STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF DEUEL	)	THIRD JUDICIAL CIRCUIT

In the Matter of PUC Docket EL19-027, Application of Crowned Ridge Wind II, LLC For a Permit of a Wind Energy Facility in Deuel, Grant and Codington Counties	
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ, *Appellants,* vs. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and CROWNED RIDGE WIND II, LLC. *Appellees.*	19CIV20-_____ NOTICE OF APPEAL (SDCL § 49-41B-30) WITH CERTIFICATE OF SERVICE

TO: *SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Karen E. Cremer, Counsel and Hearing Officer and Patricia Van Gerpen, Executive Director;*
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION'S STAFF, Kristen N. Edwards, and Amanda Reiss, Counsel, as Special Assistant Attorneys General, State of South Dakota;
CROWNED RIDGE WIND II, LLC, Miles F. Schumacher of Lynn Jackson Shultz & Lebrun, P.C., and Brian Murphy, NextEra Energy Resources, LLC, as counsel; and
All Other Intervenors, and Persons or Local Governments Interested herein, as named in Appellants' separate Certificate of Service.

COME NOW GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ (collectively, "Appellants"), by and through their undersigned attorney of record, A.J. Swanson, of Canton, South Dakota, and by this Notice, now appeal to this court a certain decision or order of the South Dakota Public

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Utilities Commission ("Commission" or "Agency"), in Docket EL19-027, "Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; Notice of Entry" (hereafter, "Decision"), as entered on April 6, 2020, and served on all interested parties the identical date by means of electronic mail.

While the *names* of Appellants are noted briefly in the Decision,[1] no further identification of, or reference to, their respective, specific interests in this matter is provided in the various ensuing findings and conclusions of the Commission. Thus, for the benefit of the Court, this Notice of Appeal now offers a succinct outline of those interests.

I. Appellants' Interests

Each of the Appellants is a resident of rural Goodwin, in Deuel County, South Dakota, as reflected in a certain "Application for Party Status (Corrected)," dated August 6, 2019,[2] which application, as required by SDCL § 49-41B-17, was made timely and also contained a "detailed statement of the interests and reasons prompting the application," now incorporated herein by this reference. Each Appellant is the fee owner of certain real estate, which includes each Appellant's primary residence, being either enclosed within, or very near, the boundaries of a large scale wind farm ("Project"), as designed by Crowned Ridge Wind II, LLC ("Applicant" or "CRWII").

Each Appellant also claims the privileges arising from fee ownership as represented by SDCL §§ 43-2-1, 43-2-5, and 43-13-4, among others. Each Appellant is deemed a "Non-Participant" in the Project, having imposed no burdens or servitudes upon their respective lands and homes in favor of Applicant, and no Appellant has conceded or stipulated that the Agency has any legal right or authority to impose burdens upon such lands and homes, as a servitude in

[1] Agency's Finding of Fact 3.
[2] *See* Exhibit I-3.

favor of the public or Applicant. Further, each Appellant also deems themselves as a party aggrieved by the Agency's decision, within the meaning of SDCL § 49-41B-30.

II. The Project, Effects and Easements

The Project is a proposed 300.6 MW wind farm, involving nearly 61,000 acres in seven townships of three counties, including Deuel, proposing 132 wind turbines, each having the operational capacity to emit on all nearby landowners a variety of so-called "Effects," including Shadow Flicker and Noise. These Effects, representing negative attributes of being required to live in or near the Project, are burdens upon Appellants.

Landowners, in general, have been referenced according to their contractual status with Applicant – "Participants," being those in privity with Applicant,[3] while "Non-Participants" are not. As said, each Appellant is a Non-Participant, in terms of privity with Applicant, while, as a consequence of the Agency's Decision, each Appellant is also required to accept the burdens of the Effects flowing from the Project, under the design promoted by Applicant and as approved by the Agency.

South Dakota law, SDCL 43-13-16, *et seq.*, provides for the creation of a wind easement, to be granted by the "property owner . . . in the same manner and with the same effect of a conveyance of an interest in real property." In the Decision,[4] the Agency notes:

> Applicant has entered into lease and easement agreements with private landowners within the Project Area for the placement of Project infrastructure.

