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THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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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

EL19-027
 ORIGINAL

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Transcript of Recorded Proceedings
 September 17, 2019

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BEFORE THE PUBLIC UTILITIES COMMISSION,
 GARY HANSON, CHAIRMAN
 CHRIS NELSON, VICE CHAIRMAN
 KRISTIE FIEGEN, COMMISSIONER

COMMISSION STAFF
 Karen Cremer
 Greg Rislov
 Adam de Hueck
 Darren Kearney
 Jon Thurber
 Eric Paulson
 Kaitlyn Baucom
 Kristen Edwards
 Mikal Hanson

A P P E A R A N C E S

Miles Schumacher and Brian Murphy,
 appearing on behalf of Crowned Ridge Wind II;

Amber Christenson and Kristi Mogen,
 appearing pro se;

Amanda Reiss,
 appearing on behalf of Staff.

Reported By Cheri McComsey Wittler, RPR, CRR
 Precision Reporting, 213 S. Main, Onida, South Dakota
 cwittler@venturecomm.net

1 The following transcript of recorded
2 proceedings was held in the above-entitled matter at the
3 South Dakota State Capitol, 500 East Capitol Avenue,
4 Pierre, South Dakota, on the 17th day of September,
5 2019.

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1 CHAIRMAN HANSON: Docket EL19-027, In the Matter
2 of the Application by Crowned Ridge Wind II, LLC For a
3 Permit of a Wind Energy Facility in Deuel, Grant, and
4 Codington Counties.

5 The Intervenors are represented by
6 Mr. Schumacher. The Staff assigned to this -- did I say
7 Mr. Schumacher? Good luck with that.

8 Staff assigned to this docket -- at least I know
9 that -- Darren Kearney, Jon Thurber, Eric Paulson,
10 Kristen Edwards, Amanda Reiss, and Mikal Hanson.

11 Questions for us today are shall the Commission
12 issue a procedural schedule? Shall the Commission grant
13 CRW the second's request to designate Section 11.10 as
14 found in the August 6 Application for party status as
15 confidential? Or how shall the Commission proceed?

16 And we've seen a lot of filings since we first
17 met and discussed this and deferred it, and we are
18 interested in the final update from Crowned Ridge Wind.

19 MR. SCHUMACHER: Thank you, Mr. Chairman. Miles
20 Schumacher again.

21 First of all, Applicant has no objection to the
22 proposed procedural schedule. And on the confidentiality
23 matter we would like to offer just a very brief argument.

24 For background, as part of the certain
25 Intervenor's petition for party status they quoted

1 Section 11.10 of a form of easement that Crowned Ridge
2 Wind II provided many years ago to one of the landowners
3 with the understanding, as explained in the Affidavit of
4 Hart, that the form of easement was to be held
5 confidential.

6 Section 11.10 is in hundreds of executed wind
7 easements throughout the U.S. which have been held
8 confidential. In fact, although copies of the old
9 easement form with Section 11.10 have been left with
10 residents that ultimately did not execute the agreement,
11 the form of agreement has remained confidential per our
12 request when we provided it to these residents.

13 The standard here is whether Crowned Ridge Wind
14 took reasonable steps to maintain the confidentiality of
15 Section 11.10, and it has. Section 11.10 qualifies as a
16 trade secret or otherwise confidential information under
17 ARSD 20:10:01:39(4)(6) and ARSD 20:10:01:42, as well as
18 SDCL 15-6-26C-7 and SDCL 37-29-1(4).

19 In the effort not to repeat the arguments in the
20 brief and the affidavit of Hart, I'll highlight why
21 Section 11.10 qualifies for confidential treatment.
22 Section 11.10 sets forth a provision that Crowned Ridge
23 Wind II has not included in its current easement
24 agreement and, therefore, public disclosures of the
25 provision shows the competitors of Crowned Ridge II what

1 Crowned Ridge Wind II and its affiliated companies
2 throughout the U.S. has included in its easement and what
3 it no longer offers in its easement, which provides these
4 competitors with information they can use to develop more
5 attractive offers to landowners, which in turn directly
6 impacts the competitiveness of Crowned Ridge Wind II's
7 affiliates, given the highly competitive nature of wind
8 project development and the competition for participating
9 landowners, as Hart explains in his Affidavit.

