

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

IN THE MATTER OF THE)	EL-19-027
APPLICATION OF CROWNED)	
RIDGE WIND II, LLC FOR A)	BRIEF ON CONFIDENTIALITY
PERMIT OF A WIND ENERGY)	OF EASEMENT AGREEMENT
FACILITY IN DEUEL, GRANT)	
AND CODINGTON COUNTIES)	

**BRIEF OF
CROWNED RIDGE WIND II, LLC**

I. Introduction

On August 21, 2019, the South Dakota Public Utilities Commission (“Commission”) directed Crowned Ridge Wind II, LLC (“CRW II”) to file a brief on: (1) whether a non-filing party can request confidential treatment of information under the Commission’s rules; and (2) if yes, should the CRW II form of easement agreement (“Easement Agreement”) be protected as confidential. The briefing of these issues has been raised in the context of the Intervenor’s attempt to file all or portions of an unexecuted copy the Easement Agreement as a public document, and CRW II’s objection to public disclosure of the Easement Agreement.

A plain language reading of the Commission’s rules allow a non-filing party, such as CRW II, to request confidential treatment of information submitted by another party. Further, the Easement Agreement used by CRW II and affiliated companies of CRW II¹ contains trade secrets, confidential and proprietary information, and, therefore, that information is properly protected from public disclosure under the Commission’s rules and South Dakota statutes. Thus, the Commission should afford confidential treatment to the CRW II Easement Agreement as requested herein.

¹ There are numerous affiliated companies of CRW II, which are indirect wholly-owned subsidiaries of NextEra Energy Resources, LLC (“NEER”) currently developing wind projects throughout the United States.

II. CRW II has a right to protect its confidential information

The Commission rules provide for the protection of confidential information. ARSD 20:10:01:39-44. More specifically, read together ARSD 20:10:10:41, and 20:10:10:42 expressly provide an opportunity to a “party” to request that information be treated as confidential treatment. ARSD 20:10:01:41 sets forth the material that must be submitted to support a request for confidential treatment, while ARSD 20:10:01:42 sets forth the burden of proof the party asserting the information is confidential must satisfy. Neither rule expressly limits which party (filing or non-filing) must provide the material to support a claim of confidentiality and meet the associated burden of proof. Further, ARSD 20:10:01:39 which sets forth the definition of what constitutes confidential information includes any such information in the possession of the Commission without regard to who filed the information. Accordingly, following a plain language reading of the Commission rules clearly allows CRW II to seek confidential treatment of information no matter whether it was the party filing the information or a party seeking to protect information filed by another party..

In fact, given the competitive harm that can result from the disclosure of confidential information in the wind energy business, it is not atypical for a non-filing party in an administrative proceeding to seek to protect its confidentiality information, particularly when that information is in the form of an agreement that both the filing and non-filing parties have in their possession. For example, in 2016, NEER, on behalf of certain indirect wholly-owned subsidiaries, intervened in a Colorado Public Service Commission (Colorado PSC) proceeding to protect confidential information from public disclosure. In that proceeding, like the present one, the non-filing party had the right to request confidential treatment of information. Therefore, NEER sought and was granted protection of its information as a trade secret, although it was not

the party providing the information. A copy of the Colorado PSC order granting confidential treatment of the NEER affiliate information is provided as Attachment A.

Consequently, not only does a plain language reading of the Commission's rules afford non-filing party the right to request confidential treatment, when a similar situation occurred before the Colorado PSC the non-filing party was afforded the right to request and was granted confidential treatment of its information. Thus, CRW II should be provided that same right before this Commission, and, as shown next, the Easement Agreement does include trade secret, confidential, and propriety information that should be provided confidential treatment.

III. Certain portions of CRW II's Easement Agreement should be afforded confidential treatment

Under the Commission's rule ARSD 20:10:01:41, a requester seeking confidential treatment shall: (A) identify the document or portion thereof that it seeks to be treated as confidential; (B) the length of time for which it seeks to maintain the confidentiality of the information; (C) the name, address, and phone number of the person associated with the confidential request; (D) the statute or common law grounds and administrative rules supporting the request for confidentiality; and (E) the factual basis that qualifies the information as confidential.

A. Identification of the portion of the Easement Agreement that is confidential

Attachment B (redacted public version) and Attachment C (confidential version, with confidential provisions highlighted in yellow) identifies the portions of the Easement Agreement that should be afforded confidential treatment. The portions of the Easement Agreement that CRW II is not seeking to protect as confidential are already public through publically recorded

participation agreements or otherwise are not considered confidential information under South Dakota statutes and Commission rules.

B. Term of confidential treatment

CRW II is seeking a perpetual term for the confidential treatment, as there is no timeframe in which the disclosure of the Easement Agreement would not harm CRW II and its affiliated companies.

C. Sponsors of the confidential treatment

The attorneys for CRW II are requesting confidential treatment, and their contact information is set forth on the signature page of this brief.

D. and E. The legal basis and factual predicates supporting confidential treatment

The information identified in the Easement Agreement (Attachments B and C) should be protected from public disclosure pursuant to Commission rules ARSD 20:10:01:39(4)(6) and ARSD 20:10:01:42 as well as statutes SDCL 15-6-26(c)(7) and SDCL 37-29-1(4). Consistent with these rules and statutes, confidential treatment should be afforded to the Easement Agreement, because (1) the Agreement contains trade secrets, confidential, and proprietary commercial information; (2) CRW II and affiliated companies derive an independent economic value by maintaining the confidentiality of the Agreement and would suffer material harm to their competitive position if the information is publically disclosed; (3) competitors of CRW II and affiliated companies would obtain economic value from the public disclosure of the Agreement; and (4) CRW II has taken reasonable efforts, under the circumstances, to maintain the secrecy of the Easement Agreement. Accordingly, consistent with the aforementioned rules and statutes, the Easement Agreement should be protected from public disclosure.

