BEFORE THE PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

EXHIBIT I-3

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

APPLICATION FOR PARTY STATUS (CORRECTED)
(Corrected Application of Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall and Laretta Kranz, "Intervenors")

The above named and within identified Intervenors now petition the Public Utilities Commission for allowance of party status in the above-referenced facility permit proceeding, pursuant to the provisions of SDCL § 49-41B-17(3), and ARSD 20:10:22:40, said Intervenors having submitted this corrected request by their counsel, undersigned.

Applicant's Name:	*Address:*	*E-mail:*
Garry Ehlebracht	17539 468th Ave., Goodwin, SD 57238	bean94@hotmail.com
Steven Greber	17165 468th Ave., Goodwin, SD 57238	smgreber@itctel.com
Mary Greber	17165 468th Ave., Goodwin, SD 57238	smgreber@itctel.com
Richard Rall	17192 469th Ave., Goodwin, SD 57238	arall1@hotmail.com
Amy Rall	17192 469th Ave., Goodwin, SD 57238	arall1@hotmail.com
Laretta Kranz	17553 468th Ave., Goodwin, SD 57238	N/A

Each of the Intervenors owns the real property at the respective address shown above, and maintains his or her principal residence upon and at such address. Each address is within the boundaries of the proposed "wind energy facility" as has been defined by the wind developer, Crowned Ridge Wind II, LLC.

Each of these identified Intervenors, furthermore, is a petitioner in the case now pending in Circuit Court, Third Judicial Circuit, Deuel County, 19CIV18-000061, *Ehlebracht, et al. vs. Deuel County Planning Commission, sitting as the Deuel County Board of Adjustment, et al.*, contesting, *inter alia*, the power and authority of the Deuel County Planning Commission, sitting as the Deuel County Board of Adjustment, to grant the certain special exception permit that has been referenced in the application now within Docket EL19-027. The pleadings within the identified court file, and all matters of discovery now or hereafter submitted therein, are also relied upon as grounds for the opposition of each Intervenor to the matter now pending in this Docket EL19-027.

The appendices or exhibits presented in support of the sought facility permit reflect that the residences of Intervenors (as coded) are predicted to be affected by the operations of wind turbines (distance to the nearest being shown):

Residence:	*Code:*	*Sound:*	*Shadow Flicker:*	*Distance:*
Kranz	CR2-D223-NP	42.5	3:04	2,749’
Ehlebracht	CR2-D220-NP	43.6	3:14	2,211’
Rall	CR2-D222-NP	42.0	15:02	2,260’
Greber	CR2-D221-NP	43.1	14:04	2,041’

As fee owners of their respective properties, Intervenors have a statutorily-granted and constitutionally-protected rights to protect and defend their interests; these are rights and interests not to be impaired or taken from them without due process of law, nor if damaged or taken, absent just compensation. Applicant’s proposed placement of wind turbines results in sound levels and types of noise (including that which is inaudible) not otherwise present in the current environment.[1] This placement results also in shadow flicker, a phenomenon that does not currently exist upon the properties of Intervenors. Both are negative features, representing a trespass. When taken under color of a county zoning ordinance, the resulting entitlement, license or permit may be referenced as “Trespass Zoning.” Under Trespass Zoning, a non-participating owner’s residence and surrounding lands may be impaired for habitation, diminished in market value, or rendered unusable for such lawful purposes as might otherwise have pertained under the zoning ordinance – but for the appearance of a wind farm on neighboring properties.

