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

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **BRIEF** **OF APPELLEE** **CROWNED RIDGE WIND, LLC**

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal of the South Dakota Public Utilities Commission's ("Commission") July 26, 2019 Order, issued in Docket No. EL19-003, granting an Energy Facility Permit ("Facility Permit") to Crowned Ridge Wind, LLC ("Crowned Ridge").

STATEMENT OF THE ISSUES

1. Whether this Court should take judicial notice of exhibits and maps in 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* (collectively referred to as "the Dakota Range Proceedings")?

2. Whether Appellants waived and failed to preserve for appeal Issue No. 2 included in Appellants Brief?

3. Whether the Commission's conclusion that the sound and shadow flicker produced by the Crowned Ridge wind facility ("Project") will not substantially impair the health or welfare of the inhabitants was supported by substantial evidence, and was reasonable and not arbitrary, and, therefore, within the Commission's discretion?

4. Whether the Commission's conclusion that the Project's impact on avian species will not pose a threat of serious injury to the environment was supported by substantial evidence, and was reasonable and not arbitrary, and, therefore, within the Commission's discretion?

STATEMENT OF THE CASE

On January 30, 2019, Crowned Ridge filed an Application for a Facility Permit to construct and operate the Project to be located in Grant County and Codington County, South Dakota ("Project"). (AR 10-960) The Commission conducted a contested case to review the Application, which included the submission of pre-filed testimony, discovery, the granting of party status to five interveners, four days of evidentiary hearings, the submittal of legal briefs, oral argument, and the issuance of a final order on July 26, 2019 granting a Facility Permit to Crowned Ridge ("Order"). On August 19, 2019, Appellants filed a Notice of Appeal of the Commission's Order followed by a Statement of Issues on August 29, 2019 and an Initial Brief on November 8, 2019. Appellants' Initial Brief asserts that the Commission abused its discretion when making certain findings and conclusions related to sound, shadow flicker, and avian impact. A review of the Commission's Order and the entire record in the context of the relevant statutes and case law, however, shows that the Commission's decisions were within its discretion and its Order should be affirmed in all respects.

STATEMENT OF THE FACTS

On January 30, 2019, Crowned Ridge filed an Application for a Facility Permit to construct and operate an up to 300 megawatt wind facility, *i.e.*, the Project. (AR 10-960; 20684) Crowned Ridge has executed a power purchase agreement with Northern States Power Company ("NSP") to sell NSP the full output of the Project. (AR 20689) On January 30, 2019, Crowned Ridge also filed the direct testimony of Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 961-2023)

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 for Party Status. Pursuant to SDCL 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on Wednesday, March 20, 2019, at 5:30 p.m., CDT, at Waverly-South Shore School Gymnasium, 319 Mary Place, Waverly, S.D. (AR 1026-1027)

On February 22, 2019, the Commission issued an order granting party status to Amber Christenson, Allen Robish, and Kristi Mogen. (AR 1070-1071) On February 27 and 28, 2019, the Applicant updated Appendix H and I based on participant status. (AR 1078-1135) On March 20, 2019, the public input hearing was held. (AR 20685)

On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR 1322) On April 5, 2019, the Commission issued a procedural schedule and granted party status to Patrick Lynch.[1] (AR 1461-1462)

On April 9, 2019, Crowned Ridge filed the supplemental testimony of Chris Ollson, Jay Haley, Mark Thomson, Tyler Wilhelm, and Sam Massey. (AR 1474-1944) On April 10, 2019, Sarah Sappington adopted the direct testimony of Kimberly Wells. (AR 1925-1944) On May 10, 2019, the Interveners filed the testimony of John Thompson and Allen Robish (AR 2096-2104),[2] while Staff filed the direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney. (AR 2105-3505)

[1] The Interveners from the underlying proceeding who comprise the Appellants are Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch.