10 The development of wind projects fundamentally
11 depends on securing willing landowners. As the Affidavit
12 of Hart explains, it costs millions of dollars to develop
13 a project. To the extent, for example, an affiliate of
14 Crowned Ridge Wind does not sign up sufficient
15 participants for a project because a competitor is able
16 to use the information and gain insight from
17 understanding that Crowned Ridge Wind affiliates no
18 longer offers Section 11.10 and the project does not go
19 forward, the economic harm to the affiliates of Crowned
20 Ridge Wind will be in the millions of dollars
21 (Inaudible).

22 Staff contends that since the concept in
23 Section 11.10 (Inaudible).

24 CHAIRMAN HANSON: Miles, pause for just a
25 second, please.

1 Okay. Thank you. Someone may have turned on a
2 phone in some -- or a web page or something of that
3 nature in the background, and it interfered with what you
4 were saying in your last sentence. Would you start over
5 with that sentence, please.

6 MR. SCHUMACHER: I hear another beep, but I
7 don't hear much.

8 CHAIRMAN HANSON: Mr. Schumacher, can you hear
9 me?

10 MR. SCHUMACHER: Yes. I can now.

11 CHAIRMAN HANSON: All right. For some reason,
12 we lost everyone for a moment, and hoping that other
13 folks on the phone can hear us as well. I'm not going to
14 run through everyone. We'll just check.

15 MR. SCHUMACHER: I have just a little bit left
16 here. Thank you, Mr. Chairman.

17 CHAIRMAN HANSON: Thank you.

18 MR. SCHUMACHER: Staff contends that since the
19 concept in 11.10 is commonly known in the industry,
20 Section 11.10 is not appropriately considered a trade
21 secret.

22 We believe Staff's argument is in error. Staff
23 incorrectly views 11.10 in isolation and on a stand-alone
24 basis rather than a part of the larger confidential
25 easement and the gives and takes in that easement, as

1 well as the business decision not to include it in the
2 current form of easement.

3 On these points, Staff and Intervenors provide
4 no evidence that the industry knows and understands how
5 Section 11.10 was used in the context of the entire
6 easement and why it is no longer used. In fact,
7 Crowned Ridge is the only party that has provided
8 evidence which comes in the form of the Affidavit from an
9 experienced wind developer, Daryl Hart, and shows by a
10 preponderance of the evidence that Section 11.10 should
11 be treated as confidential. Mr. Hart's Affidavit is the
12 only evidence offered on this issue.

13 For reference, ARSD 20:10:01:42 states, "The
14 party requesting confidentiality has the burden of
15 proving by a preponderance of the evidence that the
16 information qualifies as confidential information by
17 showing that disclosure would result in material damage
18 to its financial or competitive position, reveal a trade
19 secret, or impair the public interest."

20 Further, the Commission has broad authority
21 to --

22 CHAIRMAN HANSON: Miles, you said you only had
23 it sounded like one sentence left. I'm going to check to
24 make certain that the Intervenors are still on the phone
25 with us.

1 Amber Christenson, are you on the phone?

2 MS. CHRISTENSON: Yes, I am. Thank you for
3 checking.

4 CHAIRMAN HANSON: Yes. And Kristi Mogen?

5 MS. MOGEN: Yes, I am. Thank you.

6 CHAIRMAN HANSON: All right. Thank you very
7 much.

8 MR. SCHUMACHER: Just a couple sentences yet.
9 Thank you, Mr. Chairman.

10 CHAIRMAN HANSON: All right.

11 MR. SCHUMACHER: Finally, Section 11.10 has no
12 relevance to this proceeding. It is undisputed that
13 the Crowned Ridge Wind easements do not include
14 Section 11.10. Whether Crowned Ridge Wind at some time
15 in the past used Section 11.10 does not go to any of the
16 regulatory or statutory criteria in this proceeding,
17 which is further support that it should not be publicly
18 disclosed.