The delegation of the zoning power to the counties by the Legislature does not include any inherent or recognized right to impose recently-developed zoning standards for shadow flicker from wind farms upon those who, like Intervenors, simply wish to be sufficiently removed from any such development so as to avoid direct, negative impacts. In what other zoning application – other than a wind farm CUP – does a non-applicant (such as these Intervenors) end up with an adjudicated result, which can only be seen as having a negative impact upon their adjacent or nearby properties? The zoning power is subject to constitutional limits, and the several counties in question – including Deuel County, in the instance of these Intervenors – have transcended those limits. A proper exercise of zoning power should not result

[1] Witness Lampeter claims infrasound is already present with refrigerators, air conditioners, and washing machines, and also natural sounds, “such as ocean waves.” None of those sources – ocean waves in particular – are now a material source of infrasound for the area of Goodwin, quite like 132 newly-planted wind turbines will prove to be, most of which will crank out LFN and infrasound with 116-meter rotors at 90-meter hubs, reaching far above the height of any trees or landscaping. Does this Commission plan to hire an expert to review and challenge Witness Lampeter on any of his claims and professional writings (Exhibit RL-3), keeping in mind this Applicant’s parent corporation seems to have commissioned the Lampeter study from 2011; this feature renders the result as much suspect as the property market value study, Appendix L, sponsored by the Office of Energy Efficiency and Renewable Energy of US DOE – the same federal agency that looks to market the widespread use of windpower also looks to clear away ingrained obstacles. The entity now seeking to dismiss infrasound as a risk in its current application (EL19-027) hired Lampeter to study infrasound and LFN in 2011, concluding there is no such risk inside a dwelling that is 1,000 feet from a turbine. Coincidence? We think not. Lampeter’s study does not recognize that a certain percentage of the population is more susceptible to LFN, nor does the witness acknowledge studies concluding a risk of LFN annoyance from distances significantly greater than audible noise on the dBA scale. There is a reason wind turbine LFN is seldom regulated by zoning ordinances – Big Wind interests have implored, as ordinances were developed over the past two decades, that noise not heard cannot be harmful or a source of annoyance, and “model wind ordinances,” including the one formerly promoted by this Commission, have also omitted use of the dBC (or other) measures. The times seem to be changing, even if not yet in South Dakota.

in an adjudicatory decision, triggered by an application, enabling the land use applicant to conduct a specific economic activity, with measurement of certain (but not all) detriments inflicted upon those neighbors lacking privity with the land use applicant. "You are permitted to discomfort and afflict your neighbors to this extent, or by this measure." No other form of land use control or power – other than a wind farm CUP – is exercised in this way, with non-applicant neighbors ending up with *less* than they had before the CUP Applicant started the case.

Further, despite the statutory factors outlined in SDCL § 49-41B-22, this Commission has no superior legal standing – not even a Legislative mandate - to impose a state-version of Trespass Zoning upon Intervenors or other non-participants unfortunate enough to be proximate to Applicant's proposed land use. The author of the expansively written statute (SDCL § 49-41B-22) failed to duly consider the legal, vested rights of nearby property owners, those who are otherwise afflicted by Trespass Zoning (including the reception of negative aspects not regulated by the Deuel County Zoning Ordinance, including Low Frequency Noise and Infrasound).

The proposed adverse use of Intervenors' collective lands and residences (all in the immediate area of Goodwin) rises to that of a *de facto* servitude upon the fee interests, and for which an easement is required if permitted as a lawful use (contrasted with that of a naked trespass). Whether by terms of a County zoning ordinance, or a Facility Siting Permit authored by this Commission, this agency is walking much too close to an abrupt cliff - a taking or damaging of property interests protected by law, and from property owners claiming the protection of constitutional provisions.

For its part, Applicant has made an effort to clear the path, obviating potential objections such as those now raised by these Intervenors. Some years ago, another affiliate of NextEra Energy Resources, LLC, by the name of "Crowned Ridge Wind Energy Center, LLC," sent agents scurrying into the neighborhood now about to be inflicted by the overwhelming presence of 132 wind turbines towering over the landscape. The agents carried with them a document entitled "Wind Farm Lease and Easement Agreement." One of those documents (hereafter referenced as "Lease & Easement") was left with Intervenor Laretta Kranz for her consideration as potential "Owner." After the agent was informed by Garry Ehlebracht (Intervenor, speaking at the request of Ms. Kranz) the project involved too many turbines too close to homes, the document was never recovered by the agent. The Lease & Easement, to be sure, is an illuminating proposal, as it reveals how that particular proposed "Operator" – also a subsidiary of NextEra Energy – viewed the need for an easement – not just an easement to place, reach or build upon the turbine site, but also for purposes of afflicting the "Owner" with a wide range of negative aspects arising from trying to live too close to wind turbines.

