BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

EL 19-003

IN THE MATTER OF THE APPLICATION BY CROWN RIDGE WIND, LLC FOR A PERMIT OF A WIND ENERGY FACILITY IN GRANT AND CODINGTON COUNTIES

BRIEF OF INTERVENORS IN SUPPORT OF SECOND MOTION TO DENY AND DISMISS

Intervenors respectfully submit this Brief in Support of Intervenors' Second Motion to Deny and Dismiss by and through the undersigned counsel.

INTRODUCTION

1. The Intervenors respectfully submit this Brief in support of Intervenors' Second Motion to Deny and Dismiss. Reference in this Brief to "Intervenors" refers to those Intervenors

named and identified in the Notice of Appearance of David L Ganje dated and filed in the case on April 16, 2019. Reference to "Applicant" or "CRW" is a reference to the named wind energy facility applicant in the above entitled proceeding EL19-003. Reference to "Application" is a reference to the filed application of the Applicant in the above entitled proceedings. Reference to "Project" is a reference to the Applicant's proposed wind energy facility. Reference to "Page" numbers in the Brief is a citation to page numbers found in the filed Application. References to "Commission" or "PUC" are references to the South Dakota Public Utilities Commission. Reference to "law" is a reference to statutory law, administrative rules, or case law. Applicant filed the above entitled Application in EL19-003 on January 30, 2019. That date is an important date for the Commission to consider when ruling on Intervenors' Second Motion to Deny and Dismiss. At the time of filing this Motion, the Project application procedure is substantially and substantively underway.

2. The Applicant has failed to follow the law. The Application should be dismissed and denied under the facts, circumstances, and law provided in this Motion. The Applicant, among other errors at law, failed to file an application generally in the form and content required by South Dakota law and rules related to a proposed permit for a wind energy facility. SDCL § 49-41B-13 Further, fair notice and the requirements of timely disclosure do not allow an applicant to later establish required facts, impacts, or project analysis to comply with State-created directives for the original content of an application. The Application is the window through which the Intervenors may look at the proposed Project.

3. Three preliminary things are mandated by South Dakota law: the form of the application, the content of the application, and compliance of the application with state law. SDCL § 49-41B-13(2). State law requires that an application for a wind energy facility provide

disclosures. ARSD § 49-41B; SDCL § 20:10:22. Specifically, under ARSD § 49-41B-13(2): "An application may be denied, returned, or amended at the discretion of the Public Utilities Commission for: . . . Failure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder." Thus, the plain meaning of the rules requires that Applicant demonstrate compliance, that is disclosure and explanation, with each of the factors found in ARSD § 49-41B and SDCL § 20:10:22. Otherwise, the purpose of requiring that a wind energy facility permit application include an express description of any information is meaningless.

THE LAW OF DENIAL AND DISMISSAL: LEGAL STANDARD

4. The legal standard for this Second Motion to Deny and Dismiss is not set by SDCL § 15-6-12(b). That civil rule addresses civil pleadings and civil procedure, not the substantive law related to the Application. A "pleading" under civil rules requires only "[a] short and plain statement of the claim showing that the pleader is entitled to relief." § SDCL 15-6-8(a)(1). A civil pleading may consist of only a couple pages.

5. The legal standard for this Motion is based on South Dakota energy conversion and transmission facility law and rules, including ARSD § 49-41B-13. ARSD § 49-41B-13 allows the Commissions to deny and dismiss an application which does not 1.) generally conform to the rules of form regarding the presentation of an application; 2.) provide relevant legal content; 3.) and comply with South Dakota energy facility statutes and rules related to a wind energy facility. A wind energy facility requires considerably more content than a pleading, and legal compliance is more difficult to achieve. An application for a wind energy facility must provide a multitude of continuing disclosures and content. Intervenors' Second Motion is based on the failure of the Applicant to fulfill the legal requirements described in this Brief.