[2] During the evidentiary hearing, the Interveners 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)

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, 500 E. Capitol Ave., Pierre, South Dakota. (AR 2094-2095)

On May 24, 2019, the Applicant filed the rebuttal testimony of Sarah Sappington, Andrew Baker, Dr. Robert McCunney, Dr. Chris Ollson, Jay Haley, Richard Lampeter, Mark Thomson, Tyler Wilhelm, and Sam Massey. (AR 3098-4818) 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 ("dBA") sound within 50 feet of any nonparticipant's residence and over 50 dBA within 50 feet of any participant's residence. (AR 4701-4747) The testimony of witnesses McCunney and Ollson[3] also 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)

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 20686; 6944-11404) Among the exhibits submitted, were Exhibits A43-1 and 56 (iso maps) that confirmed that the Project was modelled to be in compliance with the

[3] Witness McCunney is a Harvard-trained medical doctor specializing in occupational medicine (AR 4144) and witness Ollson holds a Ph.D in environmental science. (AR 1587)

modelled sound and shadow flicker thresholds ultimately adopted by the Commission in its Order. (AR 17225-17231; 17821-17834; 20697-20698, 20708-20710, 20712)

On July 2, 2019, post hearing briefs were filed by Crowned Ridge, Staff, and Interveners. (AR 20686)

After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, on July 9, 2019, 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 the written Order granting the Facility Permit to Crowned Ridge. (AR 20684-20714) The Facility Permit included 45 conditions, including conditions on sound and shadow flicker thresholds and avian monitoring and protection. (*Id.*)

SUMMARY OF THE ARGUMENT

Appellants assert the Commission abused its discretion, because it granted the Facility Permit without requiring Crowned Ridge to submit: (1) a sound study that included the impact of 117 proposed turbine locations from the Dakota Range wind projects; (2) sound and shadow flicker studies that included the impact on residents residing within the towns of Stockholm and Waverly; and (3) an avian impact study for the entire Project boundary. The Appellants' assertions, however, are not only based on incorrect and incomplete factual predicates, they ignore the well-reasoned findings and conclusions of the Commission, all of which are based on substantial evidence. It is well-settled that a court cannot overturn a Commission decision as an abuse of discretion unless its findings, conclusions, and decisions are not supported by substantial evidence

and are unreasonable and arbitrary. Any reasonable reading of the Commission's Order clearly shows the Commission's findings and conclusions related to sound and shadow flicker, and avian monitoring and protection are supported by substantial evidence and they are reasonable and not arbitrary. Thus, the Court should affirm the Commission's Order.

STANDARD OF REVIEW

The court affords great weight to the Commission's factual findings and the inferences drawn by the Commission on questions of fact. *See* SDCL 1-26-36. Pursuant to SDCL 1-26-36, a "court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" implicate one of the enumerated criteria associated with Commission error set forth in SDCL 1-26-36. In the instant appeal, Appellants assert that the Commission abused its discretion, which is one of the enumerated criteria. However, the court can only find the Commission abused its discretion, when its findings, conclusions, or decisions are unsupported by substantial evidence and are unreasonable and arbitrary. *See In re Midwest Motor Express*, 431 N.W. 2d 160, 162 (S.D. 1988). Under SDCL 1-26-1(9), substantial evidence is defined as "relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support the conclusion." It is long settled that a court will not weigh the evidence or substitute its judgment for that of the Commission, but, rather, it is the court's function is to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. *In re Svoboda*, 54 N.W. 2d 325, 328 (S.D. 1952); *In re Dakota Transp., Inc.,*

291 N.W. 589, 593, 595-596 (S.D. 1940). In addition, for a court to find an abuse of discretion, the agency's action must be "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." *Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W. 2d 851, 856. Further, a court also only reverses the Commission's decision when it is "left with a definite and firm conviction that a mistake has been committed." *In re Midwest*, 431 N.W. 2d at 162. Lastly, even if the court finds the Commission abused its discretion, for the court to overturn the Commission's decision it must also conclude that the abuse of discretion had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W. 2d at 856.

ARGUMENT

The Court should affirm the Commission's Order granting a Facility Permit to Crowned Ridge, because the Commission acted within its discretion when concluding, pursuant to SDCL 48-41B-22, that: (1) the sound and shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants; and (2) Crowned Ridge's impact on avian species will not pose a threat of serious injury to the environment. The Court should further rule that Appellants waived and failed to preserve for appeal Issue No. 2 as set forth in their Brief, and, also, deny Appellants' request for judicial notice of the Dakota Range Proceedings.