Applicant and its team of lawyers doubtlessly will claim that undersigned counsel is about to quote from a "confidential" writing, and will move to strike these references from the public record. Intervenors welcome that contest, as Ms. Kranz signed nothing and made no promise to keep *anything* confidential. The entire Lease & Easement in the hands of Ms. Kranz (and now in the hands of her counsel) should be placed of record, and compared to what has presently been used by the current Applicant for the hosting of some 132 wind turbines.

Is this Applicant's current "Lease & Easement" (by any name) document now of record or in the hands of this Commission? Slapping a "confidential" label on such a document (beyond the landowner compensation features, such being of no interest to this writer) doesn't

make it so, as the question of how this Applicant – or its predecessors, all of whom rest nicely under the wings and act at the direction of NextEra Energy - views its own intrusions upon the landowners in this rural area should be of direct interest to this Commission. Applicant is employing the "confidential" label to disguise the intention to simply "take" a *de facto* easement over lands for which it has no actual "Lease & Easement," and in the process, seeks affirmation from this Commission, in the form of a Facility Siting Permit, to underscore that "taking."

Section 5.2 of the Lease & Easement (as proposed to Ms. Kranz in 2013) reads:

> **Effects Easement**. Owner grants to Operator [Crowned Ridge Wind Energy Center, LLC] a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, 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**").

In addition, the Lease & Easement includes a Section 11.10, reading thusly:

> **Remediation of Glare and Shadow Flicker**. Operator [Crowned Ridge Wind Energy Center, LLC] agrees that should Owner experience problems with glare or shadow flicker in Owner's house associated with the presence of the Turbines on Owner's Property or adjacent properties, Operator [Crowned Ridge Wind Energy Center, LLC] will promptly investigate the nature and extent of the problem and the best methods of correcting any problems found to exist. Operator [Crowned Ridge Wind Energy Center, LLC] at its expense, with agreement of Owner, will then promptly undertake measures such as tree planting or installation of awnings necessary to mitigate the offending glare or shadow.

Several observations are in order: the Lease & Easement carries an incomplete date in 2013, and it is recognized that Crowned Ridge Wind Energy Center, LLC, though having the identical address in Juno Beach, FL, and was to be signed by a John DiDonato, Vice President, the Applicant here – Crowned Ridge Wind II, LLC – is a different entity, although the affiliation is obvious. What happened between 2013 and the date on which this new entity got rolling? For one thing, County Zoning Ordinances – *Just like that!, as Forrest Gump might marvel* – have uniformly adopted a "shadow flicker" tolerance of 30 hours annually.[2] As such, having some knowledge of how current or very recent versions of Applicant's Lease & Agreement forms now read, one can note that, at some point since 2013, Section 11.10 managed to disappear totally, while Section 5.2 remains intact.

[2] How did that happen, if not from the impetus of the "best practices" report, issued January 2012, entitled "Wind Energy & Wind Park Siting and Zoning Best Practices and Guidance for States," a project of The National Association of Regulatory Utility Commissioners, commonly called NARUC. This specific report is directed to the Minnesota Public Utilities Commission and was funded, yes, by the U.S. DOE. Interestingly, at 31, the report observes: "A reasonable standard can rely on micro-siting modeling to ensure that shadow flicker will not exceed 30 hours per year or 30 minutes per day at any occupied building. These are the most commonly used guidelines (Lampeter, 2011, pp. 5-14)." Applicant's "company witness," Richard Lampeter is thus relied on *directly* for LFN-infrasound and then *indirectly* for shadow flicker guidance, his professional activities being funded either by NextEra Energy or US DOE. The professional views of such a key "company witness" should not be accepted by this Commission without further input from experts not otherwise working fulltime to advance the incipient interests of Big Wind. Bottom line, neither Lampeter's work, nor NARUC studies or US DOE, have even briefly considered the basic function of state property law – is the easement (such as Section 5.2 of Lease & Easement tellingly suggests) *required* to lawfully emit and dump upon adjoining landowners the deleterious operational effects of wind turbines, or is a Facility Siting Permit (and CUP) a legally sufficient cure for the absence of an Effects Easement? We think not but before rushing along, in keeping with the straight-jacket of the Legislature's short timetable, it is time to consider that issue.