STATEMENT OF FACTS

6. On January 30, 2019, Applicant applied to the PUC for a permit to pursue its Crowned Ridge Wind project. *Crowned Ridge Wind Farm's Application* (Jan. 30, 2019) [hereafter "*CRWind Application*"]. In Exhibits attached to the Application, the Thompsons are listed as participators on 22 different maps. *CRWind Application* Appendix A (figures 1 – 14) through Appendix M. The Thompsons are not, in fact, participators. *Affidavit of John Thompson and Email Correspondence* (filed with EL 19-003 docket May 20, 2019) [hereafter "*Thompson Affidavit*"].

7. In its Application, CRW claimed: "Landowner support of the project has been present for over 10 years and is showcased by the Applicant's ability to obtain the necessary wind leases to adequately host the project." *CRWind Application*. Sam Massey and Tyler Wilhelm, who are together "responsible for the development, permitting, community outreach, regulatory compliance, and meeting the commercial operations date for the 300 megawatt Crowned Ridge Wind generation project ('Project')," claimed in their testimony that Applicant "coordinated with landowners" regarding turbines, access roads, and collector line locations. *Direct Testimony & Exhibits of Tyler Wilhelm & Sam Massey* 1, ll. 12-14 (Jan. 29, 2019); *Id.* at 6, ll. 4-8 ("Development activities for the Project commenced in 2008. Over the past 10 years the CRW has been actively engaging stakeholders by working closely with landowners, tribal and local governments, and federal and state agencies to design the Project. Stakeholders have been approached directly to address concerns with the proposed siting and placement of the Project's infrastructure."). Applicant had not, in fact, coordinated with the Thompsons. *Thompson Affidavit*.

8. On February 7, 2019, Applicant filed an official landowner map with the Commission. Figure 3a (Feb. 7, 2019). On February 19, 2019, Applicant submitted to the PUC "updated maps and results tables that reflect the changes in participation status for the noise

receptors" (*Supplemental Material: Shadow Flicker Receptor Update* (Apr. 9, 2019)) as well as "updated maps and results tables that reflect the changes in participation status for the shadow flicker receptors" (*Supplemental Material: Noise Receptor Participation Update* (Apr. 9, 2019)). Each of the "updated maps" continue to show the Thompson properties as part of the Project.

9. NextEra, through its representative and on behalf of CRW, submitted a letter on February 18, 2019, and it renewed on March 15, 2019 an application to Grant County; both are related to this Project. In both, NextEra represented to Grant County that the Thompson property was a participator in the Project. *Grant County NextEra Cattle Ridge CUP Application* (Feb. 18, 2019).

10. On March 5, 2019, James Thompson wrote to Russ Loyd at NextEra to alert Applicant that:

> [Applicant's] map erroneously indicates that our family farm, labeled John L. Thompson, is under a lease agreement for wind dev. This is not accurate. Secondly, the map currently shows a dashed line indicating plans for a collection line dissecting our property (via the creek). This is also not true. No agreement/lease/pass through access has been authorized by us, our family.

Thompson Affidavit at 5. Mr. Thompson copied Tyler Wilhelm on the email. *Id.* at 4. Mr. Wilhelm did not reply, so Mr. Thompson wrote back on March 19, 2019, to reiterate: "no owner of this farm property has ever signed a lease with NextEra or previous company(ies) for any purpose related to wind or energy production (or similar)." *Id.* at 4. He went on to "ask again that [NextEra] please immediately clarify the reason(s) why your company has marketed and submitted for planning purposes a map that inaccurately 'claims' that our family property titled 'John L Thompson' on your map is under any related lease agreement." *Id.*

11. That day, March 19, 2019, Mr. Wilhelm stated that the Thompsons were not participators, that NextEra had no rights to their property, and that Project maps needed to be

revised. *Id.* ("After further due diligence, our team was able to confirm that there was a mapping error and that the Thompson properties are not contracted (just as you have stated. . .) . . . the Project Site plan is not accurate . . . and would need to be revised to relocate the proposed development from the property. . . . Site Plan revisions are in process now") (emphasis in original).