I. The Court should deny Appellants' request to take judicial notice of the Dakota Range Proceedings.

Appellants request that the Court take judicial notice of exhibits and maps in the Dakota Range Proceedings, (Commission Docket Nos. EL18-003 and EL18-046), which Appellants concede are not part of the underlying record. Appellants Br., p. 5. Appellants' request should be denied.

Pursuant to SDCL 19-19-201(b), for a court to take judicial notice of an adjudicative fact, it must find that:

> . . . [the] fact is not subject to reasonable dispute because it:
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> (1) Is generally known within the trial court's territorial jurisdiction; or
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> (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

The exhibits and maps in the Dakota Range Proceedings are subject to reasonable dispute, and, therefore, Appellants' request for judicial notice should be denied. The Dakota Range exhibits and maps are not part of the record of underlying proceeding, and, therefore, are not generally known to be within this Court's territorial jurisdiction in the instant appeal. Hence, the first prong of SDCL 19-19-201(b) is not satisfied. Second, the accuracy of the Dakota Range exhibits and maps are subject to question. Crowned Ridge was not a party to the Dakota Range Proceedings, and, therefore, is not in a position to verify the accuracy of the exhibits and maps, and, also has had no opportunity to litigate the accuracy of the exhibits and maps. The exhibits and maps were submitted by the Dakota Range subsidiaries of Apex Clean Energy Holdings, LLC, all of which are companies wholly separate from and unrelated to Crowned Ridge. Thus, there is no basis in this appeal for a finding that the exhibits and maps can be accurately and readily

determined from sources whose accuracy cannot reasonably be questioned. Therefore, second prong of SDCL19-19-201(b) is also not satisfied. *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) (judicial notice of an adjudicative fact is only appropriate when the fact is related to the immediate parties and involves a fact as to the who, what, when, here, and why between the parties); *State ex. rel. LeCompte v. Keckler*, 2001 S.D. 68 ¶ 11, n.7, 628 N.W.2d 749, 754, n. 7 (courts generally refuses to take judicial notice of facts outside the record, unless the fact relates to the matter at issue and involves the same parties). Further, courts refuse to take judicial notice of a fact that is asserted for the truth of the matter, which is precisely what Appellants request the Court to do in this appeal, because Appellants request judicial notice of the Dakota Range exhibits and maps in order to assert the truth of the exact location of the Dakota Range wind turbines. *See KBC Asset Mgmt. N.V. v. Omincare, Inc*. 769 F.3d 455, 468 (6th Cir. 2014); *GE Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 n.6 (7th Cir. 1997) (denying judicial notice under Federal Rules of Evidence 201 (which is identical to SDCL 19-19-201(b)) because the facts were asserted for the truth of the matter). Instructively, this Court can look to other court's decisions in interpreting a state rule of civil procedure that is the equivalent of a federal rule. *See Jacquot v. Rozum*, 2010 S.D. 84, ¶ 15, 790 N.W.2d 498, 503. Accordingly, Appellants request for the Court to take judicial notice of the Dakota Range exhibits and maps is unavailing and, therefore, should be denied. [4]

[4] Appellants cite *Sioux City Boat Club v. Mulhall*, 79 S.D. 668, 117 N.W.2d 92 as holding that courts may take judicial notice of a location of a manmade object on a map. The court, however,

II. The Commission acted within its discretion when it concluded the Project will not substantially impair the health or welfare of the inhabitants.

A. The Commission acted within its discretion when it granted a Facility Permit to Crowned Ridge without first requiring a sound study that included the proposed turbines from the Dakota Range III wind project.

Appellants assert that the Commission abused its discretion when it granted a Facility Permit to Crowned Ridge without requiring a sound study that considered all wind turbines proposed at three Dakota Range wind projects. Appellants Br. at 7-8. Appellants assertion is unavailing, because (1) they make a number of incorrect and incomplete factual assumptions and inferences; and (2) the Commission's finding 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.

Appellants' Incorrect and Incomplete Factual Assumptions and Inferences

Appellants' assumption that witness Haley only included 17 Dakota Range wind turbines in his sound models is incorrect. Appellants incorrectly base their assumption that only 17 Dakota Range wind turbines were included in the sound study based on their review of Crowned Ridge iso maps; however, the iso maps are not intended to show all turbines included in the study, but, rather, the maps are used to graphically illustrate compliance with the sound thresholds for participants and nonparticipants. Further,

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made no such holding. The issue in *Sioux City* involved the court recognizing geographic boundaries pertinent to an inquiry as to whether it had jurisdiction. This Court's jurisdiction over the instant appeal is not at issue. Therefore, the issue considered in *Sioux City* is far afield from and not instructive on Appellants' request that this Court take judicial notice of turbine locations set forth in exhibits and maps from the Dakota Range Proceedings.