This Commission requires that this Applicant confirm having a site lease for each proposed turbine installation (such as the "Lease & Easement"). According to the application presented (Witness Tyler Wilhelm), that job is nearly complete, with about five or six sites left to be inked. What this Commission does *not* now require is that a similar document – in the nature of an "effects easement," along the lines of Section 5.2 – be in place with *each* non-participating landowner; even though the non-participating landowner is not hosting a turbine site, he or she is yet destined to receive various unpleasant attributes of being proximate to one or more sites. Needless to say, an "effects easement" would place the adjacent or nearby landowner in privity with Applicant as to the unpleasantness of wind farm proximity – the easement granted, however, would respond to the servitude sought to be imposed by Applicant.

Two points now bear further mention and consideration by this Commission: – *first*, what does the Applicant deem important (and appropriate) when dealing with "participating landowners," and, *second,* what, if anything, does state law provide as to the land-based rights of "non-participating landowners" who must continue to live in or near a wind farm?

As to the first point, Section 5.2 of the Lease & Easement speaks for itself – the "Operator" proposes to extract from the proposed "participating landowner" a rather sweeping exoneration from the adverse "effects" of attempting to live a human life too close or proximate to operating wind turbines – whether such "effects" are flowing from turbines on the leased land, or from other sites nearby. Is not this Section 5.2 *exactly* the same easement form now being deployed, with some success, by this Applicant? (Does this Commission know for certain?)

As to the second point, these Intervenors have the unqualified right to protect the interests in their lands (SDCL § 43-2-1), including control as to who – if anyone – may lay a servitude upon their lands. SDCL § 43-13-4 provides: "A servitude can be created only by one who has a vested estate in the servient tenement." This definition is *not* construed expansively so as to potentially embrace as a "creator," for example, Deuel County Board of Adjustment (in approving a CUP that results in the casting of shadow flicker on non-participating properties), or the Deuel County Board (when crafting a zoning ordinance that purports to adversely permit such casting), or even this Commission (whenever issuing a facility siting permit that likewise blesses what the County's Board of Adjustment has done adversely over the protests of non-participating landowners). The concept of "creator" also does not embrace NARUC, US DOE, or even the Applicant itself, who now appears before this Commission for permission, in the form of a Facility Siting Permit, to cast and dump the operational products and hazards of 132 proposed turbines, over the fence and onto non-participating landowners.

Lacking the power to create a servitude upon and over the lands and over the residential properties of Intervenors for Applicant's benefit (a privilege belonging exclusively to Intervenors), this Commission is now asked nevertheless to provide a *de facto* easement upon and over the lands of Intervenors. This easement would be in favor of those having interests in nearby lands, sites being also possessed by the Applicant (under instruments thought similar to the "Lease & Easement," with Section 5.2 as previously quoted). SDCL § 43-13-2 defines an easement as including, *inter alia*, "[t]he right of transacting business upon land" (if establishing a collection of 132 wind turbines upon a broad scope of the landscape, including lands close enough to emit sound, LFN, and shadow flicker upon the homes and properties of Intervenors, by virtue of a facility siting permit, isn't a "right of transacting business upon land," then what is

it?). The statutory list includes also "[t]he right of receiving air, *light* or heat from or over, or discharging the same upon or over land." The filtering of available light – given by a setting or rising sun – through and beyond the spinning blades of a wind turbine at the height of 90 meters, extending upward and outward in all directions over the course of 116 meters, with a resulting projection on nearby properties – is called *shadow flicker*. It is also an adverse result succinctly embraced in the "Effects Easement," referenced earlier, which this Applicant's predecessor has deployed, and this Applicant is using also, as to participating landowners.

