BEFORE THE PUBLIC UTILITIES COMMISSION
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*	))))	Docket EL19-027

INTERVENORS' REPLY TO
MOTION TO STRIKE
TESTIMONIAL EXCERPTS

I. Introduction

By Motion filed January 14, 2020, Applicant CROWNED RIDGE WIND II, LLC ("Movant" or "CRWII") seeks to have stricken, on order of this Commission, excerpts of the prepared testimony of Steven Greber, Amy Rall and Garry Ehlebracht.

By our reckoning, the offending testimony (underscored) is as follows, accompanied, in some instances, by preceding or related testimony for context:

Steven Greber (at p. 3, lines 17 to 26, and at p. 4, line 45, continuing to p. 5, line 3):

> In other documents that I have seen, the predicted rate was much higher – somewhere in the neighborhood of 27 hours. Whether the duration is 27 hours or now reduced to "only" 14 hours, I wish to say that neither of these planned or potential impacts is acceptable to Mary and me. We view this Shadow Flicker presence (as predicted for our home) as a complete violation of our rights as property owners, including as referenced in SDCL 43-13-2.
>
> As my counsel has explained to me, and as I understand our rights to exist under statutes and the South Dakota Constitution, we also have a right to be free from servitudes we did not create being placed upon on our land. If Deuel County Board is going to create a servitude as to Shadow Flicker, or as to noise effects, or if the PUC proposes to set those rights on the part of Crowned Ridge II, then the order under which that right on the part of the Applicant is either void – *or if not void, because the County and this agency has the power to do so* – then it is a taking of or infringement upon our purchased rights.
>
> . . . .
>
> I also question why I am to have the nearest wind turbine only 2,041 feet (just over the four-times-height requirement) from my home while the good folks in Goodwin get the benefit of a one-mile (5,280 feet) set back, under the Deuel County Zoning Ordinance as last amended in early 2017. It is my understanding

that Deuel County does all of the zoning in this district, and that Goodwin is part of our same zoning district. I am advised that the zoning statutes for our state require the regulations in each district be uniform. The homes in Goodwin are no better or more deserving of a reasonable setback from wind turbines than our own home, which itself is just a mile or so outside of Goodwin, to the north. This seems to be another example of zoning regulations or zoning efforts that do not follow the zoning law or zoning power, as delegated to the County.

Amy Rall (at p. 2, line 20, starting at the second "and" and through line 21):

As I see it, we have no good options other than needing to stand with our Goodwin neighbors and fight this permit – and these planned trespasses - based on our rights as property owners.

Garry Ehlebracht (at p. 3, line 16, starting at "I" through line 17, ending at "SDCL 11-2-14," and further, at p. 4, line 14 starting at "It" through line 18; also, p. 4, line 20, starting at "This" through line 22, ending with "property," and finally, p. 4, line 24, starting with "Neither" through line 27):

(4) If Crowned Ridge was required to observe the same setback of one (1) mile as pertains to Goodwin, as I believe is the intent of the law outlined in the Zoning Power (SDCL 11-2-14), the Shadow Flicker would be further reduced – if not entirely eliminated – and the noise level would be much closer to what now exists in our quiet area (prior to wind farm development work or operation of the "wind farm").

. . . .

There does not appear to be any mechanism in the Zoning Ordinance, or the Decision made by the Board of Adjustment, and I also expect this Commission will reserve no meaningful supervision over the Crowned Ridge II operation so that, *if* these uninvited elements or "Effects" of the wind farm prove to be a nuisance (a nuisance is an annoyance – these experts seem rather dismissive of mere "annoyances" since they all claim they really don't lead to a "substantial impairment" of our health) we will at least be entitled to have further resort to the Courts to protect ourselves. It is my belief, having been so advised by counsel, that in issuing a Special Exception Permit, and also now this Facility Siting Permit, each of which approves or gives official government blessing to Crowned Ridge's predictions of this or that on my land as "okay" or "fine," our legal remedies for a nuisance may have also been seriously undercut, if not entirely ruined.

This is why I am not willing to allow these "Effects" to come onto my property or to invade my home. This predicted, proposed use is actually a trespass. And if this Commission now approves this use, I find that would be part of a taking of or damage to my property and will pursue my legal remedies accordingly. Neither this Commission, nor the Deuel County Board of Adjustment, knows what is best for my land, or how to enjoy the property. Neither agency has any real authority to approve or permit this adverse use as to the property of a "Non-Participant." If government plans or wishes to take my

land by these permits and approvals – or simply intends to just damage it – then government should be prepared to pay for it.