Crowned Ridge, on the record, clearly indicated that all 97 of the Dakota Range I and II wind turbines were included in its sound studies. (AR 1477, 2237) Moreover, the Commission's Order recognized that Crowned Ridge included all the Dakota Range I and II wind turbines in its sound models. (AR 20697) Therefore, contrary to Appellants' claim, witness Haley included the Dakota Range I and II wind turbines in the Crowned Ridge sound studies. Indeed, 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 a number of other conservative assumptions used by Crowned Ridge in its sound models.[5] Each of the conservative assumptions are cited in the Order as evidence supporting the conclusion that Crowned Ridge had appropriately minimized the sound level to be produced by the Project. (*Id.*)

The reason that 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. Further, there is no legal requirement that the modeling of sound must include every potential wind turbine that may or may not be constructed and operated. Rather, the pertinent legal obligation is for Crowned Ridge to comply with the sound thresholds imposed by the Commission's Order. (AR 20708, Condition No. 26) Accordingly, Appellants' assertion that the sound

[5] 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; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted." (AR 20967) The Commission also cited that "Applicant modelled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects." *Id.*

model should have included prospective wind turbines from Dakota Range III is unsupported and without a legal basis.

In addition, Appellants' representation of the discussion between Commissioner Nelson and witness Haley is incorrect. Witness Haley did not testify that sound from a wind turbine travels 25 miles. Instead, during his discussion with Commissioner Nelson, witness Haley agreed with Commission Nelson that the sound model was apparently picking up "some remnant of sound" from the Dakota Range I and II turbines that were 20 or 25 miles away as it related to two Interveners, Robish and Mogen. (AR 12586-12588) Mr. Haley did not testify that the apparent remnant of sound from the Dakota Range turbines was material or that the sound from these turbines 25 miles away would be realized during operation. It bears repeating, the legal obligation related to the production of sound is for Crowned Ridge to comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26), a point lost on the Appellants as it is not mentioned in its Brief.

The Commission's findings and conclusion were supported by substantial evidence, and were reasonable and not arbitrary

The Commission's findings and conclusion that the sound produced by the Project will not substantially impair the health or welfare of the inhabitants were based on substantial evidence and were reasonable and not arbitrary. *See In re Midwest*, 431 N.W. 2d at 162 (". . . we find that an agency's action is . . . an abuse of discretion only when it is unsupported by substantial evidence and is unreasonable and arbitrary."). The Commission's thorough consideration of sound included the follow rationale:

> 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 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 modelled 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 nonparticipant's residence and 50 dBA for sound within 25 feet of a participant's residence. (AR 20708, Condition No. 26) *See Presell v. Mont. 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).

Any reasonable reading of the above rationale from the Order and Condition No. 26 demonstrates the Commission's findings and ultimate conclusion that, pursuant to SDCL 49-41B-22, the sound produced from the Project will not substantially impair the health or welfare of the inhabitants were based on substantial evidence, and were reasonable and not arbitrary. Clearly, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including its conservative sound modelling assumptions and the testimony of a Harvard-trained medical doctor specializing in the field occupational health) as supporting the findings and conclusion that the sound to be produced by the Project will not substantially impair the health or welfare of the inhabitants. *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). Further, the Commission's findings, conclusions, and imposition of the sound thresholds in Condition No. 26 are within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell*, 2015 S.D. 81 ¶ 8, 871 N.W. 2d at 652. Consequently, the Commission's thorough and reasonable consideration of sound was within is discretion, which, in turn, requires that the Commission's factual findings and inferences be afforded great weight pursuant to SDCL 1-26-36, and not second guessed by the Court, as Appellants request. *See 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 Svoboda*, 54 N.W.2d at 328 (reversing 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 Dakota*, 291 N.W. at 593, 595-596 (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 "[t]he ultimate question is whether there was substantial evidence to support the order of the Commission."). Accordingly, as the Commission's rationale on sound was well-reasoned, and was based on ample and substantial evidence, the Court should affirm the Commission's conclusion that the sound produced from the Project will not substantially impair the health or welfare of inhabitants.