This Commission has no charter to simply dismiss any such "Effects" (as listed in Section 5.2 of Lease & Easement) with a waive of the hand. Does this Commission truly believe that, since the "Effects" of shadow flicker is within (somewhat – although we are perplexed the 30 minutes per day limit has disappeared!) the parameters of NARUC's siting suggestions (having been helped along by the work of "company witness" Richard Lampeter, professional work funded by that tireless, avid wind promoter, US DOE), *all is well,* and purely within the scope of SDCL § 49-41B-22? The challenge of these Intervenors is based on *property rights*, rights that have not been conferred upon Applicant by any sort of privity. Likewise, the Legislature has afforded this Commission no ostensible charter to tangle with, or to override, Intervenors' *property rights, concerning servitudes and easements*.

Likewise, Deuel County has been delegated no zoning power to determine that the "effects" arising out of a wind farm development, covered by a CUP (or special exception permit, as Deuel County persists in calling them), are no problem so long as the ordinance-based standard of 30 hours annually is observed. (The "shadow flicker" standard has been borrowed from NARUC's 2012 study, so in effect, Applicant's "company witness" Lampeter *also* wrote the essence of the "shadow flicker" standard for Deuel County's revised zoning ordinance, as adopted in 2017). By affirming that Applicant may henceforth spew and dispose of "shadow flicker" upon the properties of Intervenors, so long as it doesn't exceed 30 hours annually, this Commission, though not an authorized "creator" of such interests, is placing a servitude on the lands of Intervenors, to their distinct detriment, and for Applicant's exclusive benefit. The Commission's Facility Siting Permit, in effect, expressly approving a site-by-site infliction of shadow flicker, becomes a *de facto* easement, which Applicant will use to confirm to all whom inquire as to the purported lawfulness of such use, so clearly adverse to the fee owner's interests.

Intervenors pause here to briefly remind this Commission of the recent decision of the Supreme Court in *Knick v. Township of Scott*, _____ U.S. _____ (decided June 21, 2019). The underlying facts reflect that Knick is the owner of a 90-acre parcel, with a single-family home, and a pasture used to graze horses and other farm animals. Embraced in that property is a small graveyard where ancestors of Knick's neighbors are said to be buried. In 2012, Scott Township (Pennsylvania) adopted an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." The ordinance also authorized officials to enter the land and determine whether a cemetery existed. Knick was cited for violating the ordinance as she had failed to open the cemetery during the day. Knick responded with a suit for declaratory judgment and injunctive relief in state court (the case did not include an inverse condemnation claim); the state court declined to rule on the case, after the township withdrew the citation and agreed to stay further enforcement during the state court proceedings. Knick then filed a claim in federal court, based on 42 U.S.C. § 1983, alleging the township's ordinance violated the takings clause of the Fifth Amendment, U.S. Constitution. Based on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172

(1985), the federal trial court dismissed Knick's claim for having failed to pursue an inverse condemnation action in state court.

On Knick's appeal, the Third Circuit Court of Appeals, while noting the township's ordinance was "extraordinary and constitutionally suspect," affirmed the district court. The Supreme Court granted certiorari. En route to a ruling in favor of Knick, Chief Justice Roberts, writing for the majority, overruled *Williamson County* as to the requirement of pursing state litigation before moving to federal court, and concluded that Knick's taking claim was valid:

> A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government.

We would add this view: the State, through its agencies, whether a local government having delegated zoning powers, or this Commission acting under the breathtaking charter of SDCL § 49-41B-22, is no better empowered to do what *Township of Scott* had ordained as to access for relict cemeteries. It is all a "taking," as to the laying of a servitude and the declaration of an easement. If Applicant cannot produce an "effects easement" as to the lands and properties of Intervenors (or others not yet awake), voluntarily given, so that easement matches servitude, then this Commission wuold be prudent to require the wind farm boundaries and sites "back off."