12. The next day, on March 20th, 2019, at the PUC public input hearing, Commissioner Nelson asked Mr. Wilhelm if the official landowner map had been updated; Mr. Wilhelm said no. *In Re: The Application by Crowned Ridge Wind for a Permit of a Wind Energy Facility in Grant and Codington County: Public Input Hearing Audio* 2:01:00 (Mar. 20, 2019). The Commissioner answered: "If there are updates to that before we get to the evidentiary hearing, we'd like to have a further update so that at that hearing we've got an up-to-date map."

13. Two days later, on March 22, 2019, Applicant responded to Intervenor's first data request. It provided no updated maps.

14. Mr. Massey and Mr. Wilhelm submitted supplemental testimony to address issues from the PUC public input hearing, which was docketed on April 9, 2019. There is no report of an updated map in the testimony; they continue to rely on maps that show the Thompson property as part of the Project Site and name the Thompsons as Project participants. *Supplemental Material: Sound Study to Reflect Landowner Participation Status Update* (Feb. 19, 2017; filed Apr. 9, 2019). The Thompsons are not participants. *Thompson Affidavit* at 2.

15. On May 9, 2019, the Thompsons signed an affidavit (filed as testimony with the docket in this matter on May 10, 2019), stating they "are NOT participators in any form of the Crowned Ridge Project." *Thompson Affidavit* at 2 (emphasis in original).

16. The alleged Thompson easement, if it had been granted by the Thompsons, would have connected a large portion of the northeastern part of the proposed Project. That portion

consists of 25 proposed designated or optional turbine locations. Intervenors' ability to understand the scope and coverage of the Project is affected by the existence or absence of turbines that would have been connected by a Thompson connection line easement. The fact that the Applicant's representations are not true (and that the Application may be changed by Applicant with some last-minute "modification" or amendment) concerning relevant information which has consistently been represented as a part of the Application prejudices the Intervenors.

17. Intervenors' attorney inquired of Commission Staff regarding information they had on facility questions. The following is the email inquiry and response:

> From: David Ganje <davidganje@ganjelaw.com>
>
> Sent: Monday, May 13, 2019 5:44 PM
>
> To: Edwards, Kristen <Kristen.Edwards@state.sd.us>
>
> Cc: 'mschumacher@lynnjackson.com'
> (mschumacher@lynnjackson.com) <mschumacher@lynnjackson.com>
>
> Subject: [EXT] EL19-003
>
> Ms. Edwards

In reviewing the Applicant's Response to Staff's Data Requests identified as 2-24) the following responsive statement was made by the Applicant as I am informed on March 18th, 2019, "While placement of turbines and some other project facilities is considered relatively final, other project feature locations may be refined slightly pending ongoing survey efforts and any discoveries made during construction of unexpected circumstances. As such, the final location of certain Project facilities, such as collection lines, is still being finalized, . . ."

The Applicant says it has been working on this project for about 10 years. Yet we are less than 30 days from the hearing on the merits, and as of this date I don't know what turbines and what project facilities are final or even "relatively final." And I do not know from papers filed by the Applicant what collection lines are real and which are not real. This lack of information prejudices my clients' ability to have a full and honest, and timely, picture of the Application, and in that regard a full and fair hearing. So please help if you can by sharing any updated responses to the March 18th 2019 statement of Ms. Wells on behalf of the Applicant.

Reserving my clients' legal rights in this matter I thank you.

David L Ganje

Ganje Law Offices

Web: lexenergy.net

605 385 0330

davidganje@ganjelaw.com

From: Edwards, Kristen [mailto:Kristen.Edwards@state.sd.us]

Sent: Wednesday, May 15, 2019 7:12 AM

To: David Ganje <davidganje@ganjelaw.com>

Cc: 'mschumacher@lynnjackson.com'
(mschumacher@lynnjackson.com) <mschumacher@lynnjackson.com>

Subject: RE: EL19-003

I don't think I have any new information. I think we're still waiting on feedback on the Thompson property, but other than that, I don't know of any updates.