As basis for the motion, Movant cites SDCL 1-26-19, wherein the agency is to apply the rules of evidence applicable to the trial of civil cases, along with SDCL 19-19-701(c), commonly known as Rule 701. According to the motion, Rule 701 does not permit the "admission of lay witness testimony on subjects that require specialized knowledge, such as the offering of legal opinions." Actually, Movant has ignored the title to Rule 701, which is: *Opinion testimony by lay witnesses*.

II. Discussion

We agree that each of the witnesses is a lay witness, and is offering, to some extent, "opinion testimony." This is permitted by Rule 701, within limits. The opinions offered in each case deal directly with the future of their specific property and the prospects for their future enjoyment of their specific property, when this wind farm is, as we expect is likely to be the case, fully permitted and operating. If this Commission does not wish to know the "opinions" of Non-Participating property owners as to their specific properties, preferring instead to await subsequent litigation (also quite likely) before learning of such matters, then, by all means, the PUC should rule on this motion *post haste* – provided Rule 701 is legally sufficient for such a ruling.

But, the challenged testimony has yet to be given or offered. Typically, that would be the time for a motion to strike, based on the qualification, knowledge, and experience of the lay witness to offer an opinion. Again, Rule 701 does not say a lay witness *cannot* offer opinions. Rather, the opinions offered are to be based on elements of personal knowledge.

This wind farm has been many years in the making, and the Intervenors have now had years of exposure to the seemingly endless machinations of the County Board in formulating a new Zoning Ordinance during 2016 and 2017 to the liking of wind farm developers. Both the

public (including one or more of the Intervenors) – and the wind developers – played roles in that legislative process. Once the amended Zoning Ordinance was in place – with new rules as to WES Setbacks, Shadow Flicker and Noise – then the adjudicatory process began promptly, although it was over rather quickly. Intervenors observed and participated in that process, too, although each was limited by the Board chair's ruling to a 3-minute presentation. Each of these public events has provided (or equipped) the Intervenors – as property owners (and having a vital interest in the "how" and "where" and "why" a large wind farm might come to lay *partially* upon their respective properties) – with information, knowledge and understanding of the process, and also of legal rights as property owners, as derived from both statutory and constitutional sources.

As noted by the Court in *State v. Condon*, 2007 S.D. 124, ¶ 30, 742 N.W2d 861, the rules of evidence are "liberally interpreted with the intent of relaxing traditional barriers to opinion testimony." Thus, under Rule 701, a lay witness may give an opinion, provided it is rationally based on the witnesses' perception, is helpful to clearly understanding the testimony of the witness or to determine a fact in issue, and is not based on scientific, technical or other specialized knowledge within the scope of Rule 702. None of the witnesses have yet experienced (based on their perception – at their homes and properties) "Shadow Flicker," as the wind farm is not yet in business. But, they have, by this time, all observed Shadow Flicker elsewhere, have read about it, heard about it, and know enough about it to know they're not going to like it inside of their homes and upon their properties.

The owner of property is qualified to state an opinion, being presumed as having "special knowledge of the property, its income producing capacity, and other pertinent traits sufficient to render an opinion of value." *City of Sioux Falls v. Johnson*, 1999 S.D. 16, ¶ 13, 588 N.W.2d 904. Likewise, we think it evident that a U.S. citizen (true of each Intervenor), having ownership of real property in Deuel County, having been schooled in the public school system, and having

lived under the laws of this state for their respective lifetimes, will have some understanding – *some perception* – of their respective rights and protected liberties as a citizen. It would not be uncommon for such citizens to know about "free speech," or freedom of religion or of assembly, or the right to keep and bear arms. Likewise, lay witnesses will often understand concepts of water drainage, and of trespass – and can express an opinion of what they have perceived.

Witness Garry Ehlebracht is challenged as to the following statement (underscored):

> This is why I am not willing to allow these "Effects" to come onto my property or to invade my home. <u>This predicted, proposed use is actually a trespass. And if this Commission now approves this use, I find that would be part of a taking of or damage to my property</u> and will pursue my legal remedies accordingly. <u>Neither this Commission, nor the Deuel County Board of Adjustment, knows what is best for my land, or how to enjoy the property. Neither agency has any real authority to approve or permit this adverse use as to the property of a "Non-Participant." If government plans or wishes to take my land by these permits and approvals – or simply intends to just damage it – then government should be prepared to pay for it</u>.

