STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT

AMBER KAY CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, And PATRICK LYNCH,	)	
Appellants,	)	CIV 19-290
v.	)	**MEMORANDUM OPINION**
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UNTILITIES COMMISSION,	)	
Appellees.	)	

INTRODUCTION & STATEMENT OF FACTS

This matter comes before the circuit court on appeal by Appellants Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch (collectively "Appellants"), appealing the South Dakota Public Utilities Commission's ("the Commission's") Final Decision and Order Granting Permit to Construct Facility in EL 18-003 dated July 26, 2019. (AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions).

Crowned Ridge Wind, LLC ("Crowned Ridge" or "Applicant") submitted its application for a facility permit for a 300 megawatt (MW) wind energy facility to consist of up to 130 wind turbines in Codington and Grant counties on January 30, 2019 ("the Project"). (AR 10-960). Within its application, Crowned Ridge submitted written testimony from five witnesses[1] (two of whom filed jointly). (AR 965-1023). On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply

[1] The five witnesses included Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 961-2023).

for Party Status. (AR 1026-27). Pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on March 20, 2019, in Waverly, SD. (AR 1026-27). Five individuals intervened as parties before the April deadline and the Commission granted party status to each intervenor who filed before said deadline.[2] (AR 1070, 1322, 1463).

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses (two of whom testified jointly).[3] (AR 1467-1924). On April 10, 2019, Sarah Sappington adopted the direct testimony of Kimberly Wells. (AR 1925-44). On April 25, 2019, the intervenors filed a Motion to Deny and Dismiss the application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. (AR 2055-91, Transcript of Ad Hoc Commission Meeting). On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss and an Order to Amend Application. (AR 2092-93). Also on May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for June 11-14, 2019 to be conducted in Room 413, State Capitol Building, Pierre, SD. (AR 2094-95). Further on May 10, 2019, the intervenors filed the testimony of John Thompson and Allen Robish (AR 2096-2104);[4] while Commission Staff filed the direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney (AR 2105-3505). Intervenors submitted a Second Motion to Deny and Dismiss and brief in support on May 17, 2019. (AR 3523-55). On May 24, 2019, Crowned Ridge submitted written rebuttal testimony for Mark Thompson, Dr. Chris Ollson, Andrew Baker, Dr. Robert McCunney, Richard Lampeter, Sarah Sappington, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 3698-4818). The second motion was heard by

[2] The Commission granted party status to Amber Christenson, Allen Robish, and Kristi Mogen on February 22, 2019. (AR 1070-71). On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR 1322). On April 5, 2019, the Commission granted party status to Patrick Lynch and established a procedural schedule. (AR 1463-64).

[3] The five witnesses included Chris Ollson, Jay Haley, Tyler Wilhelm, Sam Massey, and Mark Thompson.

[4] During the evidentiary hearing, the intervenors did not move for their testimony to be made part of the evidentiary record, and, therefore, it is not part of the record. (AR 20686).

the Commission on June 6, 2019. (AR 12245-52, Motion Hearing Transcript). The Commission denied the second motion.

On June 6, 11, and 12, the Commission held evidentiary hearings, during which Crowned Ridge entered into the record its application, testimonies, and hearing exhibits. (AR 6944-11404). Among the exhibits submitted were Exhibits A43-1 and 56 (isoline maps) that confirmed the Project was demonstrated to be in compliance with the modeled sound and shadow flicker thresholds ultimately adopted by the Commission in its Order (AR 17225-31; 17821-34; 20697-98; 20708-710; 20712). At the hearing, Crowned Ridge and Commission Staff presented witness testimony. (AR 11928-12059, 12253-12504, 12521-12823). Appellants did not call any witnesses. The Hearing Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing. On June 13, Tim and Linda Lindgren, represented by counsel, filed a Late Application for party status. (AR 20101-104) On June 25, 2019, the Commission heard the late-filed request for party status and voted 2-1 to deny the Lindgrens' request. (AR 20189-192, 20196-20209, 20222-23). The parties submitted post-hearing briefs on July 2, 2019. (AR 20257-20358, Intervenor-Appellants; 20445-491, Crowned Ridge; 20492-20510, Commission Staff).