Beyond this reference, the term "easement" then nearly disappears from the Agency's Decision, other than in the "Permit Conditions," ¶ 4 (at 17), and ¶ 21 (at 21), briefly referencing the rights

[3] Generally, a "lease and easement agreement" (most often structured as an "option"), instruments that, with but one exception, are *not* part of the evidentiary record. Regardless of how structured, these agreements are commonly referenced herein as an "Easement," exemplified also by Section 5.2 thereof, entitled "Effects Easement."
[4] Finding of Fact 8, at 5.

of "Participants" to seek enforcement of *their* rights arising under the easement instrument. The Agency's Decision takes no note of the terms of any such instruments, even as Appellants have regarded those terms as crucial to their evidentiary submissions and arguments, made both to the Agency and now to this Court.

Consideration of the Applicant's own instruments (easements) supports this crucial proposition: by permitting Applicant to develop this Project, and to permanently cast Effects onto the land and homes of Appellants (as Non-Participants), the Agency has created, adversely, as to such properties, what the Easements *already* afford Applicant as to the lands and homes of Participants. In essence, the permit approved by the Decision, has itself become the easement for the casting of the Effects upon and over Appellants' lands and homes, a use now likely to endure for however long Applicant (or assigns) may wish to maintain and operate the Project. This appeal intends to challenge the Agency's power, jurisdiction and authority to impose such burdens upon Appellants by virtue of the delegated permitting authority.

III. "Effects Easement"

As reflected in the Decision, at 2, between the dates of August 6, 2019 and September 20, 2019 (although ultimately unsuccessful in such efforts), Applicant exerted efforts to maintain as confidential certain provisions of the Easement form. That said, there is but one example of the Easement's text now of record before the PUC, namely, Exhibit I-2, with supporting testimony appearing in Exhibit I-1 (Garry Ehlebracht) and Exhibit I-4 (Laretta Kranz).

The Easements, *to the extent that a single example is now of record*, include an "Effects Easement," clearly intended for Applicant's benefit (being the "Operator" in the instrument) in future operation of the Project:

> 5.2 **Effects Easement.** Owner grants to Operator a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, electromagnetic, electrical and radio frequency interference, and any other effects

attributable to the Wind Farm or activity located on the Owner's Property or on adjacent properties and across the Owner's Property (**"Effects Easement"**).[5]

This Easement, having been presented to Appellant Kranz but never signed by her, also provides that the instrument is to be kept confidential, as provided in Section 17.[6] On the basis of such provisions, Applicant Crowned Ridge Wind II then actively insisted that the intervention pleading of these Appellants, having directly quoted the Effects Easement and other provisions, was *itself confidential and unavailable for public review*, a claim that persisted until the Agency's ruling on September 20, 2019. In that ruling, the Agency determined that the proposed instrument was not entitled to confidential treatment.

IV. The "Effects" Upon these Appellants

To the extent the Applicant is in privity with landowners, including instruments with an "Effects Easement," the landowner's property serves also as a compensated host site for one or more wind turbines.[7] The homes of certain Participants are also within or very near the Project, but the record reflects others who, though landowners and Participants within the Project, are living elsewhere or some considerable distance from the Project. The homes of Appellants, on the other hand, are all in the approximate range of 1,975 to 2,300 feet from the nearest turbines within this Project,[8] and because of such proximity, each such home is slated, according to Applicant's design, to receive elevated Noise and Shadow Flicker. Shadow Flicker is the result of light passing through the rotating blades, which then falls upon and invades the interior areas of a home. (Such is not normal light, needless to say.)

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[5] *See* Exhibit I-2, at 4-5.
[6] *Id.*, at 16. This unsigned instrument is also referenced in the record as the "Kranz Easement."
[7] With the exception of a certain "Participation Agreement," disclosed by Applicant's counsel subsequent to the hearing in February 2020; that agreement was subsequently marked as Exhibit I-8, and admitted by the hearing officer, Karen E. Cremer. This instrument, with an "Easement" for "Effects" substantially similar to Section 5.2 of Exhibit I-2, involves a non-participating landowner who, while entering into privity, yet lacks a wind turbine site.
[8] Based on the original 300 MW design submitted by Applicant.

