BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY CROWNED RIDGE WIND II, LLC FOR A PERMIT OF A WIND ENERGY FACILITY IN DEUEL, GRANT AND CODINGTON COUNTIES	**)**	**STAFF'S RESPONSE TO LATE APPLICATION FOR PARTY STATUS**
	)	**EL19-003**

COMES NOW, Staff of the South Dakota Public Utilities Commission (Commission) and hereby files this Response to Late Application for Party Status.

ARSD 20:10:22:40 provides that an "application [for party status] shall be filed within sixty days from the date the facility siting application is filed." The Application was filed on January 30, 2019. Thus, this application for party status is approximately two-and-a-half months late. Historically, Staff has been supportive of late intervention, provided no party is unduly prejudiced.[1] Admittedly, the tardiness of this particular application for party status tests the boundaries of that accommodation.

It is Staff's understanding that Proposed Intervenors believe that their contract with Applicant, which expired on June 11, 2019, precluded them from intervening in the docket while the contract was in force. Staff is not in a position to opine on the legalities of the contract. However, if Proposed Intervenors were, in fact, constrained by the contract and precluded from taking an action adverse to the Project, it seems curious that written comments were filed by Proposed Intervenors on May 16, 2019, and June 6, 2019, prior to the expiration of the contract. In addition, both Linda and Timothy Lindgren spoke at the public input meeting on March 20, 2019.

The South Dakota Supreme Court has held that "the most important factor [in ruling on a

[1] See Docket No. EL18-026

late intervention] is whether the delay in moving for intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Weimer v. Ypparila*, 504 N.W.2d 333, 336 (S.D.1993) (Court holding that trial court's denial of intervention of right as untimely was an abuse of discretion). In *Mergen v. Northern States Power Co.* (2001 S.D. 14), the Court upheld the granting of untimely intervention where the opposing party failed to show any prejudice as a result of the late intervention. *Mergen*, 2001 S.D. 14, ¶ 7, 621 N.W.2d 620, 622. Therefore, it is incumbent upon any party resisting the intervention to establish prejudice.

The Court has also noted that "courts are more likely to deny intervention as untimely where it is permissive than they would where it is a matter of right." *Application of Union Carbide Corp.*, 308 N.W.2d 753, FN 4 (S.D.1981). "Since in situations in which intervention is of right, the would-be-intervenor may be seriously harmed if he is not permitted to intervene, courts should be reluctant to dismiss a request for intervention as untimely, even though they might deny the request if the intervention were merely permissive." *Baldridge v. Reid*, 88 S.D. 374, 377, 220 N.W.2d 532, 534 (1974). As landowners within the project area, the Lindgrens would be intervenors as a matter of right pursuant to SDCL 49-41B-17.

Staff cannot speculate as to the prejudice, or lack thereof, to Crowned Ridge Wind, LLC (Applicant) or to existing intervenors. Staff can only speak for Staff. Because of the statutory deadline of six months, there is no way that an additional party could prolong this process. The discovery period has long since closed, thus there is no possibility of Staff or any other party being burdened with late discovery requests. By their own delay, Proposed Intervenors have forfeited the right to call and cross-examine witnesses, and thus the right to bring new issues. This prejudices them, not Staff.

Proposed Intervenors stated in their application for party status that they seek intervention

to be a part of the remainder of the process. All that remains is post-hearing briefs and oral argument. While they've considerably lessened their time for writing a post-hearing brief by the timing of their intervention, Staff will suffer no prejudice by having one more brief submitted. This assumes that Proposed Intervenors' brief would not attempt to raise any new issues based on facts which were not a part of the evidentiary record. Should any party attempt to bring in new issues outside of those issues for which there is evidence in the record at this point in the process, whether a new or existing party, those issues would not be supported by evidence in the record. Thus, without the ability to put new evidence into the record, there is little chance of a party being prejudiced by new issues being raised.

The Court has held that "[t]he problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention." *People ex rel. J.J.*, 454 N.W.2d 317, 331 (S.D. 1990). That statement holds true in this proceeding.

Staff recommends the late application for party status be granted.

Dated this 18th day of June 2019.

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