On July 9, 2019, the Commission met to consider whether to issue a facility permit for the project. (AR 20565-20652). After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, the Commission voted unanimously to issue a Facility Permit for the Project, subject to certain conditions (AR 20554-20652). On July 26, 2019, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions (AR 20684-20714). The Facility Permit included 45 conditions, including sound and shadow flicker thresholds and avian monitoring and protection. *Id.* Appellants' issues on appeal were filed August 29, 2019, and an initial brief on November 8, 2019.

The Commission filed its response brief on December 19, 2019, and Appellee Crowned Ridge filed its brief on December 20, 2019. This court affirms the Commission's decision.

STANDARD OF REVIEW

SDCL § 49-41B-30 permits any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission to obtain judicial review of that decision by filing a notice of appeal in circuit court. "The review procedures shall be the same as that for contested cases under Chapter 1-26 [the Administrative Procedures Act.]"[5] *Id.* The review procedures are governed by SDCL § 1-26-36, which requires a reviewing court "to give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (agency findings of fact are reviewed under the clearly erroneous standard).

Questions of law are reviewed de novo on appeal from an administrative agency's decision. *Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548) (emphasis added). Matters of reviewable discretion are reviewed for abuse. *Id.* (citing SDCL § 1-26-36(6)) (emphasis added). "An agency's action is arbitrary, capricious or an abuse of discretion only when it is unsupported by substantial evidence and is unreasonable and arbitrary." *In re Midwest Motor Express*, 431 N.W.2d 160, 162 (S.D. 1988) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)) (emphasis added). *See also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a

[5] "The sections of Title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal." SDCL § 1-26-32.1; *see also* SDCL § 15-6-81(c) ("SDCL Ch. 15-6 does not supersede the provisions of statutes relating to appeals to the circuit courts.").

fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" (internal quotation omitted)). "Substantial evidence" is defined as "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL § 1-26-1(9). The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)) (emphasis added). A decision is clearly erroneous if, after reviewing the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Steinmetz v. State, DOC Star Academy*, 2008 S.D. 87, ¶ 6, 756 N.W.2d 392, 395 (internal citations omitted).

It is well settled that a court will not weigh the evidence or substitute its judgment for that of the Commission, rather, it is the court's function to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. *See, e.g., Application of Svoboda*, 54 N.W.2d 325, 327 (S.D. 1952) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)). The court affords great weight to the findings made and inferences drawn by an agency on questions of fact. *See* SDCL § 1-26-36, providing in relevant part:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The agency's decision may be affirmed or remanded but cannot be reversed or modified absent a showing of prejudice. *Anderson*, 2019 S.D. 11 at ¶ 10, 924 N.W.2d at 149 (citing SDCL § 1-26-36) (emphasis added). Even if the court finds the Commission abused its discretion, the

Commission's decision may not be overturned unless the court also concludes that the abuse of discretion had prejudicial effect.[6] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Here, Appellants primarily assert that the Commission abused its discretion when making certain findings and conclusions related to sound, shadow flicker, and avian impact–and ultimately in granting Crowned Ridge's application for a facility permit.[7] The proper standard of review for findings of fact, however, is clearly erroneous. Appellants also challenge the agency's conclusion that the Crowned Ridge wind facility will not harm the social and economic condition of inhabitants in the wind energy facility siting area and that the facility will not substantially impair the health, safety, or welfare of the inhabitants within the siting area as clearly erroneous based upon the record in its entirety.[8] This presents a mixed question of fact and law, reviewable de novo. *Johnson v. Light*, 2006 S.D. 88, ¶ 10, 723 N.W.2d 125, 127 ("Mixed questions of law and fact that require the reviewing Court to apply a legal standard are reviewable de novo." (quoting *State ex rel. Bennett v. Peterson*, 2003 S.D. 16, ¶ 13, 657 N.W.2d 698, 701)).

APPLICABLE LAW AND ANALYSIS

A. Judicial Notice of the Dakota Range Proceedings

[6] A reviewing court will reverse an administrative agency decision when the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law, are clearly erroneous in light of the entire evidence in the record, or are arbitrary and capricious, or are characterized by abuse of discretion, or are clearly an unwarranted exercise of discretion. SDCL § 1-26-36; *In re One-time Special Underground Assessment by Northern States Power Company in Sioux Falls*, 2001 S.D. 63, ¶ 8, 628 N.W.2d 332, 334. *See also Wise v. Brooks Const. Services*, 2006 S.D. 80, ¶ 16, 721 N.W.2d 461, 466; *Apland v. Butte County*, 2006 S.D. 53, ¶ 14, 716 N.W.2d 787, 791.

