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 BRIEF REGARDING CONFIDENTIALITY OF SECTION 11.10** **EL19-027**

COMES NOW, Commission staff by and through its undersigned counsel and files this Brief Regarding Confidentiality of Application for Party Status.

I. Introduction

On August 6, 2019, Gary Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall and Laretta Kranz (Intervenors) filed a Corrected Application for Party Status (Application) which allegedly contained certain excerpts taken from a Crowned Ridge Wind Energy Center, LLC Farm Lease and Easement Agreement, specifically Section 5.2 and 11.10. On August 6, 2019, Crowned Ridge Wind II, LLC (Crowned Ridge or CRWII) filed a letter claiming these excerpts are trade secrets and should be treated as confidential. Upon receipt of this request for confidential treatment, the administrative staff of the Public Utilities Commission redacted the Intervenor's Application. On August 7, 2019, Intervenors filed a letter essentially challenging Crowned Ridge's confidentiality claim. At the August 21, 2019, the confidentiality issue was discussed before the Commission. At this Meeting, the Commissioners requested the parties brief the issues of a) whether the administrative rules permit Crowned Ridge to make a confidentiality claim on material filed by another party and b) if so, whether the material should be treated as confidential. On

September 9, 2019, Crowned Ridge filed a letter revising its initial request for confidential treatment of Section 11.10 only and additionally, requesting a protective order for confidential material that may be produced through discovery. For the sake of clarity, Staff will limit comments in this brief to answering the two questions asked by the Commission as related to Crowned Ridge's request for confidential treatment of Section 11.10 in Intervenor's Application for Party Status.

II. Analysis

1. The administrative rules do permit Crowned Ridge to make a request for confidential treatment of information filed by another party.

During the discussion before the Commission, there was some question as to whether Crowned Ridge could request confidential treatment of information submitted by another party under the PUC's administrative rules. The applicable guidance supports the concept that a party who did not submit the information to the Commission may request confidential treatment. ARSD 20:10:01:41 establishes the process for requesting confidential treatment of information to the Commission. This rule is written in a general manner and does not appear to limit who may make a request for confidential treatment. The rule merely states that "a request" be made to the commission by providing the information specified. In its August 6, 2019 letter, Crowned Ridge did include substantially all of the information required to make a request for confidentiality. Staff is not aware of any other administrative rule or statute that includes a specific or general limitation as to which party may make a request for confidential treatment in a contested case proceeding. Without further limitation, the rule should be applied in the general manner it was written.

Additionally, there is an extremely practical reason the general language of this rule should be applied to this situation. The Public Utilities Commission operates in an extremely open manner

and posts all public documents on a public website as soon as practicable after a document is filed in a docket. This provides open access to the public. However, in contested case proceedings, this also creates the potential for confidential documents to be filed by an adverse party. Applying this rule conservatively and redacting material filed with the commission upon a request for confidential treatment from an interested party will prevent inadvertent release of confidential material. As indicated in ARSD 20:10:01:42 this treatment is not a determination of confidentiality by the Commission. If there is any question as to whether the request is appropriate, a party may make a request for access and the material will then be reviewed by the Commission to determine whether the material should be treated as confidential. Utilizing this process removes the burden of determining how to handle these requests from the PUC's administrative staff and keeps the decision in the hands of the Commission.

2. **The Commission should grant Intervenor's request that Section 11.10 be treated as public.**

While the Commission was correct in treating pages 3-6 as confidential upon request, Crowned Ridge has not met its burden of showing that Section 11.10 is indeed confidential. ARSD 20:10:01:42 specifies that after a request for access to confidential information is received, the Commission shall make a confidentiality determination. The rule further specifies that the entity claiming a document is confidential has the burden to prove by a preponderance of the evidence that the material qualifies as confidential. Under this rule, the standard to grant confidentiality is that a disclosure would a) result in material damage to the financial or competitive position of the entity claiming confidentiality, b) reveal a trade secret, or c) impair the public interest.

Contrary to Crowned Ridge's claim, disclosure of Section 11.10 would not reveal a "trade secret."

SDCL 37-29-1(4) defines "trade secret" as:

> "information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The test adopted by the South Dakota Supreme Court in *Weins v. Sporleder* explains that there is both a legal determination of whether the material could constitute a trade secret and a factual determination of whether, under subparts (i) and (ii) a trade secret actually exists. *Weins v.* Sporleder, 569 NW 2d 16 (SD 1997). Even if Section 11.10 meets the first legal test, Crowned Ridge has failed to meet the remaining parts of the test. Crowned Ridge claims Section 11.10 has independent economic value simply by utilizing resources to develop the agreement and that disclosure would harm Crowned Ridge's competitive position and allow competitors to profit. This argument is simply not sufficient to meet standard under the trade secret test. SDCL 37-29-1(4)(ii) is specific that the economic value is "not readily ascertainable by proper means" and case law is clear that trade secret protection is not afforded to information generally known within an industry. See *Weins v.* Sporleder, 569 NW 2d 16 (SD 1997); *Mangren Research & Dev. v. National Chem. Co.,* 87 F.3d 937, 942 (7th Cir.1996). Section 11.10 addresses a concept that is readily known in the industry. While Crowned Ridge may have taken the initiative to include this provision in an easement, it is not a novel idea before the Commission nor in the industry and Staff is confident that a competitor wind project clearly has this knowledge and the skills to draft a similar provision without utilizing an unascertainable amount of time or resources. See *Weins v. Sporleder*, 569 NW 2d 16 (SD 1997).

Crowned Ridge has also failed to show that the company has actually taken reasonable steps to maintain the secrecy of Section 11.10 as required by SDCL 37-29-1(4)(ii). In his affidavit, Daryl Hart claims the Crowned Ridge requested the specifics of the easement not be shared by landowners, but that does not change the fact that the language was openly shared outside of the Company. Staff equates this claim to a door to door salesman offering a homeowner a discount on a vacuum and then requesting the homeowner not share that language with anyone else. Hart explicitly states that this section was shared with landowners by Crowned Ridge's land agents in an attempt to secure easement. While the full easement may have contained a confidentiality clause, it appears from Hart's affidavit that Crowned Ridge shared this language before any type of confidentiality agreement was made. Based on this, it does not appear that Crowned Ridge actually took steps to maintain the secrecy of Section 11.10 and it is therefore not a trade secret.

Crowned Ridge has not shown that disclosure of Section 11.10 would result in a material damage to its financial or competitive position. Crowned Ridge makes a general claim that it expended time and money drafting the Easement Agreement and disclosure would allow competitors to benefit at Crowned Ridge's expense. However, Staff has seen no evidence that any impact would be material. Review of Section 11.10 shows general language that is not a foreign concept before this Commission. Section 11.10 addresses a concept that is well known in the wind industry and the language appears to be a mere marketing tool, not unlike a vacuum salesman offering to include extra attachments with the purchase of a vacuum. While Crowned Ridge may prefer that this language is not included in a publicly available docket, Crowned Ridge has not shown that disclosure would result in a material impact its competitive position in actually securing land easements nor materially impact the financial position of the company.

III. Conclusion

Given that Section 11.10 fails to meet the first two prongs of the test for confidentiality in ARSD 20:10:01:42 and given that Crowned Ridge fails to even attempt an argument that disclosure would impair the public interest under the third prong, Section 11.10 should be treated as public.

WHEREFORE, Staff respectfully requests the Commission grant Intervenor's request that Section 11.10 be treated as public.

Dated this 12th day of September 2019.

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