter:

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