[7] Appellants argue that certain findings and conclusions are an abuse of discretion on the part of the Commission. However, the ultimate decision (to grant the permit) would be reviewed under abuse of discretion, while the agency's findings of fact would be reviewed under the clearly erroneous standard. Despite these differences, the outcome is still the same: the appeal should be denied.

[8] An applicant for a permit is required to establish that the facility "will not substantially impair the health, safety or welfare of the inhabitants" in accordance with SDCL § 49-41B-22(3).

Appellants request that the court take judicial notice of exhibits and maps in the Dakota Range Proceedings.[9] Appellants argue that although not a part of the record in this case, the exhibits and maps generated in the Dakota Range wind projects are relevant to the issues here and were a point of contention during the evidentiary hearings in the present case. SDCL § 19-19-201 governs judicial notice of adjudicative facts.[10] That statute provides:

> **(a) Scope.** This section governs judicial notice of an adjudicative fact only, not a legislative fact.
> **(b) Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
> (1) Is generally known within the trial court's territorial jurisdiction; or
> (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
> **(c) Taking notice.** The court:
> (1) May take judicial notice on its own; or
> (2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.
> **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
> **(e) Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
> **(f) Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

The general rule is that a fact judicially noticed must not be one subject to reasonable dispute. *See* SDCL § 19-19-201(b). It must be either generally known within the trial court's territorial jurisdiction, or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Id.*

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[9] Commission Docket Nos. EL18-003, *In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility*, and EL18-046, *In the Matter of the Application by Dakota Range III for a Permit of a Wind Energy Facility.* These dockets are separate, but related, and in the same geographic area (within 25 miles) of the proposed Crowned Ridge wind facility.

[10] "Adjudicative facts are those which relate to the immediate parties involved—the who, what, when, where, and why as between the parties." *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419 (quoting *In re Dorsey & Whitney Tr. Co.*, 2001 S.D. 35, ¶ 19, 623 N.W.2d 468, 474) (internal citations omitted).

Appellants cite to *Sioux City Boat Club v. Mulhall* to support the assertion that courts will take judicial notice of the location of a manmade object on a map. 117 N.W.2d 92 (S.D. 1962). However, in *Sioux City Boat Club*, the issue involved the court recognizing geographic boundaries pertinent to an inquiry as to whether it had jurisdiction. The issue in *Sioux City Boat Club* is not analogous or instructive on Appellants' request that this court take judicial notice of turbine locations set forth in exhibits and maps from the Dakota Range proceedings.

The number of wind turbines in the Dakota Range facility and the geographic location of the turbines is not a matter of common knowledge generally known within the trial court's jurisdiction. *See* SDCL § 19-19-201(b)(1). Additionally, the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. *See* SDCL § 19-19-201(b)(2). Further, Crowned Ridge was not a party to the Dakota Range proceedings and cannot verify the accuracy of the exhibits and maps.[11] Because there is no basis for a finding that the exhibits and maps from the Dakota Range proceedings are either generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned, this court declines to take judicial notice of the Dakota Range proceedings.

B. Appellants' Arguments Regarding Sound Studies

Appellants argue the Commission abused its discretion when it approved Crowned Ridge's application, alleging the Commission relied on incomplete and inaccurate information related to sound studies. However, on findings of fact the proper analysis is the clearly erroneous standard. Therefore, this court analyzes if the Commission's findings of fact were clearly erroneous based on the record as it pertains to sound studies. Here, the Commission's conclusion that the sound produced by the project would not substantially impair the health or welfare of the inhabitants was

[11] The exhibits and maps were submitted by Apex Clean Energy Holdings, LLC, a Dakota Range subsidiary wholly separate from and unrelated to Crowned Ridge.

supported by substantial evidence in the record, was reasonable and not arbitrary, therefore within their discretion.