Further, even if the Court finds the Commission abused its discretion, which it should not, Appellants have failed to show the Commission's actions had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W. 2d at 856 (even if the decision was an abuse of discretion, court will not overturn an agency's decision unless the abuse produced some prejudicial effect). The record shows that the modelled sound level at 50 feet away from the residence of each of the Interveners-Appellants is substantially below the 45 dBA nonparticipant threshold set forth in Condition No. 26: Robish 29.3 dBA, Christenson 38.6 dBA, Mogen 28.8 dBA, and Lynch 37.3 dBA. (AR 17839) For additional context, the record shows that the sound produced from the Project has been

modelled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less the sound of a library for Mogen and Robish. (AR 184) Consequently, there is no showing of prejudicial effect, because the Project's sound is below the 45 dBA Commission imposed threshold, including for Interveners-Appellants. Thus, the Court should affirm the Commission's conclusion that the sound produced from the Project will not substantially impair the health or welfare of the inhabitants.

B. The Commission acted within its discretion when it accepted Crowned Ridge's sound and shadow models as showing the residents of Stockholm and Waverly were below the sound and shadow flicker thresholds.

1. The Court should disregard Appellants' Issue No. 2 as it was waived and not preserved for appeal.

On August 29, 2019, the Appellants filed a Statement of Issues. It is well settled that if an appellant's Statement of Issues fails to set forth the reasons why the Commission's decision, ruling, or action should be reserved or modified the argument is waived. *See Lagler v. Menard, Inc.*, 2018 S.D. 53 ¶ 42, 915 N.W. 2d 707, 719. It is equally well settled that if an Appellant does not object to the issue in the underlying proceeding the issue is not preserved for appeal. *See City of Watertown v. Dakota, Minn. & E.R.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). In in the instant appeal, Appellants assert in their Brief under Issue No. 2 that the Commission abused its discretion by granting a Facility Permit to Crowned Ridge when sound and shadow flicker studies were not conducted for all occupied residents within the project area. However, Appellants' Issue No. 2 is not set forth in Appellants Statement of Issues, and, therefore, is waived.

Lagler., 2018 S.D. 53 ¶ 42, 915 N.W. 2d at 719. In addition, Issue No. 2 questions the veracity of Crowned Ridge Hearing Exhibits A67, A68, and A57, none of which Appellants objected to in the underlying proceeding. Hence, Appellants also failed to preserve for appeal a challenge on the veracity of these exhibits. *See City of Watertown,* 1996 S.D. 82 ¶ 26, 551 N.W.2d at 577; *American Fed. Sav.*, 320 N.W.2d at 803. Accordingly, for these reasons, the Court should disregard Appellants' Issue No. 2.

2. If the Court does not disregard the arguments in Appellants' Brief under Issue No. 2, it should affirm because the Commission acted within its discretion when it accepted Crowned Ridge's sound and shadow models as showing the residents of Stockholm and Waverly were below the sound and shadow flicker thresholds.

Appellants' Incorrect and Incomplete Factual Assumptions and Inferences

Appellants' factual assumption that Crowned Ridge did not analyze the impact of sound and shadow flicker on residents of Stockholm and Waverly is incorrect. Appellants Br. at 9-10. Appellants' assumption is incorrect because it is based on a misreading of the sound and shadow flicker tables, while, at the same time, ignoring the balance of the substantial evidence on sound and shadow flicker submitted by Crowned Ridge. For example, Appellants fail to recognize that the sounds iso 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.[6] (AR

[6] For example, the sound iso 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 the

17225-17231; 17821-17834) Appellants also fail to recognize that the Commission's Order cites to Exhibits A43-1 and A56 as well as the testimony of witness Haley to reach the conclusion that that the Project's modelled sound and shadow flicker levels were below the Commission imposed sound and shadow flicker thresholds for all non-participating residents, which would include the residents of Stockholm and Waverly. (AR 20697-20698) Therefore, contrary to the faulty inferences of Appellants, Crowned Ridge did show that all the residents of Stockholm and Waverly were modelled to be below the applicable sound and shadow flicker thresholds.