If the motion is allowed, then this witness is unable to assert – under the views of CRWII, at least - that *neither this Commission, nor the Deuel County Board of Adjustment* "knows what is best for my land, or how to enjoy the property." This effort suggests the viewpoint of this Movant, when or if considering (and respecting) the property rights of adjacent Non-Participants, is far more reprehensible than first feared.

Movant designed this wind farm, and then brought it forward to Deuel County's Board of Adjustment for blessing. In each and every case – according to pre-filed testimony of one expert or another – every one of the homes and properties of these Intervenors will receive "Shadow Flicker" of some measure, and also noise substantially in excess of ambient levels. Other than the initial, unsuccessful efforts to persuade Ms. Kranz to enter into a certain option for Wind Farm Lease and Easement Agreement, Movant and its predecessors have no permit, license, servitude or easement to dump, inflict or display any of these "Effects" onto the Intervenors. That is to say, no permit other than the Special Exception Permit now issued by Deuel County's

Board of Adjustment, and, we expect in due course, the Facility Siting Permit from this Commission.

Wind farms create a lot of noise, and they cast off lots of "Effects." These Effects can either be dealt with so that a sufficient, adequate buffer area exists between Wind Farm and its Participants, on the one hand, and on the other, the Non-Participants. In a just world, such a buffer would cause the Wind Farm Developer – and its Participants – to fully bear the cost of the Effects. After all, the Wind Farm has been designed and pursued by the Developer.

In the real world of Deuel County, however, the decision was made (not by the property owners, but by those claiming to exercise the delegated Zoning Power) to *split or apportion the cost* (much like Solomon proposing to run his sword through the young child, top to bottom, in the presence of both the actual and the putative mothers). In Deuel County, some cost of these burdensome Effects would fall on the Wind Farm Developer and its Participants, with some cast over onto the properties of the Non-Participants.

There seems to be an "easement" to do so in the case of Participants, but no such instrument to support any of Movant's rough dealings (thus far) with Non-Participants. Lest this Commission not remember the language of the Option,[1] this reply will briefly review the most salient features. The key feature is Section 5.2:

> **Effects Easement**. Owner grants to Operator a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency inteference, and any other effects attributable to the Wind Farm or activity located on the Owner's Property, or on adjacent properties over and across the Owner's Property (**"Effects Easement"**).

It appears that Movant endeavors to have such an instrument in place with each Participant, as the law would also require such for purposes of WES siting (SDCL 43-13-16, *et seq*.). Such an instrument was proposed to Ms. Kranz, obviously, because of the Intervenors herewith

responding, she is the only one with a parcel of sufficient size to hold one or more WES placements. As to Non-Participants, however, there is no such Effects Easement, whether embraced in an Option or any other like instrument.

In responses that are neither paginated, dated nor signed by anyone, Movant has earlier responded in a veritable blizzard of paper to PUC Staff's data requests in this docket, having in mind specifically "Applicant's Responses to Staff's First Set of Data Requests to Applicant." There are several key questions – and responses – within this document, and even though this filing is a "reply" to a motion to strike, it all fits together:

1-8) Does Applicant offer a "good neighbor" contract? If so, provide a sample.

> **Response:** The Applicant interprets the question to ask whether it is providing non-participants compensation through a written agreement. The Applicant has not been executing "good neighbor" agreements. As the Project proceeds, if there is a specific need to mitigate an identified impact with a non-participant, the Application [sic] may enter into an agreement related to the implementation of the mitigation.
>
> **Respondent:** Tyler Wilhelm, Senior Project Manager

1-13) Did Applicant base its 30-hour per year shadow flicker limit on any factor other than county ordinance? If so, provide support.

> **Response:** Yes, Crowned Ridge Wind II also based its 30-hour per year shadow flicker limit on the acceptance of this limit in the peer-reviewed scientific literature. Please see Attachment 1.
>
> **Respondent:** Chris Ollson, Consultant

1-14) Has Applicant reached out to non-participating landowners with shadow flicker levels approaching the maximum to mitigate the shadow flicker? Explain.

> **Response:** No. After the Project enters commercial operations, the Crowned Ridge Wind II operations team will conduct conversations with non-participating landowners who have concerns with shadow flicker levels, if any, and discuss possible mitigation actions.
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> **Respondent:** Tyler Wilhelm, Senior Project Manager

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[1] Also referenced as the "Kranz Easement," now that the claims of "confidentiality" have been

The intended point is this – since Wind Farm Developers have been given the luxury of simply assuming the rights of Non-Participants (as to their individual properties and homes) are pretty much free for the taking, there has been *no impetus* whatsoever, either at the level of the Board of Adjustment or before this agency (in our view) that would either encourage Applicant – or require it – to either shift, redesign or move the Wind Farm or individual turbines so as to create the "buffer" appropriate to the conditional use at hand.

