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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 matter of the affidavit of Steven Greber (dated November 13, 2019) is on the agenda for November 26, and I will do my best to participate in that discussion by phone. Meanwhile, given that Attorney Schumacher, on behalf of his client (Applicant), vigorously resists my motion, I ask that these additional thoughts be provided to the Commissioners in advance of that date.

I have not been able to discuss Applicant's position with the Grebers by phone, but I expect to do so prior to November 26, and hope to further advise the Commission on Tuesday as to Greber's expected sailing date and availability. I do have his cell phone number for possible shipboard communications; if my request cannot be accommodated prior to his departure, I would yet *hope* to schedule Steven Greber's appearance by phone sometime during the course of the February hearing. The time difference between his ship ("Far East" sounds distant, at least to me) and Pierre is likely to be quite substantial – I am also not clear at this moment whether the ship's captain will permit this to transpire or whether Greber is on call throughout all hours, both day and night. I hope to learn more, and soon.

Schumacher's reply to my motion holds at least two propositions on which I hope to comment in this letter. First, why is Mrs. Mary Greber not available in February? As stated in the motion (filed November 16), Mrs. Greber returns to her native country while her husband is serving on these missions. Requiring that she stay here in South Dakota – by herself – to brave the winter so that Crowned Ridge's counsel can examine her in person in Pierre – seems a bit much. This is particularly so since the opposition of the Grebers is clearly based (as has been outlined in the petition for intervention, and subsequent thereto) on their respective property rights arising under South Dakota law, and also their rights as citizens of the United States.

This is the same essential theme that will be the basis of the opposition of the remaining Goodwin-area intervenors that I am privileged to represent – the Ralls, Garry Ehlebracht, and Mrs. Kranz. These parties cannot speak on behalf of the Grebers, of course – only the Grebers – or one of them – may testify as to their individual and particularized rights as owners and citizens. It seems ironic (to this writer, at least) that Crowned Ridge (also a citizen, of sorts, but with the winds of much wealth – or financing - behind it) is here to stake out a claim to make a *permanent,*

adverse use of the Greber property, without also being in privity of contract with the Grebers, as owners. When the Grebers rise to resist that effort, Crowned Ridge now insists on the right to cross-examine witness Greber. Some might say this is just what good lawyers must assert, but in these circumstances, I regard this as rather shameful conduct on the part of Applicant. That said – the Grebers, as property owners and occupants, and as citizens of the United States – will have their day in some venue so as to testify about their property and their interests, even if such proves not possible before this Commission come February (whether such is precluded by Attorney Schumacher's current objection, a bad shipboard telephone connection, a typhoon or otherwise).

Given Mr. Schumacher's further claim that his client is prejudiced by being unaware (caught by surprise, as it were) that Steven Greber – not having been *expressly identified* in recent discovery response as a "witness" – intended to testify in opposition to this Applicant's endeavors, let me make this point perfectly clear: *each* of my clients intends to adduce evidence and testimony come February as to why they do not wish to have their respective properties and persons afflicted by Applicant's intended, planned wind farm operation. Also, my clients do not have the financial means to hire and bring in costly medical experts or other experts to testify on the specific framework of SDCL § 49-41B-22.

That said, however, each of the intervenors will be able to testify as to why Applicant's intended casting of "Effects" about their properties and upon their residences is not agreed to, and will constitute an annoyance, *if not worse*. Mr. Greber intends (or had intended) to do likewise, then or prior to that date, but for the circumstance that will now place him on board a vessel chartered to our federal government, sailing the waters somewhere in the Far East.

I can read the Commission's prior decisions on similar Facility Siting Permits. It is possible to discern from such history that a neighbor's state of being merely - or even greatly - annoyed does *not*, under the parlance of either Applicant or this Commission (where folks like the Grebers are dispassionately discussed as mere "receptors" – look that neutered term up in the dictionary!), pass muster under the "burden of proof" statute (requiring *substantial impairment*), at least as to the "health" prong. (What if health is actually impaired, but perhaps not substantially? Is this Commission comfortable holding the controls in that wheelhouse?)

Yet, the Commission's process, leading to a Facility Siting Permit, is based on the assumption that local land use issues have been fully and completely resolved in favor of Applicant, at least in those places – like Deuel County (all of my clients being residents and property owners there) – that exercise the Zoning Power. Here's the problem - while the Zoning Power (in South Dakota) is pretty comprehensive, *it is not pervasive*, and is also not to be conflated with the Takings Power of a local or state government.