18. The Applicant knew at the time of filing the Application on Jan. 30, 2019; at the time of filing an updated official landowner map on Feb. 7, 2019; at the time of filing updated maps on Feb. 19, 2019; at the time of filing for a CUP permit with Grant County on Feb. 18, 2019; at the time of filing an amended application for a CUP permit with Grant County on Mar. 15, 2019; at the time Applicant made representations to the Commission on Mar. 20, 2019; at the time Applicant submitted responses to Intervenors' Data Requests on Mar. 22, 2019; at the time Applicant submitted supplemental testimony to the PUC on Apr. 9, 2019; and thereafter—during all these times Applicant knew, but failed to disclose, that an important, relevant, and material easement agreement with the Thompsons did not exist.

LEGAL ARGUMENT

THE APPLICANT'S SUBMISSION DENIES INTERVENORS DUE PROCESS OF THE LAW

19. The Applicant's submission of false facts throughout this Application process denies Intervenors due process of the law by prejudicing their right to *timely* analyze, review, and object to facts relevant to the approval of the Application. The Applicant's failure to submit accurate information and its decision to continually perpetuate false information prejudices Intervenors' rights and limits the Commission's grasp of the decision's scope and probable effect on the community—the Commission should dismiss this case for a violation of Intervenors' due process rights, based on Applicant's actions in this matter.

20. "[L]icensing hearings . . . [require] notice and opportunity for hearing [because they] are contested cases. *Application of Union Carbide Corp.*, 308 N.W.2d 753, 756–57 (S.D. 1981) (holding that "contested case," as used in SDCL 1-26-1(2), means an adjudicatory hearing). "The constitutional guaranty of due process of law applies to . . . administrative . . . proceedings, particularly where such proceedings are specifically classified as judicial or quasi-judicial in nature." *Id.* (citing 2 Am.Jur.2d Administrative Law s 351 (1962)).

21. In *South Dakota v. U.S. Dept. of Interior*, the court found a violation of due process because plaintiffs lacked access to twenty-three documents material to an administrative decision, which precluded the plaintiffs from rebutting arguments on a significant portion of the factual material relied upon. 787 F.Supp.2d 981, 996. The court also determined that the action violated regulation 25 C.F.R. § 2.21(b), which provides:

> When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided.

Id. (citation omitted). The court determined that the agency's violation of the procedural rule was more than a harmless error because it precluded an interested party from presenting certain colorable arguments to the ultimate decision maker. *Id.* (citing *Gerber v. Norton*, 294 F.3d 173, 182–185 (D.C. Cir. 2002) (declining to find harmless error where agency's violation of procedural rule prevented plaintiffs from commenting on certain evidence and plaintiffs specified three arguments they would have made if provided with the evidence in a timely manner) (citations omitted). The federal district court considered the nature of the information withheld, the importance of the information relative to the entire file, how the information was used, and the Plaintiffs' identification of five additional arguments that would have been available had they obtained the information, and the court found more than "harmless error." *Id.* (citation omitted).

22. In *Application of Midwest Sec. Transfer, Inc.*, the Intervenor argued to the Supreme Court of South Dakota that he was denied due process because the Commission violated its own procedure when it denied his request for a hearing in order to cross-examine the license Applicant. 354 N.W.2d 728, 730 (S.D. 1984). In rejecting the argument, the Court reiterated that procedure adopted by an agency pursuant to the Administrative Procedures Act acquires the force and effect of law, *id.* (citation omitted), but determined the procedure followed by the Commission afforded the Intervenor adequate process. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelley*, 397 U.S. 254 (1970)). The Supreme Court of South Dakota cited *Mathews v. Eldridge* in which the Supreme Court of the United States held that three factors must be considered and balanced when determining the constitutional sufficiency of procedures used to deprive an individual of their protected interest:

> First, the private interest . . . affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

> administrative burdens that the additional or substitute procedural requisites would entail.

