BEFORE THE PUBLIC UTILITIES COMMISSION OF THE 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	)))))	**ORDER DENYING REQUEST FOR CONFIDENTIALITY** **EL19-027**

On July 9, 2019, the South Dakota Public Utilities Commission (Commission) received an Application for a Facility Permit (Application) from Crowned Ridge Wind II, LLC (Crowned Ridge or Applicant), a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC. Crowned Ridge proposes to construct a wind energy conversion facility to be located in Deuel, Grant, and Codington Counties, South Dakota (Project). The Project would be situated within approximately 60,996-acres in the townships of Waverly, Kranzburg North, Kranzburg South, Troy, Rome, Goodwin, and Havana, South Dakota (Project Area). The total installed capacity of the Project would not exceed 301 megawatts (MW) of nameplate capacity. The proposed Project includes up to 132 wind turbine generators, access roads to turbines and associated facilities, underground 34.5-kilovolt (kV) electrical collector lines, underground fiber-optic cable, a 34.5-kV to 230-kV collection substation, two permanent meteorological towers, and an operations and maintenance facility. The Project will utilize the Crowned Ridge Wind II 5-mile 230-kV generation tie line and the Crowned Ridge Wind II collector substation to transmit the generation to the dead-end transmission structure adjacent to the Crowned Ridge Wind, LLC project's collector substation and conjoined to the Big Stone South 230-kV Substation, which is owned by Otter Tail Power Company. Applicant has executed a purchase and sale agreement with Northern States Power Company (NSP) to sell NSP the Project and the Facility Permits once constructed. The Project is expected to be completed in 2020. Applicant estimates the total cost of the Project to be $425 million.

On July 11, 2019, the Commission electronically transmitted notice of the filing and the intervention deadline of September 9, 2019, to interested persons and entities on the Commission's PUC Weekly Filings electronic listserv. On July 31, 2019, Amber Christenson, Allen Robish, and Kristi Mogen were granted Party Status. On August 6, 2019, Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz submitted a corrected Application for Party Status. On August 6, 2019, Applicant submitted a letter stating it had no objection to granting the above-referenced landowners party status. Applicant also requested that pages 3-6 of the Application for Party Status be redacted pursuant to ARSD 20:10:01:39 (4) and SDCL 15-6-26 (c) (7). On August 7, 2019, the proposed intervenors filed a letter in response to Applicant's redaction request. On August 21, 2019, at its regularly scheduled meeting, the Commission granted party status to the above-referenced persons. The Commission requested the parties brief 1) who can make a confidentiality claim on material filed by another party, and 2) whether pages 3-6 of the August 6, 2019, Application for Party Status should remain confidential. The parties filed briefs addressing these issues. On September 9, 2019, Applicant filed a letter revising its initial request for confidential treatment to Section 11.10 only as found in the August 6, 2019, Application for Party Status (Section 11.10 language).

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 15-6, 37-29, 49-41B and ARSD Chapters 20:10:01 and 20:10:22, specifically 20:10:01:40 through 20:10:01:43. The Commission may rely upon any or all of these laws or other laws of this state in making its determination.

At its regularly scheduled meeting on September 17, 2019, the Commission considered this matter. Applicant argued that the Section 11.10 language contains trade secrets, confidential, and

proprietary commercial information; that it derives an independent economic value by maintaining the confidentiality of the Section 11.10 language and it would suffer material harm to its competitive position if the information is publicly disclosed; competitors would obtain economic value from the disclosure of the Section 11.10 language; and it has taken reasonable efforts to maintain the secrecy of the Section 11.10 language. Commission staff and the intervenors opposed the request stating that Applicant had not met its burden proving the Section 11.10 language should remain confidential. Commission staff stated that under the standard set forth in case law, state statutes, and ARSD 20:10:01:42, disclosure of Section 11.10 language would not reveal a trade secret; that reasonable steps were not taken to maintain the secrecy of Section 11.10 language; that disclosure of Section 11.10 language would not result in material damage to Applicant's financial or competitive position; and that Applicant made no attempt to argue that disclosure would impair the public interest.