Wind energy development is a highly competitive business involving many companies often seeking to develop wind generation facilities in the same area, and, therefore competing for the same landowners. Affidavit of Hart at ¶ 2. In the context of CRW II, the competitive nature of signing willing landowners is evidenced by the number of applications the Commission has received in recent years seeking a facility permit to construct wind projects located in Grant, Codington, and Deuel counties, which are the same counties associated with CRW II.² CRW II has been working for 10 years to develop its proposed wind facility in these counties, including securing sufficient landowners to solidify the project boundary and site a wind turbine array that meets sound, shadow-flicker and other set back requirements, while minimizing the impact on the environment. These development activities required the expenditure of millions of dollars and involved hundreds of hours of land agents working to secure willing landowners. *Id.*

Against this competitive milieu which is present for CRW II in South Dakota and for its affiliated companies throughout the United States, over the last 20 years CRW II's affiliates have developed the Easement Agreement at considerable expense, time, and commitment of resources. *Id.* at ¶ 3. The Easement Agreement includes trade secrets, confidential, and proprietary interrelated terms and conditions, including pricing and financial formulas, commitments to improvements, and terms on who bears certain risks. This information is precisely the type of information that a competitor would use to gain a competitive advantage, because the competitor could match or offer more attractive terms and conditions to secure potential landowner-participants. *Id.* at ¶ 5. Given that the securing of willing landowners is the foundation of developing the project boundary and the wind turbine array, publically disclosing the Easement Agreement would provide competitors of CRW II and its affiliated companies an

² EL19-026, wind facility in Deuel County; EL18-053, wind facility in Deuel County; EL18-046, wind facility in Deuel County; and EL18-003, wind project in Grant County and Codington County.

advantage not only on securing landowners, but, also, developing the overall wind project. *Id.* Given the competitive value associated with the Easement Agreement in the process of developing wind projects, CRW II and its affiliated companies derive an independent economic value in maintaining it as confidential. As well, competitors would clearly obtain an economic value through the public disclosure of the Agreement, as they would obtain competitive business information at no cost, and would immediately be in a better competitive position to compete for willing landowners and the full development of wind projects. *Id.* Concurrently, the competitive position of CRW II and its affiliated companies would be materially harmed by the disclosure of the Easement Agreement. The harm would manifest itself in the loss of willing landowners to competitors, which, in turn, would result in the increased time and costs to develop wind project boundaries and turbine arrays, and potentially even the demise of some wind projects currently under development. *Id.* at ¶ 2. Accordingly, the Commission's rules and South Dakota statutes support the confidential treatment of the Easement Agreement, because it contains trade secrets, confidential, and proprietary commercial information; CRW II and affiliated companies derive an independent economic value from the Agreement by maintaining it as confidential, while competitors would obtain an economic value from its public disclosure; and the competitive position of CRW II and its affiliated companies would be materially harmed if it is publically disclosed.

Further, CRW II has taken reasonable steps to protect the confidentiality of the Easement Agreement. The Easement Agreement expressly identifies that it includes confidential and proprietary information, and, also, limits the copying and distribution of the Agreement. Section 17 of Attachment C. Consistent with this language, the land agents providing the Easement Agreement to potential participating landowners explain the confidential nature of the

unexecuted Agreement. Affidavit of Daryl Hart at ¶ 2. In Docket No. 19-003, when the same Easement Agreement was provided in response to a Staff data request, Crowned Ridge Wind, LLC submitted it as confidential.³ Therefore, CRW II and its affiliated companies have taken reasonable efforts under the circumstances to maintain the secrecy of the Easement Agreement.

Consequently, for the foregoing reasons, the Easement Agreement should be afforded confidential treatment as it satisfies all of the requirements Commission rules ARSD 20:10:01:39(4)(6) and ARSD 20:10:01:42 as well as statutes SDCL 15-6-26(c)(7) and SDCL 37-29-1(4).⁴ *Bertelsen. Allstate Ins. Co.*, 2011 SD 13, ¶ 60, 796 N.W.2d 685, 705 (insurance company's statement of confidentiality in manuals identifying the information as containing trade secrets, confidential and propriety information coupled with company's efforts to maintain secrecy was sufficient to afford the information confidential treatment).

IV. Conclusion

The Commission should grant confidential treatment to CRW II's Easement Agreement as requested herein.

³ In fact, competitors have done the same. In Docket No. EL18-003, a competitor of CRW II filed two forms of easements as confidential: Exhibit A19 Wind Energy Lease and Wind Easement Agreement (filed 6/12/18) Exhibit A20 Wind Easement, Setback Waiver, and Good Neighbor Agreement (filed 6/13/18).

⁴ Other state energy regulatory agencies have also protected information related to and actual easements from public disclosure due to the competitive harm that would result from public disclosure. *In Re: Hawket Land Co., Rick Stickle and Cedar Lake Development Corporation v. ITC Holdings Corp.*, Docket No. FCU-2009-0006, Order Granting Request for Confidentiality (April 6, 2010) (granted confidential treatment to detailed descriptions of ITC's transmission easement negotiation procedures, pricing information, and negotiation strategies) (Attachment D); *Bangor Hydro-Electric Company Request for Approval of Affiliated Interest Transaction regarding Property Adjacent to Orrington Substation*, Docket Nos. 2000-667 and 2006-629, Protective Order No. 2 issued by Hearing Examiner (Nov. 16, 2006) (transmission easement agreement provided confidential treatment) (Attachment E).

Dated: August 27, 2019

/s/ Miles Schumacher

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