As counsel for those living in and around Goodwin – none of whom are in privity of any sort with Applicant – I think it possible to establish my case by using Applicant's own instruments and writings with others who have come into privity for establishment of a "wind farm" on their property. This Commission's own prior rulings and regulations have fostered Crowned Ridge's efforts to keep these "instruments and writings" as under-the-table, confidential documents. Each reader of this letter should recall the efforts – in this very docket – to keep the "Kranz Easement"

from public disclosure and discussion, under the claim it is a "trade secret" with "confidential information." Eventually, Attorney Schumacher retreated to trying to protect just a single paragraph in that document – Section 11.10, entitled "Remediation of Glare and Shadow Flicker." The Commission's order of September 20, 2019 should have now put those claims to rest. The "Kranz Easement" (it is actually a mere proposed *option* to obtain an easement – and in reviewing the so-called administrative record in the pending writ of certiorari in 19CIV18-000061, *Ehlebracht, et al. v. Deuel County Planning Commission, sitting as Deuel County Board of Adjustment, et al.*, it is apparent that a considerable number of the "easements" claimed to exist with Deuel County landowners are likewise "options") will be *one* of the exhibits proposed for admission in this case by one of my clients during the upcoming hearing (fair warning to Applicant!).

My clients have initiated discovery requests to Crowned Ridge (served November 19, 2019), seeking the production of two specific instruments, *see* Appendix A and Appendix B to Intervenors' Discovery Requests to Applicant (First Set) – each a self-described "option" to obtain a series of named "leases and easements." The 2009 filing (Appendix A) makes reference to a "Noise Easement," while the 2015 filing (Appendix B) references an "Effects Easement" (this being the very same title used in the so-called Kranz Easement). When produced (as we trust will be the case – timely, without further claims of "confidentiality"), these items, along with the Kranz Easement, will be marked as exhibits in this proceeding (again, Applicant, take notice).

Why are these important for this Commission to carefully consider? Because as part of Deuel County's efforts at using the Zoning Power as a Taking Power, the ordinance there doesn't merely suggest, but *requires* (Section 1215.03.15.c, reproduced in Appendix A, attached) that a "[c]opy of easement agreements with landowners" be produced to the Board of Adjustment. However, Applicant merely submitted to Deuel County an endless stream of "memorandums," which as this Commission surely appreciates (based on the real-life experiences of each Commissioner), a "memorandum" submitted for recording is much different than an actual "easement agreement."

Meanwhile, these same "easement agreements," as have been deployed by Applicant to obvious success, have never seen the actual light of day in prior proceedings before this Commission. When the text (representing the writings of Applicant, and thus constituting an "admission" of how Applicant itself views the "Effects" spewed out by the wind turbines) has been referenced in prior filings and cases, Crowned Ridge has promptly thrust back, claiming the words, phrases and text – all of it – is a trade secret, comprising confidential information.[1] In this very docket, the petition for party status of these intervenors was itself placed in the Commission's "confidentiality cooler" (meaning, not for public viewing) as the filing, in quoting Section 5.2 and Section 11.10 of the so-called Lease & Easement (sometimes referenced as the "Kranz Easement") offended the sensibilities of Applicant.

[1] The Commission's order of September 20, 2019, hopefully, will put those particular claims to rest. We do not seek production of any exhibit or attachment to "easements and leases" (whether termed as a mere option, or as and effective, final and agreed servitude) disclosing financial or compensation agreements.

As deftly manipulated by Crowned Ridge, whether by Applicant and the Board both ignoring the *express terms* of the Zoning Ordinance (a "[c]opy of easement agreements with landowners" are required to be filed with the Board – not merely claimed as then being in existence) or by means of Applicant coming to Pierre to invoke "confidentiality" and trade secret protection over its instruments, the actions of *both* Deuel County Board of Adjustment and this Commission, in their respective, crucial oversight roles, have fostered a misuse of the Zoning Power (wherein it becomes a Taking Power) for undertaking of these "wind farm" endeavors. As these "leases and easements" are actually read, viewed and fully considered in proper context under South Dakota law, they are clearly intended (by Applicant) to comprise "burdens and servitudes" upon lands – including those adjoining lands that are not actually described in the instrument. The instruments are intended to immunize Applicant from future claims that such "burdens and servitudes" – in the form of "Effects" – will have as to and upon the lands and homes of each landowner having the temerity to enter into such an instrument.

Each landowner entering into such a "lease and easement" has functionally sealed his or her own fate as to "Effects," having done so for mere money (a "mess of potage," as this writer has termed it in other writings as to Crowned Ridge). And the legal effect of such rashness remains binding regardless of whether the Board of Adjustment or this Commission, in due course, have read or understood the breathtaking (for this writer, at least) scope of such instruments. Future actions for nuisance claims would be throttled by the "lease and easement" – and it is a major concern of Intervenors that the existence of official permits and licenses, both at the local and state level, will likewise limit access to the Courts, should an approved level of "Effects" be or become a nuisance.