SDCL § 49-41B-22 requires a permit applicant to establish:

> ...by a preponderance of the evidence that:
> (1) The proposed facility will comply with all applicable laws and rules;
> (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is determined not to threaten the social and economic condition of inhabitants or expected inhabitants in the siting area;
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is in compliance with this subdivision.[12]

The statute does not require *how* the applicant must establish the four elements: whether by maps, charts, random samplings, or otherwise. Here the Commission thoroughly considered the following information regarding sound (among other things):

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound

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[12] However, this version of SDCL § 49-41B-22 has only been in effect since July 1, 2019. While the Commission issued its decision granting the facility permit for the project on July 26, 2019, all hearings were held prior to July 1, 2019. The prior version of SDCL § 49-41B-22, effective through June 30, 2019, reads as follows:
The applicant has the burden of proof to establish that:
(1) The proposed facility will comply with all applicable laws and rules;
(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
(4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

The 2019 update to the statute did not materially change the law, but instead clarified that wind energy facilities must comply with this statute.

> emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants' property boundaries for those residences in Codington County. Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects. Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and Applicant. Applicant agreed to a post-construction sound protocol to be used in the event the Commission orders post-construction sound monitoring.
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> * * * *
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR 20697-20698, footnotes citing record evidence omitted).

In Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge complying with the sound thresholds of 45 dBA for sound within 25 feet of a non-participant's residence and 50 dBA for sound within 25 feet of a participant's residence. (AR 20708, Condition No. 26). *See Pesall v. Montana Dakota Utils., Co.*, 2015 S.D. 81, ¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring re-submittal of the application to consider additional information.). The Commission's analysis went above and beyond what was required by SDCL § 49-41B and ARSD 20:10:22. ARSD 20:10:22:13 provides in part:

> ... The environmental effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction...

Even considering this administrative rule, if it applies to wind energy facilities, at the time of the application for the Project when the sound modeling was completed (as well as at the time the permit was issued) there were no energy conversion facilities or wind energy facilities operating or under construction in the area.[13] Therefore, the sound modeling and the Commission's analysis went above and beyond the scope of review contemplated in the rule by factoring in the closest permitted wind turbines into the noise and shadow flicker analysis. The inclusion of the Dakota Range I and II wind turbines (which were approved by the Commission, but not yet constructed) was an additional conservative assumption in addition to several other conservative assumptions used by Crowned Ridge in its sound models.[14] The reason the Dakota Ridge III wind turbines were not added as yet another conservative assumption was the fact that Commission had not granted Dakota Range III a facility permit at the time Crowned Ridge filed its application. Crowned Ridge witness Jay Haley's rebuttal testimony states that "the tables in Exhibit 3 of the supplemental testimony show the cumulative results from *all turbines* in CRW, Crowned Ridge Wind II, and Dakota Range I and II." (emphasis added) (AR 4703, Rebuttal Testimony of Jay Haley, 2:11-13).

Appellants make a number of incorrect and incomplete factual assumptions and inferences. Appellants allege that only 17 Dakota Range turbines were included in the sound study based on a review of the Crowned Ridge isoline maps. But the maps are not intended to show all turbines included in the study—rather, they are used to graphically illustrate compliance with the sound thresholds for participants and non-participants. Crowned Ridge clearly indicated on the record

[13] The Dakota Range projects were not existing or under construction at this time. Because of this, even under the administrative rule Applicant was not required to include them in the modeling. Further, there is no legal requirement that the modeling of sound include every potential wind turbine that may or may not be constructed and operated.

[14] The Commission cited the following conservative assumptions included: "(1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted." (AR 20967). The omission also cited that "Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects." *Id.*

that all 97 of the Dakota Range I and II wind turbines were included in its sound studies (AR 1477, 2237). Further, the Commission's order recognized that Crowned Ridge included all the Dakota Range I and II turbines in its sound models (AR 20697). The fact that the map showed only the nearest 17 turbines appears to have led Appellants to the inaccurate conclusion that only 17 were included in the model. [Even so,] the Commission found that "Applicant modeled sound levels with consideration of the cumulative impacts from Dakota Range I and II and Crowned Ridge, II, LLC wind projects." (AR 20697, Finding of Fact 46).

Appellants also criticize witness Jay Haley's credentials and the use of the initials P.E. (indicating he is a professional engineer). At the evidentiary hearing, Appellants' trial attorney conducted a lengthy voir dire of Haley, after which Attorney Ganje objected to Haley's testimony on the grounds that the witness had held himself out to be a licensed professional engineer because of the initials behind his signature. Appellants' trial counsel also submitted a brief upon making an oral objection. Commission staff argued that credibility of a witness can be established by training, education, and experience, and licensing is not the end-all determination. (EH 352:15-20). Chairman Hanson stated that he agreed with Commission staff's argument. (EH 354:10-17). After taking argument from the parties, the Commission unanimously voted to overrule attorney Ganje's objection. (EH 355:7-9). The Commission's ruling on the admissibility of Haley's testimony is not an issue that was included within the Statement of Issues and is not subject to this appeal. *See* SDCL § 1-26-31.4.