The homes of Appellants, in many cases, have been predicted (by Applicant's own experts, as well as experts appearing at the behest of Agency's Staff) to receive more intense Noise and Shadow Flicker of greater duration than the homes of those who, as Participants, have been compensated for giving an Effects Easement for the benefit of Applicant. Shadow Flicker is not presently a phenomenon observable in the natural environment in and around the Goodwin area. Further, while there is now *some* Noise in this quiet rural area, the level that Appellants will be required to tolerate – *permanently* – is significantly higher due to this Project. Each of these named Effects comprise a non-consensual burden upon the land and homes of Appellants.

V. Agency's Mission

The Legislature has made findings of the need to exercise permitting authority over facilities such as the Project, SDCL § 49-41B-1, the expressed goal being to "produce minimal adverse effects on the environment and upon the citizens of this state." It is the view of Appellants that *nothing* in this statute obviates the need for obtaining an "easement" to permit such burdens being placed upon the citizens, to the extent they are property owners.

Both Agency and Applicant are of the apparent view that in the act of issuing the necessary permit,[9] the "citizens of this state" (to the extent they are fee owners, otherwise enjoying the protections of both statutory law and constitutional provisions as to their property interests), by the sheer force of that permit, are required to submit to such "minimal adverse effects" without having given an easement accepting that servitude. Of course, the kind of "adverse effects" that might be thought "minimal" for purposes of the referenced statute is certainly subject to debate; the fee owner sees this differently than someone like Applicant, looking to build a wind farm that will dispense Effects.

[9] The permit is required of each wind farm capable of producing more than 100 MW of electricity, SDCL 49-41B-2(13).

In carrying forth under the Legislature's findings, the Agency has promulgated a number of "energy facility siting rules" as collected in ARSD, Chapter 20:10, but there is (as of now) no rule requiring that Applicant deploy "easements" to deal with "minimal adverse effects." Yet, in dealing with Participants (those having wind turbine sites), Applicant has included an "Effects Easement," whether those may originate from operations to be conducted on the Participant's own property, or adjacent properties. Further, in the one example of "Participation Agreement" with someone who is otherwise a "Non-Participant" (having no wind turbines on his or her property), there is language very much like the Effects Easement within that instrument.[10]

The rationale for obtaining an "easement" with a mere "Non-Participant," according to Appellants' understanding, is that the particular landowner[11] is likely exposed to "Effects" of duration or intensity greater than the standards as adopted (informally, case-by-case) by the Agency. That very proposition then raises the question: What, exactly, are the tolerance standards for "Effects" honored or followed by this Agency?

There are no such standards, in terms of actual Agency-adopted, formal regulations. Rather, in dealing with the Effects of Shadow Flicker, the experts hired by Applicant – and those hired by Staff – apply, to some extent, that favored portion of a Shadow Flicker standard developed in Germany over the past twenty years. The wind development industry has promoted this German standard, including the importation of that standard into the United States, where it now finds a home, *inter alia*, in the Deuel County Zoning Ordinance and likewise in Codington and Grant Counties (and, for the most part, also in the applicable wind farm permit decisions of the Agency).

[10] *See* Exhibit I-8, ¶ 2, and reference in n. 7, above.
[11] Residing on a small parcel in Section 6-117-50, Deuel County.

Having already briefed these concerns to the Agency (to no avail), Appellants will not further belabor this Notice of Appeal, other than to note that the German standard – as imported into Deuel County, and as now used also by the Agency – is *not* the full standard followed in Germany.[12] Nevertheless, it is used by the Agency because the as-applied limit of 30 hours Shadow Flicker annually is recognized as an "industry standard," fondly spoken of and supported by the experts providing consulting and testimonial services to the wind development industry.[13] Whether the goals, actions and sentiments of those hoping to establish a wind farm Project might be at odds, somehow, with the vested land interests of those already living and owning property in the bulls-eye of that design is a most interesting question.[14]

