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Patricia Van Gerpen, Executive Director
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
Pierre, South Dakota

Re: File 6184-003. • *In re Docket EL19-027, Crowned Ridge Wind II, LLC*
Codington, Grant & Deuel Counties

Dear Director Van Gerpen:

This letter is a response to that of Attorney Miles F. Schumacher, dated August 6, 2019, in which he urges the Commission to redact pages 3 to 6 of the Corrected Application for Party Status submitted August 6 on behalf of Garry Ehlebracht and others (including Laretta Kranz), all living in the Goodwin area and within the "project boundary." The rationale for Mr. Schumacher's request is that these pages have direct references and quotations from a certain 27-page document, short-handedly referenced as "Lease & Easement," that another entity, now dissolved – Crowned Ridge Wind Energy Center, LLC – had provided to Ms. Laretta Kranz in 2013 in an unsuccessful effort to obtain her signature (we will reference this as the "Kranz 2013 Proposal"). Lawyer Schumacher contends the terms and conditions of the Kranz 2013 Proposal are "properly protected from public disclosure as *a trade secret and commercial information.*" (Emphasis supplied)

Applicant's counsel also contends the information quoted in the Corrected Application (this being Section 5.2, "Effects Easement" and also, we suppose, Section 11.10, "Remediation of Glare and Shadow Flicker," the latter provision no longer being found in similar leases or easements deployed by Boulevard Associates for the wind farm in question) is "confidential," therefore implicating ARSD 20:10:01:39(4), and SDCL § 15-6-26(c)(7) – the latter being a provision for protective orders as to non-disclosure, or limited disclosure, of "a trade secret or other confidential research, development, or commercial information." Meanwhile, the administrative rule cited by Mr. Schumacher, in turn, cites to the protective order statute, "or other law." On the matter of "confidentiality," Schumacher's letter cites to Section 17 of the "Crowned Ridge II Agreement," pursuant to which, counsel intones, disclosure is restricted to "Owner's family, attorney" and so forth – his citation of the last sentence is entirely accurate. Here's the crucial part not mentioned by Applicant's counsel – the Kranz 2013 Proposal is unsigned, unexecuted. *Ms. Kranz has never had a confidential relationship with Crowned Ridge, and, therefore, is not bound by any purported "Confidentiality" provisions established therein, just as she is also not bound by any purported Effects Easement (or other imposition or provision) outlined in that unsigned instrument!* She is free to talk about it, as are others, just as this writer, as her counsel, is free to write about it, and communicate regarding such matters to any and all persons.

The title of Section 5.2, namely, "Effects Easement," was not carelessly chosen by the anonymous author of the Kranz 2013 Proposal. The term "Effects Easement" does not appear as such in the wind easement statutes, SDCL § 43-13-16, *et seq.*, or elsewhere under the general topic of "easements and servitudes" (Chapter 43-13, SDCL). Yet, this Commission has expressed some interest in "effects," such as the inquiry under ARSD 20:10:22:18(3), as to "present land use of the surrounding area, with special attention paid to the *effects* on rural life and the business of farming." Further inquiry follows in 20:10:22:18(4), as to a "general analysis of the *effects* of the proposed facility and associated facilities on land uses and the planned measures to ameliorate adverse impacts." Likewise, we should not forget the inquiry under 20:10:22:12, directing that "[t]he environmental *effects* shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction."

The adverse "Effects" of a wind farm, that of being too close to a wind farm, are not confined to merely those having the temerity to sign a "Lease & Easement" arrangement with Boulevard Associates. To further speak the obvious, it is not the fact that an "Effects Easement" exists that Crowned Ridge's counsel is attempting to keep from the public. In the typical recorded "Memorandum of Leases and Easements" ("Memorandum"), as executed between landowners in Codington, Grant or Deuel County and Boulevard Associates, LLC, there are no less than eight (8) specific easements mentioned, of which the "Effects Easement" is merely one. Other than by title, however, the eight easements are never described in the Memorandum, beyond the clear statement that "Operator has the exclusive right to use, maintain, capture and convert all of the wind resources on the Owner Property," and the Leases and Easements outlined in the underlying Agreement (which we have sometimes called the "Lease & Easement," being the blank, unexecuted Kranz 2013 Proposal, or, in the case of the Lindgrens, to which they were a party until the moment of expiration in June 2019) are to run with the land. The Memorandums, at Section 7, also provide an interesting "option to convert" the "Leases to Easements, and the Easements to Leases," in Boulevard's sole discretion. Rather, Mr. Schumacher is objecting to *any* public disclosure (or discourse) of the *specific language* of the "Effects Easement" as contained in Section 5.2 of the Kranz 2013 Proposal (and, we would add, likewise in the Lindgren's expired Lease & Easement).