The Commission's findings and conclusions that the sound produced by the project will not substantially impair the health or welfare of the inhabitants were reasonable, not arbitrary, and

supported by substantial evidence.[15] *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence sufficiently adequate to supporting the conclusion). Based on the information in the administrative record, the Project will comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26).[16] This court gives great deference to the Commission's findings pursuant to SDCL § 1-26-36. *Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952) (reversing the circuit court and directing it to affirm a Commission order that was based on substantial evidence, concluding that "... the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission.); *In re Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589, 593-96 (S.D. 1940) (reversing circuit court and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "the ultimate question is whether there was substantial evidence to support the order of the Commission.") Commission's thorough and reasonable consideration of sound was within its discretion.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to show that the Commission's actions had any prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its

[15] The testimony of witnesses McCunney and Ollson showed that if the Project complied with the sound and shadow flicker thresholds implemented by the counties and self-imposed by Crowned Ridge the Project would not have a detrimental impact on the health and welfare of inhabitants. (AR 1563-1924, 3728-3917, 4132-4369).

[16] The rebuttal testimony of witness Haley confirmed that the Project was in compliance with the county sound and shadow flicker thresholds, as well as a self-imposed sound threshold for the Project not to produce sound over 45 A-weighted decibels ("dBAs") sound within 50 feet of any nonparticipant's residence and over 50 dBA within 50 feet of any participant's residence. (AR 4701-4747).

discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). The record shows that the modeled sound level at 50 feet away from the residence of each of the Appellants is substantially below the 45 dBA non-participant threshold set forth in Condition 26.[17] The sound produced from the Project has been modeled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less than the sound of a library for Mogen and Robish. (AR 184). The sound is below the 45 dBA threshold imposed by the Commission. Appellants have failed to demonstrate any prejudicial effect, and their appeal on this issue should be denied.

C. Appellants' Arguments Regarding Shadow Flicker

Appellants argue that the Commission abused its discretion when it approved Crowned Ridge's application for a permit without sound and shadow flicker studies that encompassed all occupied residences within the siting area.[18] Applicant argues that Appellants failed to preserve this issue for appeal. It is well settled that if an Appellant does not object to the issue in the underlying proceeding, the issue is not preserved for appeal. *See, e.g., City of Watertown v. Dakota, Minnesota & E.R. Co.*, 1996 S.D. 82, ¶ 26, 551 N.W.2d 571, 577; *American Fed. Sav. & Loan Ass'n v. Kass*, 320 N.W.2d 800, 803 (S.D. 1982). This issue questions the veracity of Crowned Ridge hearing exhibits A67, A68, and A57, none of which Appellants objected to in the underlying proceeding. They also failed to preserve for appeal a challenge on the veracity of these exhibits. *See City of Watertown*, 1998 S.D. 82, ¶ 26, 551 N.W.2d at 577.

Applicant also argues that Appellants failed to include this issue in its Statement of Issues.[19] Applicant argues that it is well settled that if an appellant's Statement of Issues fails to set forth

[17] Robish: 29.3 dBA, Christenson: 38.6 dBA, Mogen: 28.8 dBA, Lynch: 37.3 dBA (AR 17839).
[18] As previously mentioned, however, the proper standard of review would be analyzing whether the factual findings and conclusions regarding shadow flicker were clearly erroneous.
[19] See Statement of Issues, filed by Appellants on August 29, 2019, listing 31 separate issues.

the reasons why the Commission's decision, ruling, or action should be reserved or modified, the argument is waived, citing *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 42, 915 N.W.2d 707, 719. However, that is not necessarily what *Lagler* says. The cited paragraph reads as follows:

> Once the circuit court's jurisdiction to review a particular decision, ruling, or action has been established—either through the filing of a notice of appeal or a notice of review—the question then becomes one of issue waiver. As indicated above, the appellant must file a statement of the issues to be presented on appeal, and the appellee may file such a statement as well. SDCL 1–26–31.4. In other words, once jurisdiction is established, the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified. *While the failure to specify a decision, ruling, or action in a notice of appeal or notice of review results in a lack of jurisdiction to review the same, the failure to file a statement of issues results in a waiver of argument.* And while either lack of jurisdiction or waiver of argument results in a denial of relief on appeal, they do so in fundamentally different ways (a lack of jurisdiction—which may be raised at any time—is a mandatory restraint on the court's power to act, but waiver is a restraint on a party's arguments that gives a court discretion to disregard them).