In this rush to promote wind development by NextEra and many others, even when such results in close confinement to the properties and homes of those (like Intervenors) who wish not to be part of a so-called wind farm, Deuel County, this Commission, NARUC, US DOE, and others – are all in the process of hoping to impose servitudes upon and across the lands of Intervenors, when, in fact, these governmental entities and associations have no more actual authority to do so than "company witness" Lampeter would have, in his own strength and merit. By taking official action – whether by issuing a CUP that confirms Applicant's "right" to dispose of "shadow flicker" on nearby properties – or in the form of a facility siting permit bearing the signatures of the three Commissioners elected to this state-wide office, the effective outcome is that of an easement, an official document and imprimatur that *all is safe, all is well, you may proceed as proposed!* In all of this function, however, the Commission is actually facilitating an unpermitted, unlawful taking of property rights. Without this essential Facility Siting Permit, bearing the hands of each Commissioner, and the seal of this Commission, Applicant would not be lawfully permitted to even begin work, much less carry out and perform operationally, what it proposes to do as to the properties of each of these Intervenors.

Intervenors would ask the Commission to retain experts (both science-based and as to the legal rights of property owners in South Dakota), capable of offering some counter-balance to the platitudes and assurances of "company witnesses" (such as Lampeter), whose historic input into the fashioning of shadow flicker and other "tolerances" (for non-participating properties) now seem generally accepted by this Commission as being customary, normal and lawful – when in fact, these standards represent a taking of *property rights*. The Township of Scott cannot lawfully ordain that Mrs. Knick must keep her horse pasture open for daytime visits of others (strangers to title and who, like this Applicant, have paid nothing for the privilege) to the small cemetery, without incurring a Takings claim.

Likewise, this Commission should be extremely cautious about confirming Applicant's rights to reach across those property lines (where it now holds site leases, much like the "Lease

& Easement" referenced herein) for the proposed 132 wind turbines, and in the process, be permitted (this is why it is called a *Facility Siting Permit*) to hereafter dump, dispose of and spew "shadow flicker" and all manner of negative features of wind production onto the properties of Intervenors, so long as Applicant wishes to do so. Applicant has paid nothing for that privilege – beyond prosecuting this Facility Siting Permit (and CUP), which then together become the "source" of Applicant's claim of right and privilege adverse to Intervenor's fee ownership. But, Intervenors *never* agreed to burden the enjoyment of their own lands in such manner, and neither the County, nor this Commission (and not even the Legislature itself), has the legal right and wherewithal to rule that they must accept this result, whether under SDCL § 49-41B-22 or otherwise.

In their own way, over what seems to be a much more modest proposition (access to a remote, rural cemetery) Mrs. Knick and her lawyers have birthed a revolution, regarding the ingrained land-based rights, so jealously and laboriously guarded by Mrs. Knick, that are *not* for sale, and *neither* to simply be taken by governmental fiat. These Intervenors feel likewise. Their lands are not now subject to an "Effects Easement" as crafted by a NextEra subsidiary, and they are unwilling to accept some substitute, whether crafted by this Commission or Deuel County. These land-based rights, as referenced in this filing, cannot simply be taken, used or damaged, adversely to the fee owner and without permission. This is so even if one marches under the banner of "public interest" or "green energy," or another soul-stirring flag flown by this Applicant, cheered on by a tumultuous onlooking crowd, while state and local governmental agents issue the permits ostensibly authorizing such an adverse use.

Applicants, as named herein, seek the right to gain party status, and as a consequence thereof, to further appear and participate in this proceeding, whether by and through undersigned counsel, or other counsel who may then appear on their behalf, reserving also the right, as persons having a direct, pecuniary and personal interest in the outcome of this matter, to appear personally, without counsel, as they may hereafter choose and elect to do, as a matter of convenience and privilege. *These premises considered, Intervenors, each of them, pray accordingly.*

Dated at Canton, South Dakota, this 6th day of August, 2019.

Respectfully submitted,

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com
Attorney for Intervenors Seeking Recognition of Party Status,
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ

/s/ A.J. Swanson
A.J. Swanson
State Bar of South Dakota # 1680