19 Rather at the heart of Intervenor's argument
20 that it wants public disclosure of easement provisions,
21 including 11.10, is the theory that allowing shadow
22 flicker and sound on a nonparticipants's property is a
23 taking of property without compensation in violation of
24 State and Federal Constitutions.

25 Not only is the Intervenor's argument wholly

1 without merit, the case law in this case makes it clear
2 that such a legal claim is not ripe for consideration
3 until the wind project is actually operational.

4 I have Brian Murphy and Daryl Hart here to
5 answer any questions that the Commission might have.

6 Thank you.

7 CHAIRMAN HANSON: Thank you.

8 And I will turn to the Intervenors next and then
9 to Staff. And, Amber Christenson, you are first by right
10 of the alphabet.

11 MS. CHRISTENSON: All right.

12 My statement was similar to what I wrote in
13 about, is there's no meeting of the minds that the people
14 they left the Application with would keep it
15 confidential. There's no signed confidentiality
16 anything.

17 You know, Crowned Ridge may have wished they
18 would have kept it confidential, but my understanding of
19 a contract, it has to have a meeting of the minds, and I
20 don't see that as one.

21 And I also believe that we need to show the
22 public what's out there. You know, we're here to protect
23 South Dakota. We're not here to protect NextEra Energy.

24 That's my statement. Thank you.

25 CHAIRMAN HANSON: Thank you, Ms. Christenson.

1 And I'll turn next to Ms. Mogen.

2 MS. MOGEN: I agree with Amber and Staff. You
3 know, this agreement, this contract, has been spread all
4 over northeastern South Dakota. We've seen many
5 different versions of it.

6 And, you know, NextEra still has not produced a
7 confidentiality agreement with the person who is the
8 other Intervenor who is presenting this document. If
9 they show up with one of those, then maybe I'd reconsider
10 my position, but they do not have one. This is fair game
11 for everybody.

12 CHAIRMAN HANSON: Thank you.

13 And Staff. Ms. Reiss.

14 MS. REISS: Thank you, Mr. Chair. This is
15 Amanda Reiss for Staff.

16 Staff filed a brief laying out our position on
17 this matter and would stand by for questions.

18 Thank you.

19 CHAIRMAN HANSON: Thank you. And I'm sure there
20 are some questions, especially -- as I understand it
21 then, Mr. Schumacher, you've -- according to the written
22 items we have received, you're withdrawing. And, as I
23 understand today, you've stated today verbally you're
24 withdrawing your request that -- for confidentiality on
25 both items that you had originally requested

1 confidentiality on; is that correct?

2 MR. SCHUMACHER: We are still looking for
3 confidential treatment of the language in Section 11.10.

4 CHAIRMAN HANSON: Thus, your argument.

5 All right. Well, thank you. I'm a bit
6 perplexed that you would do that. In looking at --

7 When this was originally presented my feeling
8 was you certainly have the right to request that because
9 if another party announces something and presents
10 something for public consumption, then certainly you have
11 the right to at least request the Commission to look at
12 that and determine whether it should be.

13 It seemed obvious to me that if these are
14 already in the public knowledge, that it's strange to
15 request that they would be granted confidentiality
16 again.

17 I enjoy reading A.J. Swanson's letters, his pros
18 and -- I'm sorry he can't be with us because of his
19 broken wrist, but I thought he made very good points.
20 And, frankly, I thought that our Staff made excellent
21 points. And I don't find your arguments substantive.

