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Patricia Van Gerpen, Executive Director
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
Pierre, South Dakota

Re: File 6184-004. • *In re Docket EL19-027, Crowned Ridge Wind II, LLC*
Codington, Grant & Deuel Counties

Dear Director Van Gerpen:

The Commission's order of February 15, 2020 provides a decision is to be made on March 17, 2020, and that parties shall have 5 minutes for oral argument "responding to the parties' briefs." With all due respect to the Commission, we would ask this letter be accepted in lieu of further arguments on behalf of my clients, Garry Ehlebracht, *et al.* I trust this letter will be provided to each of the Commissioners accordingly.

These Intervenors, comprising the "Goodwin Group," maintain they each possess property rights in some conflict with the siting permit sought by Crowned Ridge Wind II, LLC. This conflict certainly extends to both noise and Shadow Flicker as "Effects," otherwise covered by Crowned Ridge's easements embraced both within the leases executed with Participants, and also the sole "Participation Agreement" applicant thought prudent to enter into with a Non-Participant (thus converting the *non-participant* into a *participant*, but one without turbine sites). The Goodwin Group, of course, has no such agreements with Applicant, nor do they seek them – rather, my clients simply ask that the Commission require that Applicant observe these expressed property rights. Instead, we are faced with intrusions from a wind farm that is aggressively designed, intended to hug regulatory limits rather than limiting conflicts with non-participants, as witness Hessler has testified.

These case-by-case regulatory limits seem to be devised, in some part, on the Zoning Ordinances of the counties in question. Beyond that, they are fashioned on an *ad hoc* basis, keyed to the regulator's professed eye kept on "applicant's burden of proof" as outlined in SDCL 49-41B-22. This Commission, as recounted in the testimony of Kearney, has now allowed (not counting this one) eight permits with shadow flicker limits of 30 hours per year, and one (EL18-026) with limits of 15 hours per year-30 minutes per day. As to noise, there is a similar permit count, with 45 dBA being the rule imposed for non-participants (50 dBA for participants), while one permit has been limited at 40 dBA. Kearney then cites Hessler, claiming "it is difficult for wind projects to meet the ideal design goal" (this being 40 dBA), so allowing higher impact on non-participants, in Kearney's opinion, is "reasonable."

Hessler and Kearney have not considered whether the test of "will not substantially impair the health, safety or welfare of the inhabitants" amounts to more than merely imposing, case-by-case, the specific limit of Effects they find "reasonable." In this process, the experts, and ultimately this Commission – guided primarily by the spurious Lodestar of "the numbers we used last time" - seem unwilling to ask whether those who must permanently tolerate the Effects might possess vested property rights conflicting with whatever the selected experts see as entirely "reasonable."

Legal rights as to real property, as claimed by these Intervenors, have sharp and distinct corners; this is why Applicant uses "Effects Easements" to be in command of the lands and lives of the Participants. Meanwhile, for those who are not Participants, the opinions of experts lead this Commission into the entering of orders seen as "reasonable" infringements of property rights. This is actually a descent into a quagmire that sullies the property rights of Non-Participants, a descent halted only, in theory, should the snag of "substantial impair[ment]" be struck in the process. However, the "property rights" of those assaulted in *Prevailing Winds* are no different – *are no more exalted or more highly valued by governmental action* - than those who are about to be assaulted in and around the Village of Goodwin.

This Commission has previously rejected claims (Docket EL18-026 being one example) that Non-Participants should not be subjected to *any* amount of Shadow Flicker, noting that no other jurisdiction has banned such an infiltration.[1] This kind of reasoning simply prolongs the agony and the conflict. The correct question is – if having Shadow Flicker invade one's own residence *is* a matter of the inhabitant's welfare (as the Commission has implicitly found in *Prevailing Winds*, EL18-026), why should *any* amount of it be allowed? Is the limit reached (thus warranting a regulatory limit) only if the Effect is one that is thought to "substantially impair" welfare? The right to avoid Shadow Flicker is one of property rights (as Professor Laymon would assert, if only he were still teaching us today). As such, the legislative charter of this Commission, to delegate and distribute these Effects, like a dose of medicine – under a case-by-case determination of what is "reasonable" – is thus challenged.

On what empirical testing and studies are the "reasonable" dosage determinations based? Clearly, your actions – to some extent – are based on the so called "German standards," as reported in Exhibit A12-16, as further widely publicized in Stanton's NARUC Best Practices report. The German standard for Shadow Flicker consists of 3 distinct time or duration elements.[2] This Commission (and Staff) would seem to be fully aware of the complete scope of German standards, as in *Prevailing Winds*, the Shadow Flicker limit was imposed under both an annual and a daily standard. The German standards have three components. Is this Commission not troubled by the fact that just one of those three Shadow Flicker standards (namely, 30 hours annually) has been imported and then re-sold to each of the County governments as *the* singular "industry standard"?

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[1] Other than Hutchinson, MN, of course. This writer suggests that the Commission's lack of a similar declaration by permanent regulation promotes "aggressive" wind farm designs. Is that the goal?

[2] As outlined at p. 19 of *Post-Hearing Brief of Intervenors Garry Ehlebracht, et al.*

When this Commission relies on the "industry standard" now conveniently supplied under each Zoning Ordinance (more or less), is there no concern arising in Pierre about those pieces of the German standard so clearly missing at the County level? "Apparently not" would seem to be the historic answer, since this Commission – with the exception of imposing a conservative annual and daily limit in *Prevailing Winds* – has otherwise adhered to the "industry standards," as have been selectively imported and promoted by the wind development industry. Imposing one level of "Effects" to one wind farm, while deploying another level to others, seems inherently unreasonable.

The Effects about to be approved by this Commission - noise (at these levels) and Shadow Flicker (of any duration) - are neither presently nor historically commonplace in the area of Goodwin. These Effects, once coming to fruition, will permanently and dramatically change the enjoyment, use and development of the homes and properties of the Goodwin Group.

As such, this writer expects this permitted intrusion of their homes and properties (enthusiastically supported by experts, Staff and Applicant alike), an adverse use that would not otherwise transpire *but for* the final order of this Commission, will necessarily be challenged in Circuit Court as a violation of the property rights claimed by the Goodwin Group. The final decision from this Commission will function just as if it were an "easement" for commencing this intrusive use, much like the very instruments fashioned for that express purpose by Applicant's own legal department.

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

A.J. Swanson

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Garry Ehlebracht, *et al.*