Rather, the agencies – including this one - seem to have simply *assumed* that the 30-hour annual limit on Shadow Flicker is some God-given right engrained, somewhere, in some constitution. Not so! Clearly, this assumption begins with the NARUC Best Practices report from 2012, which was written by a single former staff-member of the Michigan Public Service Commission, Tom Stanton. Stanton has a BA in Communications, MA in Journalism (Michigan State University) and an MS-Public Administration (Western Michigan University), but his authored report contains no analysis whatsoever of this crucial question – is this recommended course of action (such as imposing up to 30 hours of Shadow Flicker) something that is *actually* within the recognized Zoning Power (meaning, a constitutionally based exercise) of the local or state agencies? The legal foundation of the NARUC Best Practices document – *if that's what it can be called* – actually goes back to a solitary "Big Bang Event," namely, the purported opinion (date and place unknown) of a nameless German judge, ruling on the case of a neighboring landowner, apparently unhappy about being so close to a wind turbine emitting Shadow Flicker. There are two versions of the ruling – in one, the ruling is this level of Shadow Flicker is "tolerable," and in the other, "acceptable." (This has now become the veritable zoning standard in Deuel County. Is it now likewise in Pierre?)

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put to rest by the PUC's order of September 20, 2019.

All this is said to ask this question – *is it possible, just maybe,* that the legal mechanisms and standards under which this German judge was operating (German law, we presume) is *substantially different* than here? Is it possible that Deuel County, and Crowned Ridge Wind II, and also this Commission, have *assumed much too much about, or regarded too poorly,* the legal standards that clearly exist to protect the property interests of those who, like Intervenors, are subject to general zoning law constraints? We think so. However, zoning constraints – as honored in the *Village of Euclid v. Ambler Realty Co.* case many decades ago - are far from the concept here, where Owner A is clearly extended the right, by official permit, to make some non-privity use of neighboring Owner B's property for some duration (Shadow Flicker) or to some level of intensity (noise).

Do those constraints – under the Zoning Power as recognized in South Dakota, and as applicable to the properties owned by citizens of the United States - include the right of a County to then grant permission to Property Owner A (let's call it Crowned Ridge Wind II) – desiring to proceed with a project (such as a Wind Farm – a project that is sure to make a lot of noise while casting Shadow Flicker, too) so that in creating a buffer for the project, it is perfectly okay, under the County's vision and ordinance, for Property Owner A to project an adverse use of the lands and homes of the neighbors – Property Owners B, and so on? And that Property Owners B have *no recourse* but to hope and pray that, someday, Property Owner A will take pity and offer up – maybe – a Good Neighbor Agreement and a few dollars?[2] Such a zoning scheme – here in the United States (as opposed to whatever passes for the public good and interest in Germany) - suffers from a serious lack of respect for Substantive Due Process rights of the Non-Participants,

[2] Normally, when a dominant owner desires to make use of the servient owner's land, there is equal bargaining power; in this scenario, Crowned Ridge has the Non-Participant over a barrel, if there is no legal right to prevent this adverse use under the guise (and misuse) of the Zoning Power. "Oh, having issues with Shadow Flicker? Here's a few dollars. Well, take it or leave it."

while purporting to function also as a Takings arm of government, whether for a public or a private purpose.[3]

It may be – as urged by the experts – that the peer reviewed literature all claims that Shadow Flicker, up to 30 hours annually, is "safe" – no health worries.[4] But from what source of law comes the legal right of the County – or of this Commission – to direct or permit an unwelcome use of a non-applicant's land, a non-participating land, of any duration, let alone 30 hours? Neither the Zoning Power nor even the Facility Siting Power extends that far. The opinion of a German judge counts for nothing in this jurisdiction.

III. Conclusion

The challenged testimony of three Intervenors is for the purposes of helping this Commission to understand the testimony of these intended witnesses. If Crowned Ridge Wind II wishes to take issue with these "opinions," it is free to do so with experts, and we trust it will do so. This Commission will find such testimony fully useful in that respect.

Dated at Canton, South Dakota, this 15th day of January, 2020.

Respectfully submitted,

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[3] Those interested in an expanded discussion of the legal theory of these claims, based on property rights, will need to await further specialized briefing on the point; meanwhile, we urge the Motion to Strike be denied.

[4] This is an assumption for purposes of this writing only – property rights are the primary point of concern.