22 I'll give you an opportunity to respond to that,
23 but your written responses and your verbal -- your oral
24 presentation today pretty much presents all of your
25 arguments.

1 I'm just at a loss of how you can -- I guess in
2 Ms. Christenson's letter, which I guess I found
3 entertaining too, was her statement that the unsigned
4 contracts are like a swarm of gnats flying around the
5 head of this docket and that these wind contracts, with
6 all similar and sometimes slightly varied language, are
7 scattered around northeastern South Dakota like confetti
8 at Times Square on New Year's Eve.

9 I'm thinking she exaggerated just a smidgen on
10 that, but if that's the case, how can you claim
11 confidentiality when, in fact, they are ubiquitously
12 distributed -- universally distributed around, well,
13 probably several states?

14 That's a question.

15 MR. SCHUMACHER: Chairman Hanson, there's a
16 difference between being passed around by hand among the
17 various landowners and posting them on the docket where
18 they are accessible by our competitors across the
19 country.

20 And the concern is is that posting them on the
21 docket serves no purpose other than to put Crowned Ridge
22 in a position where its competitors are free to pick up
23 that language and use it to the disadvantage of Crowned
24 Ridge. And that's far different from having them passed
25 around by word of mouth or hand to hand among the

1 landowners in the area.

2 CHAIRMAN HANSON: Well, I beg to differ with
3 you. Your competitors are quite well experienced, and
4 they're in -- throughout the -- international. And they
5 could easily access those. I think they're in the public
6 wherewithal at the present time.

7 The two arguments that you make that there's no
8 other purpose to them, most certainly there's a purpose
9 of presenting to the Commission, for one, and to argument
10 that there is something that can be done about shadow
11 flicker.

12 I have some other questions, but I'm going to
13 allow -- I'm going to allow for other Commissioners if
14 they have questions at this time. Or concerns.

15 Commissioner Nelson.

16 COMMISSIONER NELSON: For Mr. Schumacher, the
17 letter you filed yesterday, I apologize, but I have no
18 idea what you're asking for. Can you help me understand
19 what you were asking for in that letter?

20 MR. SCHUMACHER: Yes.

21 Commissioner Nelson, the filing had been made
22 to put a redacted confidential version on the docket,
23 and, to our knowledge, there have been no requests for
24 that information. And we've been attempting to have a
25 protective order in place, and our feeling now is is that

1 until a request is made for that confidential version, it
2 serves no purpose to continue to be on the docket so
3 we're looking to pull it.

4 COMMISSIONER NELSON: Okay. Thank you. I
5 appreciate that.

6 No further questions.

7 CHAIRMAN HANSON: Questions? Commissioner
8 Fiegen has none.

9 So is there a motion on this docket?

10 Commissioner Nelson.

11 COMMISSIONER NELSON: I move in EL19-027 that we
12 grant Staff's request for a procedural schedule and that
13 we find that Section 11.10 is not confidential for the
14 reasons listed in Staff's brief.

15 CHAIRMAN HANSON: Discussion on that motion.

16 COMMISSIONER NELSON: I will say two things.
17 Actually I'm going to say three things.

18 Staff's brief laid out two reasons why they felt
19 that this should not be confidential. The first relied
20 upon the language of ARSD 20:10:01:41. And Staff's
21 contention that that would, in fact, allow someone who
22 was the nonfiler to request confidentiality such as is
23 happening in this case, I don't agree with that
24 conclusion.

25 But it ends up being irrelevant because I do

1 believe that Staff's conclusions regarding the fact that
2 the material itself is not confidential wins the day and
3 wins the argument and, therefore, my motion to not retain
4 the confidentiality of this particular language.

5 As has been noted, this language was spread
6 around. And I find it an incredible argument to think
7 that you can provide this language to people in attempts
8 to sign up landowners and then all the sudden later say,
9 oh, but, by the way, you have a responsibility to keep it
10 confidential.