How does Applicant, with respect to the "Effects" that will flow also onto adjacent lands and homes from this "wind farm," propose to deal with the property rights of Intervenors? First, Applicant has attempted to keep the scope of Applicant's own crafted covenants with the large host of "Participants" *completely confidential and unrevealed*, far away from any prying eyes connected also to a brain. (These efforts have thus far been pretty successful – neither the Board of Adjustment in Deuel County has any actual knowledge of the easements, except to the extent individual board members might have entered into their own privity with Applicant, even as this Commission – notwithstanding the September 20, 2019 order in this docket – has seemed rather disinclined to much consider the scope of the "leases and easements." Several times, this writer has heard Commission staff observe that leases, easements and associated land use rights are really not in the Commission's wheelhouse under SDCL § 49-41B-22, but are matters strictly for the local county board to consider and resolve. In response, this writer merely observes for now – *if* the Zoning Power is being used locally to debase, violate or damage land rights of those not otherwise in privity with Applicant, then this Commission itself should be reticent to lay an essential Facility Siting Permit over the top of that local misuse, as this only serves to confirm and thereby aid in the Taking of property rights. Both governments would be complicit in the end result.)

This Commission might further observe that the Deuel County Zoning Ordinance – as of 2017 – now allows for "Shadow Flicker" of up to 30 hours annually, and providing also that "[n]oise level shall not exceed 45 dBA average A-Weighted Sound pressure at the perimeter of

existing residences, for non-participating residences." Both of these concepts find comfort – if not direct foundational support – in the so-called NARUC Best Practices report from January 2012.[2] But, in turning to that 186-page document, this Commission and Staff counsel will find no consideration whatsoever of just how such recommended policies, cures and directives for Shadow Flicker and noise (as to those *not* in privity, otherwise known as "Non-Participants") actually square – at least in South Dakota – with the assured rights that land owners have to permit – *and also to withhold* – the creation of servitudes upon and over their property. If that basic principal of law is now ignored or further dishonored, then this Commission is merely working to pave over a misuse of the Zoning Power with a Facility Siting Permit. The topcoat is no better nor more durable than the foundation.

In a nutshell, South Dakota law is much more protective of the rights of landowners than the writer of the NARUC Best Practices report – or any of the supporting theorists behind that seminal work – could ever understand. One can cite the unknown German judge as support for Shadow Flicker rules, and even submit articles to the docket in this case in that language, but the reality is – *this is a topic covered by South Dakota law.* South Dakota law as to "servitudes and easements" will govern, rather than some misuse of the Zoning Power (now serving also as the Taking Power), a notion that is built squarely on NARUC Best Practices, itself being founded on the ruling of the nameless German judge, to the effect that Shadow Flicker of 30 hours duration or less, is or should be "acceptable" or "tolerable."[3] That's all very interesting – but South Dakota law is to govern these matters.

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

A.J. Swanson

c: All persons listed in the current Service List, as reflected in the Certificate of Service submitted herewith, including counsel for Applicant:

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Garry Ehlebracht, *et al.*

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[2] As discussed on p. 4, and footnote 2, of the Application for Party Status in this docket.

[3] Wind farm advocates report the German judge's purported decision as headed in both of these directions. Unsure which is correct, being unable to speak or read that language, even were I lucky enough to uncover any "opinion" supporting NARUC Best Practices insofar as "Shadow Flicker" is concerned. I'll keep digging, however.

b. Limit for allowable shadow flicker at existing residences to no more than 30 hours annually.

14. Permit Expiration. The permit shall become void if no substantial construction has been completed within three (3) years of issuance.

15. Required Information for Permit.

a. Boundaries of the site proposed for WES and associated facilities on United States Geological Survey Map or other map as appropriate.
b. Map of easements for WES.
c. Copy of easement agreements with landowners.
d. Map of occupied residential structures, businesses and public buildings.
e. Map of sites for WES, access roads and utility lines.
f. Proof of utility right-of-way easement for access to transmission lines.
g. Location of other WES in general area.
h. Project schedule.

Section 1216. Wireless Telecommunications Towers And Facilities

Section 1216.01 Purpose

The general purpose of this Section is to regulate the placement, construction, and modification of Towers and Telecommunications Facilities in order to protect the health, safety, and welfare of the public, while at the same time not unreasonably interfering with the development of the competitive wireless telecommunications marketplace in the County.

Specifically, the purposes of this Ordinance are:

1. To regulate the location of Towers and Telecommunications Facilities in the County;