The "Effects Easement," as we read the language of the Kranz 2013 Proposal, is a relatively short passage, pursuant to which a landowner implicitly surrenders to Boulevard (and ultimately, Crowned Ridge – although *not* the same "Crowned Ridge" now making the objection) all manner and kinds of potential claims that could arise from certain "effects" of being close (even much too close) to an operating wind farm, having given *carte blanche* for Operator to proceed with whatever "effects" may come from wind turbine operations. (We hasten to add, those "effects" might not be of much concern to the absentee owner who lives in a nearby town or city, for whom leasehold income is of paramount importance, but the "effects" remain of direct, keen interest to the neighboring owner who must also lead a daily life on his or her adjacent property.)

By extracting an "Effects Easement" from those Owners with whom Applicant also claims a "wind easement," the risk of future claims arising from unpleasant or obnoxious features of wind

farm operation is obviated – particularly for Owners living elsewhere. This is just good business – any lawyer representing a wind farm developer would look to close the loop! Understanding the scope and obvious intent of the "Effects Easement" remains important for both this Commission and all potentially affected members of the public, however, as the "Effects" of wind farm operation do not nicely or cleanly observe property boundaries, nor are they confined to merely those who have given up such an "Effects Easement." Further, while Crowned Ridge (under any name) hopes to keep the "Effects Easement" *confidential* by slapping on a Section 17 to that effect, it does not follow that these provisions are actually entitled to such respect. (At no time has this writer proposed to disclose, as an example, the Lease & Easement schedule that references compensation.)

Mr. Schumacher asserts that if the Agreement's terms and conditions are "publically disclosed," then Crowned Ridge II will be harmed, while its competitors will benefit. That an "easement" of any sort – whether labeled "Effects Easement" or otherwise – might be referenced by title in a recorded Memorandum, but then excluded from public discourse by the claims and techniques being deployed here by Crowned Ridge's counsel is actually emblematic of Applicant's obvious business plan. This is a transparent effort, where a "Lease & Easement" is extracted from those Owners whose lands will host wind turbines (an instrument that, *inter alia*, includes Section 5.2, now professed to be a "trade secret"), but which then relies on opaqueness of a recorded Memorandum to hide from public view the breathtaking expanse of the "Effects Easement." Public disclosure would inform non-participating neighbors to what extent the willing hosts of wind turbine sites (Participating Owners) have sold out, *literally to the bare walls*, their own property rights.

According to "Final Report, Crowned Ridge II Wind Farm Sound Study, Codington, Deuel and Grant Counties, SD," dated July 7, 2019, authored by one Jay Haley (now merely using the title of "Partner" rather than "P.E."), this proposed wind farm involves the following "occupied structures" ("OS") within 2 kilometers of a wind turbine (when this writer was educated, long ago, our study was limited to English miles of 5,280 feet, acres of 43,560 square feet, and the wonderful symmetry of the public land survey system of sections, townships and ranges):

County	*Participating*	*Non-participating*	*Total OS*
Codington	39	112	151
Deuel	21	82	103
Grant	1	1	2
Totals:	61	195	256

It also seems apparent that 61 Participating Owners (who presently live there, in or near the wind farm!) have elected to be in privity of contract with Applicant, cheerfully accepting whatever monetary benefits might come their way pursuant to the "Effects Easement." These people have all surrendered their land-based rights, to be protected henceforth *only* by whatever restrictions are placed upon Applicant's turbine siting work by means of the underlying zoning ordinances and the eventual Facility Siting Permit of this Commission. And, if that's what a Participating Owner wishes to do with his or her land and estate, well, they have made an exchange of property rights for money – *that's why this is America.* It seems, to us, a careless exchange, but an exchange it is.