11 It doesn't work that way. You can't just give
12 somebody something and then later say, oh, by the way,
13 there's parameters around what we just gave you. And
14 so, therefore, I don't believe it should remain
15 confidential.

16 The last thing I will say, and Mr. Schumacher
17 had it in his written arguments and he repeated it again
18 today -- and I want you to think about this. His
19 reasoning for keeping this confidential -- and I'm going
20 to quote this. He said today "to prevent more attractive
21 offers to landowners."

22 Well, when we get all of these developers coming
23 to South Dakota, one of the things that they are
24 contending is, by golly, you should approve our
25 Application because we are benefiting landowners. And

1 now he's saying, well, by golly, we wouldn't want to do
2 anything to further improve the offer to landowners. I
3 just find that offensive as it relates to South Dakota
4 landowners.

5 And so for all those reasons, my motion.

6 CHAIRMAN HANSON: Further discussion on the
7 motion? No?

8 I apologize. I was going to ask a question of
9 Mr. Christenson and Ms. Mogen.

10 Ms. Christenson, did you -- I don't believe that
11 you did but -- I know you didn't sign anything, but did
12 you state to them that you would keep it confidential
13 when they presented the information to you?

14 MS. CHRISTENSON: They didn't present it to me.

15 CHAIRMAN HANSON: So you've just received it
16 from other parties?

17 MS. CHRISTENSON: Yeah. Neighbors. Neighbors
18 that had blank ones in their possession.

19 CHAIRMAN HANSON: Thank you. And, Ms. Mogen, is
20 that the situation with you as well?

21 MS. MOGEN: That's correct.

22 CHAIRMAN HANSON: Okay. Thank you very much.

23 And in discussion I would just say that I
24 believe every party -- every party, whether they're an
25 Intervenor or whether they're the Applicant, has the

1 right, Staff has the right, to request that something be
2 held confidential -- in confidentiality. And then it's
3 up to the Commission to decide whether it should or
4 should not be. Otherwise -- even if it's someone else
5 that presents the information. Otherwise, people could
6 present confidential information, and there would be no
7 means other than trying to go to court to stop it. And
8 that falls on our shoulders.

9 I stated my position earlier, and I will be
10 supporting the motion.

11 Any further discussion on the motion?

12 Hearing none, Commissioner Nelson.

13 COMMISSIONER NELSON: Aye.

14 CHAIRMAN HANSON: Commissioner Fiegen.

15 COMMISSIONER FIEGEN: Fiegen votes aye.

16 CHAIRMAN HANSON: Hanson votes aye. The motion
17 carries.

18 One question on this docket: According to
19 20:10:01:43 under Requests For Access To Confidential
20 Information, "Requests for access to confidential
21 information shall be handled as follows:" Sub 4 states,
22 "Upon a determination that the information is not
23 confidential, the information shall be afforded
24 confidential treatment for an additional period of
25 10 days or for a longer period as ordered by the

1 Commission to give the party asserting confidentiality an
2 opportunity to seek review by the Court."

3 So that is under statute -- or under rules.
4 And, as I understand, they now have 10 days to seek Court
5 intervention.

6 MS. CREMER: Yes. This is Karen Cremer, and
7 that would be correct. And it would be -- if they're not
8 going to seek Court review, it would be nice if they
9 would let us know that so that we can make this public as
10 soon as possible.

11 CHAIRMAN HANSON: Thank you. And it does state
12 that unless the Commission decides to add additional
13 time.

14 Is there any desire -- a motion from any of the
15 Commissioners to allow the Applicant additional time,
16 more than the 10 days?

17 Hearing none, we will move to item 6 on the
18 agenda.

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STATE OF SOUTH DAKOTA)

COUNTY OF SULLY)

:SS CERTIFICATE

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 17th day of September, 2019, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Onida, South Dakota this 27th day of September, 2019.

/s/ Cheri McComsey Wittler
Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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