Agency adheres (more or less) to that industry standard as the dividing line between those "adverse effects" where (if greater in duration) some waiver or permission of the landowner *is* required. If lesser, on the other hand, then the Agency's permit stands alone as evidence of Applicant's right to cast those Effects on the Non-Participants.[15] The limits imposed on Appellants, as persons now required to hereafter live and own property near the Project in question (thus forced to either tolerate the Effects – or to sell out and move) should not be more demanding or stringent than those imposed in the case noted by Staff witness Kearney in his exhibit. The auditory and visual faculties of these Appellants (as humans) are not much different

[12] Exhibit A12-16, sponsored by Applicant's expert Christopher Ollson reflects the German standard for Shadow Flicker is comprised of three time elements – just one being used in the Deuel County Zoning Ordinance. On one occasion, the Agency used two of the three elements, but has since retreated to one.
[13] History of the German standard is also a key topic in "Wind Energy & Wind Park Siting and Zoning Best Practices and Guidance for States," Tom Stanton, author, published January 2012, by National Association of Regulatory Utility Commissioners (NARUC). Stanton's work never addresses imposing the burdens of Effects, according to German standards, on landowners in South Dakota (or other jurisdictions) dwelling near the Projects by means of zoning or other laws.
[14] Those hosting turbines will also embrace an Effects Easement; those who are merely close neighbors to the Project are left with the "Effects," which the literature concurs either is or can become a nuisance.
[15] Staff witness Kearney, Exhibit S-2, at 9, 11, outlines the Agency's history of setting Noise and Shadow Flicker limits in noted permit cases, beginning with EL17-055, *Crocker*, which marks the modern era of invoking rather than avoiding the Agency's jurisdiction for Projects greater than 100 MW.

(nor more durable) than the Non-Participants (persons) living on their properties in Bon Homme, Charles Mix or Hutchinson Counties, near the project known as EL18-026, *Prevailing Wind Park*. The Agency's use of one standard for Non-Participants in Deuel County – and then another standard in another county, one more palatable to the same category of Project neighbors – should be troubling to this Court.

This Agency might have addressed the issue of "Effects" by requiring that those seeking permits for a "wind energy facility" shall obtain an easement from those about to be burdened by the Effects flowing from the operation. (While keeping in mind, if such an easement can't be obtained, then some adjustment is required to eliminate those Effects as to *that* neighbor.) Instead, the Agency deploys a partial German standard, strongly favored by the wind industry, to mark the difference between those Effects that, at least in the opinion of the Agency, are so inconsequential that no easement is required, and those where some formal instrument is deemed essential.

This approach blissfully ignores that Applicant's instruments embrace an "Effects Easement" – without any regard to the predicted consequences on Participants. The "Effects" reaching the eyes and ears of Participants (compensated to some extent for that role), come also onto Non-Participants, these Appellants, included. While the source of the power to this Commission (the Legislature) may have also set forth a burden of proof that each Applicant must bear, SDCL § 49-41B-22, it does not follow that as to the property rights of those same "inhabitants,"[16] Applicant is free to trample on those rights, casting the Effects when and as desired, just as the Project was designed, subject only to limits of that "industry standard."

[16] SDCL 49-41B-22(3).

VI. The Permit Becomes the Instrument of Ostensible Authority?

Within the same chapter providing for wind easements,[17] there yet exists a legislative enactment from 1878 – SDCL 43-13-2(8), in the context of easements, "land burdens or servitudes upon land [that] may be attached to other land as incidents or appurtenances." The statute does not appear to have been either applied nor cited in any South Dakota case since adoption 142 years ago. While the meaning is obscure, the statute clearly pertains to the right of either receiving – or discharging – light either from or over land. Appellants think the statute arguably pertains to those circumstances where light (the rays from the sun) is adulterated or adjusted by the intervening, rotating blades of a wind turbine, commonly known as "Shadow Flicker." The old statute seems as trustworthy, *if not more so*, than having the Commission apply, case-by-case, some German standard the wind industry finds to its liking.

There is no *de minimus* rule applicable to cases of trespass to property. Even if the Commission may properly rule on the issues to be resolved under SDCL 49-41B-22, it does not follow the Commission may also decide whether the Effects (whether Noise, Shadow Flicker, or some other feature listed in the Effects Easement) are sufficiently troublesome (or not) so as to also violate the rights of Appellants, as property owners. In sorting that out, it does not follow the Agency may continue to be uninterested in the existence of an easement, or the text of such instruments; nor should the Agency assume that such an easement is required *only* when necessary for "placement of Project infrastructure,"[18] or if the Effects registered at a home exceed some level of Noise or duration of Shadow Flicker.