More than three-fourths of the occupied structures, however, are those of non-participating owners. It seems obvious that not a single one of them has any privity of contract with Applicant or Boulevard Associates. This large group of non-participating property owners *have given up nothing to Applicant!*

Rather than extract something like an "Effects Easement" from that reticent bunch of nearby landowners (which, if successful, would likely cost money), otherwise under the category of "non-participating, occupied structures," we think that Applicant hopes to be fully protected into the distant future by a pair of prophylactic devices inherent in the wind farm approval process – first, the local land use permit (CUP or special exception permit, as it is known in Deuel County), and secondly, the Facility Siting Permit fashioned by this Commission. For anyone viewing this as a *great business plan* – one providing absolute immunity, offered up by supportive county officials under the guise of the delegated zoning power, and buttressed further by this Commission in the exercise of authority under Chapter 49-41B, SDCL, we would suggest the Corrected Application for Party Status be re-read, carefully. What these non-participating owners (including Intervenors, Garry Ehlebracht, *et al.*) have steadfastly failed or stubbornly refused to surrender for Applicant's benefit by contract (similar to all those grieving neighbors hoping to cross over the horse pasture of an equally stubborn Ms. Knick, simply to visit a remote rural cemetery holding the remains of their ancestors), is, frankly, well beyond the right and power of this Commission (or these Counties). The non-participating owners of occupied structures, cluttering the landscape of this proposed wind farm, deserve to grasp this reality (to the extent they may not already fully understand). If honoring Applicant's claim that an unsigned document (the Kranz 2013 Proposal) is a genuine *trade secret*, this Commission will have done a great disservice to at least 195 non-participating owners with "Occupied Structures" over the face of these three counties.

Bluntly speaking, the "Effects Easement" is hardly the work of genius, which is not to diminish the talents of whoever might have written the document referenced herein as Kranz 2013 Proposal. Most lawyers could produce a similar list of "effects" for Crowned Ridge's benefit in about ten minutes time. (In contrast, this writer has taken much longer to respond to Mr. Schumacher's objection.) Neither Section 5.2 – nor any other textual provision of that proposal – is a "trade secret" in the sense that a particular formula, pattern, compilation, program, device, method, technique or process might be. Even if a "trade secret," Applicant's claimed predecessor-in-interest (Crowned Ridge Wind Energy Center, LLC) has been rather careless in keeping the matter confidential (while being rather persistent in those protestations of late). Labeling some writing as "confidential," while giving anyone (such as Ms. Kranz, with land of some interest to Applicant for purposes of commercial subjugation), a copy to read in advance, and then complaining when the landowner refuses to either sign or follow any of its demands or burdens, is not a reasonable practice, intended to accomplish that objective. Unless restrained by a Court of competent jurisdiction, these Intervenors and undersigned counsel, intend to further communicate these thoughts to all non-participating owners having any interest in reading and learning.

While Section 5.2, Effects Easement is not some magical writing, it does seem sufficient for each and every "participating landowner" (61 having occupied structures) to have forever given up any property-rights claim concerning sound, shadow flicker or other negative features of being

too close to operating wind turbines. And, what if a neighboring, non-participating landowner were to have a property-rights based claim concerning sound or shadow flicker? The "Effects Easement" is not a defense for Applicant, because there isn't one. But it seems pretty certain - to this writer, at least - that Applicant would raise, whether in succession or at once, the approved CUP and the Facility Siting Permit as defenses. If the demand that the Kranz 2013 Proposal (as one example of several such items in counsel's possession, currently) be kept from public disclosure is now honored by this Commission, this agency would become complicit with Applicant for keeping crucial and relevant information from scores of non-participating landowners with occupied structures, in or near this proposed wind farm.

All non-participating owners (including these Intervenors, collectively occupying but four of the 195 occupied structures allocated to non-participants) are possessed of land-based rights thus far ignored by Applicant. These rights all turn on the privilege of rejecting the burden of servitudes not created by the fee owner, while the placement of easements thereon must be at the hand of someone having due and requisite authority. Applicant's vision of the scope and breadth of an "Effects Easement," as an essential benefit for Applicant's wind farm, is the mirror image of the servitudes looking to be placed on the non-participating, adjacent or nearby properties of Intervenors and those similarly situated. Absent some express, written consent by the non-participating fee owners to accept the "Effect" of these intrusions, the perceived impact of the wind farm needs to move, as in moved back.

This Commission would do well to squarely face these property-rights concerns now, in this case, before this wind farm is approved and built, rather than waiting for exploration of those issues (in a public forum) for the first time on appeal by the Circuit Court, or beyond that, a U.S. District Court having jurisdiction of a Takings claim lodged under 42 U.S.C § 1983.

Very truly yours,
ARVID J. SWANSON P.C.

A.J. Swanson

c: All persons listed in the current Service List,
as reflected in the Certificate of Service
submitted herewith, including counsel for
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Garry Ehlebracht, *et al.*