(emphasis added). This paragraph does not necessarily state that the failure to state the exact issue in the Statement of Issues constitutes a waiver, but rather, that the failure to file a Statement of Issues altogether results in a waiver of argument. Here, in Appellants' Statement of Issues, Issue 8 is "[w]hether the PUC acted arbitrarily and capriciously when it failed to consider testimony regarding trespass violations for shadow flicker and infrasound."

The court finds that Appellants Issue 8 is sufficient enough to allow the court to consider this issue on appeal. While Appellants certainly would have been better served had they objected to the admission of Exhibits A57, A67, or A68. (EH 366, 579:10-12), the court will consider argument on this issue.

Appellants' factual assumption that Crowned Ridge did not analyze the impact of shadow flicker on residents of Stockholm and Waverly is incorrect and not supported by the record. Appellants fail to recognize that the sounds isoline map in Exhibit A56 and the shadow flicker

map in Exhibit A43-1 clearly show that all residences in Stockholm and Waverly are well below the sound threshold for nonparticipating residents of 45 dBA and the 30-hour shadow flicker annual threshold for all residents.[20] (AR 17225-17231, 17821-17834). Exhibit A43-1 is a map detailing shadow flicker isolines for the entire project area (AR 17225-17231). This map demonstrates that each town is well below the shadow flicker limit in the Final Order.

Further, no requirement exists in South Dakota law for sound and shadow flicker studies that include each and every structure in the siting area. Again, nowhere in the statute or the administrative rules is it mandated how an applicant must establish the four elements in SDCL § 49-41B-22: whether by isoline maps, all-inclusive charts, random samplings, or otherwise. Further, while ARSD 20:10:22:33.02(5) requires an applicant to provide information regarding anticipated operational sound, the rules contain no such requirement for a shadow flicker analysis. With respect to the impact of the Project's shadow flicker on inhabitants, the Commission concluded:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CR1-C10-P) who is at 36:57 hours of shadow flicker. Applicant modeled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours. Applicant also used conservative assumptions, such as greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.

[20] For example, the sound isoline map filed as Exhibit A56 shows that all the residents of Stockholm and Waverly are below 35 dBA, which is well below the non-participant threshold of 45 dBA. (AR 17832-17833). Stockholm's results are also confirmed by the stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A57, which are in close proximity to Stockholm, and yet their sound is modeled at 35.4 dBA and 36.5 dBA respectively. (AR 17837). The same holds true for Waverly, which is represented by CR1-C4-NP, which is modeled at 38.5 dBA. (AR 17239). Similarly, for shadow flicker, the isoline map filed as Exhibit A43-1 shows that the residences of Stockholm will experience less than 10 hours of shadow flicker annually (AR 17236) which is again confirmed when reviewing stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A67, both of which will experience zero hours of shadow flicker. (AR 17895). The same holds true for shadow flicker in Waverly; the isoline map in Exhibit A43-1 shows that the residences of Waverly will experience less than 10 hours of shadow flicker annually (AR 17237) which again is confirmed when reviewing CR1-C4-NP in the table of Exhibit A67 which will experience zero hours of shadow flicker. (AR 17893).

(AR 20698) (footnotes citing record evidence omitted).

As with sound, the Commission cited the testimony of Drs. Ollson and McCunney showing no health or welfare impact from 30 hours of annual shadow flicker per year, and also imposed a compliance threshold that shadow flicker at a residence shall not exceed 30 hours of shadow flicker annually, unless waived. (AR 20698-20711). Therefore, similar to the Commission's rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including conservative shadow flicker modeling assumptions and testimony of a medical doctor specializing in the field of occupational health) as supporting the findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. See SDCL 1-26-1(9). Also, the Commission's findings, conclusions, and imposition of the shadow flicker thresholds in Condition No. 34 were within the range of permissible choices given the record, and therefore were reasonable and not arbitrary. The Commission's factual findings regarding the sound produced from the Project were not clearly erroneous and were supported by substantial evidence.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to demonstrate prejudice. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). Appellants do not even argue that they are prejudiced. Any threat of prejudice is eradicated by the fact that the sound and shadow flicker conditions placed on the permit by the Commission account for actual, not modeled, sound and shadow flicker (AR 20708-20710, Condition 26). Additionally, each intervenor is well below

the 30-hour annual compliance threshold for shadow flicker.[21] As such, Appellants' arguments regarding shadow flicker are denied.

