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Kristen N. Edwards, Staff Attorney
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
Pierre, South Dakota

Re: File 6215-001. • *In re Docket EL19-003, Crowned Ridge Wind LLC*
Codington & Grant Counties
- *Concerning the Application of Timothy & Linda Lindgren for Party Status*

Dear Counsel:

I will work to make this a much shorter letter – I write today only because Applicant's counsel, Mr. Schumacher, continues to insist that my posting of letters or pleadings to the public file, with several full or abbreviated quotations from the non-effective Wind Farm Lease and Easement Agreement between Crowned Ridge Wind and my clients, is some violation of the contract-based rights of Crowned Ridge Wind for "confidentiality."

South Dakota's document recording system is based on the so-called "race-notice" concept – documents filed first in time are constructive notice to the world. Applicant's affiliates know all about the recording system here – a "Memorandum of Leases and Easements" ("Memorandum") for the Lindgren Farm was filed July 7, 2014, 10:12AM, Office of Register of Deeds, Codington County, Instrument 201402773, Book 4T, Memorandum of Option, page 4490. This recorded instrument is several pages long, and gives constructive notice that Boulevard Associates, LLC ("Operator") has entered into a Wind Farm Lease and Easement Agreement ("Agreement"), under which an exclusive option has been given for eight enumerated types or kinds of leases and easements, namely:

(1) Turbine Site Lease with Access Rights
(2) Met Tower Lease with Access Rights
(3) Collection Lease with Access Rights
(4) Construction Right
(5) Wind Non-Obstruction Easement
(6) Effects Easement
(7) Overhang Right
(8) Telecommunications Facilities

Having mentioned these various leases and easements, the recorded Memorandum references the Agreement in passing (as it is not part of the recorded instrument); the recorded instrument does advise the Operator intends to "use, maintain, capture and convert all of the

wind resources on the Owner Property," and as to the remaining terms and conditions, the public is directed to the Agreement. No mention is made in the recorded instrument that the referenced Agreement is itself regarded by Operator as being "confidential." (Because one can only get *that* express thought out of the Agreement, at Section 17, and *not* the Memorandum, I fully expect counsel will again protest this letter by saying I am again quoting directly from the Agreement – to that extent, guilty as charged.)

Applicant seeks the best of all worlds – the Memorandum provides public notice that the Operator claims – by reference to title – eight different kinds and sorts of leases and easements as to the Lindgren Farm. The public is otherwise left to guess as to what the provisions might be. The Owners, of course, know the provisions of the unrecorded document, as does the Operator and Applicant. Then, Operator elects not to timely exercise the Option, even as Owners decide not to extend the Option. So, to what extent are the Owners bound by the anticipated, but failed, document – including an "Effects Easement" – when Operator's cohort, this Applicant, later seeks to have established those rights and privileges for the adverse use of the Lindgren Farm, a use that would have been covered by the Effects Easement, but now actually isn't – because it has failed? (For the moment, we reference only the provision's reference to "flicker" and "shadow," or as it is more commonly known, "shadow flicker," being one of the land use rights claimed by Operator when the option is exercised.) Not at all, we would submit.

Despite having devised the "Effects Easement," with the intent of using the Lindgren Farm as a "participating" parcel, Applicant has no similar contractual-based right to deal with my clients as non-participating landowners. When the Effects Easement is then mentioned – along with the need for something very much like that, if throwing shadow flicker – Applicant then objects and casts aspersions, claiming that the Effects Easement is forever confidential, and cannot now be mentioned (or shown) to this Commission. That is having it both ways – covering your legal risk with an Effects Easement, via an unrecorded, confidential document, while later objecting to its emergence when the Applicant's right to make an adverse use of land is on the table – along with the Commission's lack of authority to take, even while handing those rights over to Applicant in the form of a siting permit. (If these issues aren't yet on the table, then we believe they should be.) Applicant, even with checkbook and forms in hand, has been unable to volitionally extract certain land use rights from a whole host of non-participating owners. Should they remain near or in the way of the wind farm at the time of final design and approval of this wind farm, well, no worries for Applicant will now claim to having been conferred with those virtual rights via the siting permit.

For some time, the Lindgren Family has openly discussed (while also regretting) the Section 5.2 (Effects Easement) before this Commission; their newly hired counsel – this writer – has stepped up that effort. This Commission now proposes to approve up to 30 hours of shadow flicker for Applicant's benefit on the various lands referenced in Exhibit A68, including the Lindgren Farm, presently clocked at 16 hours and 5 minutes. If this is part of the legislature's mandate, then the Commission's order leading to the siting permit (to be decided in July) might be viewed as a taking of non-participating property interests. Applicant will likely use the siting permit as a shield, of sorts, in any subsequent litigation over this adverse use. Conversely, if

"shadow flicker" affirmations are not within the mission given to this Commission, then allowing for shadow flicker under the stipulation between Commission staff and Applicant would constitute action beyond the scope of the powers delegated.

Either way, the Commission will allow Applicant this kind of latitude and largess, as to the property of non-participants, at its own peril. We say – and I expect many other non-participants obliquely or obscurely referenced in Exhibit A68 would agree – this type of Commission permission cannot and should not happen unless Applicant can also produce as to each affected parcel something like the "Effects Easement" as it had bargained for over the landscape of the Lindgren Farm, once the option was exercised. If the "Effects Easement" cannot be obtained from non-participants (in the sense that their lands are not the site of a turbine), then the wind farm needs to be re-designed, if not re-thought.

If the Commission is proposing to issue a permit that, *inter alia*, expressly references the right for Applicant to display, discard, or dump shadow flicker on the residence and property of my clients, within limits, that is yet a taking of land-use rights and conferring those rights upon the Applicant. I would merely mention in passing the decision handed down just yesterday in *Knick v. Township of Scott, Pennsylvania, et al.*, 588 U.S. _____ (2019), a takings case arising out of a township ordinance requiring private property owners to keep open their lands "during daylight hours" as a means of access to adjoining cemeteries, whether on public or private lands. The opinion of Chief Justice Roberts should be a warning bell for governmental agencies proposing to award a siting-permit Applicant with professed or declared rights and privileges to emit – as an example, shadow flicker – over the lands and homes of non-participating owners, when state law (and the prior instruments prepared by this very Applicant) would hold that the right to control such uses are exclusively within the "bundle of sticks" possessed by the fee owners.

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

A.J. Swanson

c: All persons listed in the PUC's current
Service List for EL19-003, as reflected in the Certificate of Service
as is submitted herewith, including counsel for
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Timothy & Linda Lindgren