After hearing the oral arguments and having reviewed the written submissions of the parties, the Commission finds that Applicant has not met its burden of showing that the Section 11.10 language is a trade secret; that it is not confidential and proprietary information; that it does not derive an independent economic value by maintaining the confidentiality of the Section 11.10 language and it would not suffer material harm to its competitive position if the information is publicly disclosed; that competitors would not obtain economic value from the disclosure of the Section 11.10 language; and it has not taken reasonable efforts to maintain the secrecy of the Section 11.10 language. The Commission voted unanimously to deny Crowned Ridge's request for the Section 11.10 language to remain confidential.

Pursuant to ARSD 20:10:40:42, for confidentiality to remain intact, Applicant must prove that a disclosure would a) result in material damage to the financial or competitive position of the entity claiming confidentiality, b) reveal a trade secret, or c) impair the public interest.

> 20:10:01:42. Requirements for proving confidentiality. A request for confidentiality generates confidential treatment of information pursuant to § 20:10:01:40, but it does not constitute a determination that the information is or is not confidential. The information will be treated as confidential and shall not be released until after a confidentiality determination has been made. The commission shall determine confidentiality after a request for access to the information is received. The party requesting confidentiality has the burden of proving by a preponderance of the evidence that the information qualifies as confidential information by showing that disclosure would result in material damage to its financial or competitive position, reveal a trade secret, or impair the public interest. (emphasis added).

Applicant's contention that it would suffer material damage is not persuasive. The generic language found in Section 11.10 is not new or novel language to those involved in the wind industry so release of it will not bring a discernable financial or competitive benefit to Applicant's competitors nor material damage to Applicant. In fact, the only persons who might see a benefit are the landowners in or near the Project.

Next, Applicant argues that release of Section 11.10 language would reveal a trade secret. For the Section 11.10 language to be declared a trade secret, it must be shown that the economic value is not readily ascertainable by proper means and that reasonable steps were taken to maintain the secrecy of the Section 11.10 language. The definition for trade secret is found at SDCL 37-29-1(4):

> "information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The case law in this matter is clear; trade secret protection is not afforded to information generally

known within an industry. *Weins v. Sporleder*, 569 NW 2d 16 (SD 1997). Applicant's argument that the Section 11.10 language has independent economic value because it utilized resources to develop the agreement and that disclosure would harm its competitive position and allow competitors to profit is not sufficient to meet the standard under SDCL 37-29-1(4). The generic concept found within Section 11.10 is not a novel idea within the industry nor before this Commission. Further, as noted by Commission staff and the intervenors, the Section 11.10 language was not the subject of an effort, reasonable under the circumstances, to maintain its secrecy. Certainly, properly-kept trade secrets are a form of intellectual property that must be kept confidential. However, a business must affirmatively behave in a way that proves its desire to keep the information secret. This means taking certain reasonable precautions over secrecy. Simply calling information a "trade secret" will not make it so. Once a trade secret is made available to the public, trade secret protection ends. Applicant acknowledged that it did not make an effort, reasonable under the circumstances, to maintain the secrecy of the Section 11.10 language, but merely "instructed" prospective participating landowners to maintain confidentiality. *See,* Daryl Hart Affidavit dated August 26, 2019. Finally, no argument as to the impairment of public interest was made by Applicant.

It is therefore

ORDERED, that Crowned Ridge's request for the Section 11.10 language to remain confidential is hereby denied. It is further

ORDERED, that pursuant to ARSD 20:10:01:43, the Section 11.10 language shall remain confidential for an additional 10 days following this determination to allow Applicant an opportunity to seek review from the circuit court.

Dated at Pierre, South Dakota, this 20th day of September 2019.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically or by mail.

By: Karen E. Cremer

Date: 09/20/19

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Gary Hanson

GARY HANSON, Chairman

Chris Nelson

CHRIS NELSON, Commissioner

Kristie Fiegen

KRISTIE FIEGEN, Commissioner