D. Appellants' Arguments Regarding Avian Use Studies

Finally, Appellants argue that the Commission could not have reasonably issued a decision in this matter because the avian use survey[22] submitted by Applicant "did not include data from the northeast portion of the project area, the historic Cattle Ridge portion of the project, and that the Commission overlooked this missing information." These arguments are not supported by the record or by legal authority. The Commission directly addressed this issue in its Order, when pursuant to SDCL § 49-41B-22, it concluded that the project will not pose a threat of serious injury to the environment. Specifically, the Commission rejected the claim that the avian impact study was not adequate, concluding in relevant part:

> 31. Intervenors argue that Crowned Ridge's application is materially incomplete since the Avian Use Survey did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the raptor nest surveys did include that area. Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to SD GF & P. Staff's witness, Mr. Tom Kirschenmann from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate. The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann.
>
> 32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations. There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a

[21] Robish: zero hours, Christenson: 6:56 hours, Mogen: zero hours, Lynch: zero hours. (AR 17839).

[22] SDCL § 49-41B-11(11) requires that an application for a permit include environmental studies relative to the proposed facility. One of the many required environmental studies required by applicant is an Avian Use Study. Avian use surveys are vital and required because impacts of wind energy facilities on avian species can be direct (e.g. turbine strike mortality) or indirect (e.g. loss of degradation of habitat). (AR7022). SWCA Environmental Consultants prepared an Avian Use Survey Report for Applicant summarizing the avian use surveys that were completed for the project area from April 1, 2017 through November 30, 2017 (AR 7017).

> game production area. Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project. Applicant committed to file a Wildlife Conservation Strategy, which includes both direct and indirect effects as well as the wildlife mitigation measures set forth in the Application, prior to the start of construction. Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Mr. Kirschenmann testified that Applicant had appropriately coordinated with SD GF&P on the impact of the Project on wildlife.

(AR 20693-20694) (footnotes with citations to record evidence omitted). As evidenced by Findings of Fact 31 and 32, the Commission clearly recognized that Applicant did study the full extent of the Project Area, and that the survey methods utilized were reasonable and appropriate.

Additionally, in its final Order, the Commission imposed a number of conditions related to avian monitoring and protection:

> 10. Applicant shall promptly report to the Commission the presence of any critical habitat of threatened or endangered species in the Project Area that Applicant becomes aware of and that was not previously reported to the Commission.
>
> 29. Applicant agrees to undertake a minimum of two years of independently-conducted post-construction avian and bat mortality monitoring for the Project, and to provide a copy of the report and all further reports to the United States Fish and Wildlife Services, South Dakota Game, Fish, & Parks, and the Commission.
>
> 30. Applicant shall file a Bird and Bat Conservation Strategy (BBCS) prior to beginning construction of the Project. The BBCS shall be implemented during construction and operation of the Project.

(AR 20706, 20710, Condition Nos. 10, 29, 30). The Order's rationale and conditions clearly demonstrate the Commission addressed the Project's impact on avian species and in doing so cited substantial evidence that a reasonable mind might accept as being adequate as supporting the Commission's conclusion that the Project will not pose a threat of serious injury to the environment, including avian species. *See* SDCL § 1-26-1(9). Further, the Commission's findings, conclusions, and imposition of conditions related to avian species in light of the entire record were reasonable and not arbitrary. Thus, the Commission's findings and conclusions on the Project's

impact on avian species, including the imposition of numerous conditions on avian monitoring and protection, were within the Commission's discretion and are afforded great deference. *See Pesall*, 2015 S.D. 81, ¶ 8, 871 N.W.2d at 652.