The Agency has no statutory authority to decide, as an example, that a home receiving 31 hours of Shadow Flicker *must* be supported by an Easement, but that merely 25 hours worth

[17] Chapter 43-13, SDCL
[18] Decision, Finding of Fact 8, at 5.

of that specific Effect is fully sanctified through the issuance of a requested permit, despite the lack of any such Easement conferred by the landowner. Each of the Appellants *will* receive Effects, as predicted by Applicant's own experts. Appellants themselves delegated no authority to either Applicant or the Agency to approve and select (as agents of Appellants) the specific Effects soon to become permanent invaders of their respective homes. It is highly doubtful the Legislature delegated *that* authority to the Commission, or the Legislature could itself abuse the property rights of Appellants, absent due compensation for the taking or injury thereof.

VII. Related Case Before this Court

Appellants' call the Court's attention to the matter currently pending in the Third Circuit, a review by writ of certiorari of the actions of Deuel County Planning Commission, sitting as the Board of Adjustment. This matter is 19CIV18-000061, *Ehlebracht, et al. v. Deuel County Planning Commission, et al.* The identified case has been assigned to Honorable Dawn Elshere, Circuit Judge, and is fully submitted on briefs as of March 31, 2020.

Dated at Canton, South Dakota, the 29th day of April 2020.

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com

Attorney for Appellants,
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ

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CERTIFICATE OF SERVICE

Undersigned, as counsel for Appellants in the above entitled matter, being an appeal from the administrative agency, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Docket EL19-027, and the decision of such agency made and served April 6, 2020, hereby certifies that on the date entered or printed below, a true copy of the NOTICE OF APPEAL has been served on each of the following, such having been undertaken by first class mail, postage prepaid, having been mailed at a facility of the U.S. Postal Service at Harrisburg, South Dakota, addressed as follows, in accordance with the agency's service list of parties for the identified docket, with the addition of Hearing Officer Karen E. Cremer; additionally, a scan or pdf version of the pleadings has been served this date upon each if the identified persons by means of electronic mail:

Karen E. Cremer, Commission Counsel
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
karen.cremer@state.sd.us

Eric Paulson, Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
eric.paulson@state.sd.us

Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us

Miles Schumacher – Attorney for CRW II, LLC
Lynn, Jackson, Shultz and Lebrun, PC
110 N. Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
mschumacher@lynnjackson.com

Kristen Edwards, Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us

Tyler Wilhelm, Senior Project Manager
Crowned Ridge Wind II, LLC
700 Universe Blvd.
Juno Beach, FL 33408
tyler.Wilhelm@nexteraenergy.com

Amanda Reiss, Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
amanda.reiss@state.sd.us

Brian J. Murphy , Managing Attorney
NextEra Energy Resources, LLC
700 Universe Blvd.
Juno Beach, FL 33408
brian.J.Murphy@nee.com

Darren Kearney, Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
darren.kearney@state.sd.us

Cindy Brugman, Auditor
Codington County
14 First Ave. SE
Watertown, SD 57201
cbrugman@codington.org

Jon Thurber, Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
jon.thurber@state.sd.us

Karen Layher, Auditor
Grant County
210 E. Fifth Ave.
Milbank, SD 57252
karen.layher@grantcounty.sd.us

Mary Korth, Auditor
Deuel County
PO Box 616
408 4th St. West
Clear Lake, SD 57226
dcaudit1@itctel.com

Kristi Mogen
15160 471st Ave.
Twin Brooks, SD 57269
silversagehomestead@gmail.com

Mr. Allen Robish
47278 161st St.
Strandburg, SD 57265
allen.robish@gmail.com

Ms. Amber Christenson
16217 466th Ave.
Strandburg, SD 57265
amber@uniformoutlet.net

Dated at Canton, South Dakota, this 29th day of April 2020.

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com

Attorneys for Appellants,
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ

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