424 U.S. 319, 335 (1976).

INTERVENORS ARE DEPRIVED OF THE FACTS NECESSARY TO ANALYZE THE APPLICATION

23. In this matter, Intervenors were—and continue to be—deprived of the truth necessary to analyze and contest the Application, which is a violation of their rights to due process. Intervenors' property rights are a protected interest, and this is a contested administrative hearing—the due process clause does not just apply at the 11th hour. U. S. Const. amend XIV; S.D. Const. Art. VI, §2. "[D]ue process is flexible, and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471.

24. This matter is similar to *South Dakota v. U.S. Dept. of Interior* because it regards the *lack of access* to material information that, under the law, was supposed to be disclosed to any party in interest. This crucial fact should change the outcome under *Mathews v. Eldridge*—here, the information provided is and continues to be blatantly incorrect. How can the Commission ever assure due process when Applicant fails to submit accurate data? How can the Commission ever assure due process when Intervenors receive inaccurate data?

25. The responsibility of accurate disclosure, here, is with Applicant. The costs of inaccurate disclosure, though, fall on the PUC and Intervenors. Applicants will not disclose material information if the PUC fails to enforce its disclosure requirements. The State has an interest in Applicant complying with the Commission's disclosure rule:

> the truth and accuracy of the Application shall be verified by the Applicant. Each Application shall be considered to be a continuing application, and the Applicant must immediately notify the commission of any changes of facts or applicable law materially affecting the application. This duty continues up to and includes the date on which the permit is issued or denied.

SDCL § 20:10:22:04 (2019).

26. The disclosure requirement is obligatory and continuous. If it is not important whether the Applicant has secured an easement necessary for a large portion of planned and alternative capacity, what is important? South Dakota requires, among other details, accurate depictions of rights-of-access to operate a facility. *See* SD ADC § 20:10:22.33.02. (requiring turbine right-of-way disclosure); *id.* § 20:10:22:07 (requiring "*complete description*" of the current and proposed rights of ownership) (emphasis added). We should pause to consider that the established procedures, if followed by the Applicant in good faith, would have prevented this inequity from manifesting into the threat it is today. The Commission and the State has a legitimate interest in enforcing its procedural safeguards and defending residents' protected interests in property. An untimely, belated, and late disclosure at this late stage is a violation of due process.

27. There is insufficient time for anyone to process the Applicant's newly disclosed reality—the Thompson easement that was alleged to have been, but it is not actually in existence. This absent easement is identified for the Project's proposed access to 25 designated or proposed alternate turbines sites, which Applicant has continually represented as included in this Project. How can the Commission expect Intervenors to accurately assess the present situation? How can the Commission expect itself to accurately assess the present situation? For one example, if the submissions are inaccurate, how can the Commission accurately determine (and how can the Intervenors at this 11th hour fairly challenge and object to) the "size of the facility, the location of the facility, and the financial condition of the applicant" when determining whether to require funding for the project? *See* 20:10:22:33.01; *see also* 20:10:22:33.02 ("[A]pplicant shall provide . . . Configuration of the wind turbines. . . . The number of wind turbines . . . . The proposed wind

energy site and major alternatives. . . . Right-of-way or condemnation requirements . . ."). With the testimony of the Staff's own expert recommending another 16 turbine modifications, the absence of relevant and accurate information is apparent at this time. *Docket No EL19-003: Direct Testimony of David M Hessler On Behalf of the Staff of the South Dakota Public Utilities Commission* 5 ¶¶ 9–23, 6 ¶¶ 1-23 (May 10, 2019) ("I believe that the relocation of the 16 primary units indicated in Exhibit DMH-2 to 16 alternate sites should be made a precondition of the permit. . ."). The Applicant has worked on the Project for 10 years—we are now less than 30 days from a hearing on the merits. As of this date, those who should be advised—except for (maybe) the developer—know what turbines and project facilities are final or even "relatively final." No one is aware whether the Applicant's collection lines—as submitted—will be used. In whole, the lack of time for Intervenors and the PUC to understand these facts prejudices Intervenors' right to a full, honest, and *timely*, picture of the Application—it prejudices Intervenors' right to the full, honest, and *timely* hearing that due process guarantees.