Appellants cite no legal authority that an application must contain an avian use survey covering the *entire* project area. SDCL § 49-41B-11(11) does require an application for a permit to include environmental studies relative to the proposed facility, and ARSD 20:10:22:16 requires an Applicant provide information resulting from surveys to identify and quantify terrestrial ecosystems within the siting area. However, similarly to the issues regarding sound and shadow above, SDCL § 49-41B-22 does not specify how an Applicant must meet this burden. While an avian use survey is often used to assess avian species and populations within a project area, it is just one tool that an applicant can utilize to meet the filing content requirements of SDCL 49-41B-11(11) and ARSD 20:10:22:16. This court is unaware of, and Appellants do not cite, any other statute or administrative rule which mandates Applicant must file a *complete* avian use survey to meet its burden of proof.

Applicant errs in the assessment that the Commission overlooked the fact that the Avian Use Survey Report (Survey) the Applicant filed with its Application failed to include data from the Cattle Ridge area. In fact, the Survey included a map that was clearly marked and clearly identified the portion of the project area the Applicant studied to prepare the survey. (AR 7271). The scope of the Survey was discussed at length and on numerous occasions before the Commission. During the evidentiary hearing, Ms. Sappington specifically answered questions about the Survey and its scope and contents (AR 12317-12318). While Ms. Sappington agreed with Appellants' cross-examination questions that the Survey did not include data collected from the Cattle Ridge area, Ms. Sappington also indicated that applicant did conduct other studies within

the Cattle Ridge area and utilized the data collected to prepare Section 11.3 of the Application. (AR 12317-12318). Following the evidentiary hearing, Appellants addressed the lack of data collection in the Cattle Ridge area in Intervenors' post-hearing brief filed on July 2, 2019. (AR 2265). This matter was again discussed before the Commission at the July 9, 2019 Commission meeting, during which, the Commission heard oral arguments of each party, asked additional questions of the parties, and issued its oral decision. (AR 20565-2652???). Of the Permit, but found Section 11.3 of the Application identified the project's potential effects to wildlife for the entire project. (AR 20694). Clearly the Commission did not overlook Appellants' concerns about the scope of the Survey.

The record also clearly shows that the Commission made a reasonable determination that the Applicant submitted sufficient evidence to meet the environmental information requirements in SDCL 49-41B-11(11) and ARSD 20:10:22:16 and to meet the Applicant's ultimate burden of proof. This evidence is concisely explained in Findings of Fact V. B. 31 and 32 of the Commission's permit which state (). As evidence in Finding of Fact 31 and 32, the Applicant presented ample environmental and wildlife evidence to supplement any deficiencies in the avian use survey.

Even assuming *arguendo* that the Commission erred when it relied on the Survey, Appellants make no argument that they were prejudiced by the Commission's decision to grant the Permit. Additionally, the Commission included a number of conditions on the Permit, applicable to the entire project area, to further ensure that the facility does not adversely affect wildlife in the project area (AR 20710 and 20714, Conditions 29, 30, and 45). Given that there is no specific requirement that an Applicant submit an avian use survey of the entire project area to meet its burden of proof, the Commission's decision to issue a permit based on the totality of the

evidence presented was not an abuse of discretion. In conclusion, Appellants have also not shown any prejudicial effect from the Commission's action on avian protections, and, therefore, even if the Court were to find that the Commission abused its discretion, which it did not, the court should not overturn the Commission's order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. As such, the appeal on this issue is denied.

CONCLUSION

The decision of the South Dakota Public Utilities Commission is hereby affirmed. This court gives great weight to the findings made and inferences drawn by the agency on questions of fact in accordance with SDCL § 1-26-36.

Judicial notice of exhibits and maps from the Dakota Range proceedings is not proper, as the number of wind turbines in the Dakota Range facility is not a matter of common knowledge generally known within the trial court's jurisdiction, and the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. This court declines to take the judicial notice requested by Appellants.

The decision to grant the permit to Crowned Ridge was within the Commission's sound discretion, and extensive factual findings and conclusions of law were made that were supported by the administrative record. These factual findings were not clearly erroneous, and this court reviews those factual findings with great deference to the Commission. Applicant met the burden of submitting a complete application which demonstrated that the Crowned Ridge Project will not pose a threat of serious injury to the environment, nor to the social and economic condition of inhabitants or expected inhabitants in the footprint area, and further, that it will not substantially impair the health, safety, or welfare of the inhabitants in the siting area in accordance with SDCL § 49-41B-22.

Counsel for Appellees is directed to file an Order affirming the decision of the Public Utilities Commission.

BY THE COURT:

Carmen A. Means
Circuit Court Judge
Third Judicial Circuit