28. The reality of erroneously depriving the Intervenors of their rights in private property has been shown at this stage of the proceedings—the Applicant's Application should be dismissed for a violation of due process based on a failure to disclose information material to the administrative decision-maker and to the Intervenor whose protected property interests are at stake. To consider that the Application may be changed with last minute "modifications" is concerning because facts in this Application process have consistently been represented by the Applicant as accurate and true. To press forward now is to prejudice the Intervenors for the reasons stated in these papers.

APPLICANT FAILED TO COMPLY WITH ONGOING DUTIES OF DISCLOSURE IN THE APPLICATION

29. Applicant additionally proceeds in bad faith—its Application should be denied and dismissed. The Applicant is not acting in good faith in this Application. The Applicant failed on the cited occasions to advise the Commission and interested parties of the falsehoods contained in its pending application. The energy siting rules are clear: "The truth and accuracy of the Application shall be verified by the Applicant. Each Application shall be considered . . . a continuing application." SD ADC § 20:10:22:04.

30. Good faith requires candor and honesty. Statutory guidance can be found at SDCL 2-14-2(13), which states "good faith" is an "honest intention to abstain from taking any unconscientious advantage of another, even [if it is] through forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." Black's Law Dictionary 693 (6th ed., 1990) holds:

> Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.... In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom of intention to defraud, and, generally speaking, means being faithful to one's duty or obligation.

See also Garrett v. BankWest, Inc., 459 N.W.2d 833, 841 (S.D.1990) (good faith "varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party" and an "honest belief in the suitability of the actions taken").

31. Applicant may argue it has not violated the Commission's rule or acted in bad faith during the application process because its failure to disclose the Thompson easement does not "materially affect the application." 20:10:22:04. ("[A]pplicant must immediately notify the commission of any changes of facts . . . *materially affecting* the application.") (emphasis added).

This argument should be rejected for two reasons. First, "good faith" is an "intention to abstain from taking . . . advantage . . . *even through* . . . *technicalities of law*. . .". SDCL 2-14-2(13) (emphasis added). To argue that the word "materially" justifies non-disclosure of information entirely relevant to the Intervenors' rights to notice and due process is a position that cannot and should not be abided. Second, according to ARSD 20:10:22:39, an applicant's burden is to be maintained in the form of data, exhibits and related testimony. And, there is no tenable argument to suggest evidence necessary to carry one's burden is not material. The burden here has and should lie with Applicant.

32. Applicant perpetuated a significant fact that did not exist and continued to perpetuate the same even after being advised by the landowner of the falsehood. The Commission should not tolerate this disregard for truth. Nor should it ignore the Applicant 's continuing legal duty to disclosure material facts relevant to its application. The Commission should deny and dismiss the Applicant's Application.

CONCLUSION

33. Intervenors respectfully move that the PUC deny and dismiss the Application in this matter based upon the law, constitutional grounds, and arguments presented in this Brief and the Motion. The Commission has an established and orderly course of rules to be followed in the application process. It would be error to not follow the process and the law required as a part of that process. Further, to allow the Applicant, at this time, to amend or add significant and legally required content requirements, as well as substantive legal requirements, because of Applicant's own failures in filing an application would misapply the purpose of any statute permitting amendment. The Application fails to comply with applicable laws and rules. Further, the Applicant is not able to carry its burden of proof, including proving that the Project will not pose

a threat of serious injury to the environment. Further, the Application fails to comply with required application form and content and fails to comply with South Dakota law as well as the rules of the Commission, all as addressed in this Brief.

Dated this 17 day of May, 2019

/s/ David L Ganje

Ganje Law Offices

17220 N Boswell Blvd Suite 130L, Sun City, AZ 85373

Web: lexenergy.net

Phone 605 385 0330

davidganje@ganjelaw.com