The Commission's findings and conclusion were supported by substantial evidence, and were reasonable and not arbitrary

The Commission's rationale, findings, and conclusion on the sound produced by the Project and its impact on habitants are set forth, *supra*, in Section II A. As Section II A demonstrates, the Commission's conclusion that the sound produced by the Project will not substantially impair the health or welfare of the inhabitants was supported by substantial evidence, and was reasonable and not arbitrary. Further, Appellants are flatly incorrect that Crowned Ridge excluded the residents of Stockholm and Waverly. Thus,

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Stockholm, and yet their sound is modelled 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 iso 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 again is 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 iso 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).

Appellants faulty assertion cannot impact the Commission's well-reasoned rationale on sound that cites to Crowned Ridge's studies, exhibits, and testimony shows the residents of Stockholm and Waverly are below the 45 dBA threshold imposed by the Commission. Accordingly, the Court, for the same reasons set forth in Section II A, should affirm the Commission's conclusion that the sound produced from the Project will not substantially impair the health or welfare of the inhabitants.

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 (CR 1-C10-P) who is at 36:57 hours of shadow flicker. Applicant modelled 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 the greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.
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> (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, 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 well-reasoned rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including its conservative shadow flicker modelling assumptions and testimony of a Harvard-trained medical doctor specializing in the field occupational health) as supporting the

Commission's 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. *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell*, 2015 S.D. 81¶ 8, 871 N.W.2d at 652. Thus, the Commission's thorough consideration of shadow flicker in the Order was well-reasoned decision and well within the Commission's discretion. Thus, its factual findings and inferences on shadow flicker should be afforded great weight pursuant to SDCL 1-26-36, and not second guessed by the Court. *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856; *In re Svoboda*, 54 N.W.2d at 328; *In re Dakota*, 291 N.W. at 593, 595-596. Accordingly, as the Commission's rationale on shadow flicker was well-reasoned, and was based on ample and substantial evidence, the Court should affirm the Commission's conclusion that the shadow flicker produced from the Project will not substantially impair the health or welfare of inhabitants.

Further, as already established in Section II A, *supr*a, the Appellants cannot show the Commission's actions on sound had a prejudicial effect, as they are all below the Commission's imposed sound threshold. The same holds true for shadow flicker, as each Intervener is below the 30-hour annual compliance threshold: Robish – zero hours, Christenson – 6:56 hours, Mogen – zero hours, and Lynch – zero hours. (AR 17839) Therefore, Appellants cannot show the Commission's actions on shadow flicker had a prejudicial effect. Accordingly, even if this Court were to find the Commission abused

its discretion, which it did not, it should not overturn the Order, because there is no prejudicial effect resulting from the Commission's Order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856.

III. The Commission acted within its discretion when it found there was substantial evidence that the Project will not pose a threat to serious injury to the environment.

Appellants assert that the Commission should not have granted a Facility Permit to the Project because the avian impact study did not cover the acquired Cattle Ridge portion of the Project. Appellants Br. at 11-12. Appellants, however, ignore that 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:

> 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 the 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 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 mitigations 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 evidence omitted). In addition, 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 and 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 that the Commission directly addressed the Project's impact on avian species, and in so doing cited substantial evidence that a reasonable mind might accept as being sufficiently 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 findings, conclusion, and

imposition of conditions related to avian species in light of the entire record were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell*, 2015 S.D. 81¶ 8, 871 N.W.2d at 652. Thus, the Commission's findings and conclusions regarding the Project's impact on avian species, including the imposition of numerous conditions on avian monitoring and protection, was within the Commission's discretion. Accordingly, its factual findings and inferences on avian issues should be afforded great weight pursuant to SDCL 1-26-36, and not second guessed by the Court. *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W. 2d at 856; *In re Svoboda*, 54 N.W.2d at 328; *In re Dakota*, 291 N.W. at 593, 595-596. Put another way, Appellants' assertion on avian studies is squarely an attempt to have the Court weigh the evidence and substitute its judgment for the Commission's, neither of which are the role of the Court. *See In re Svoboda*, 54 N.W. 2d at 328; *In re Dakota*, 291 N.W. at 593, 595-596. Accordingly, as the Commission's rationale on the Project's impact on environment, including avian species, was well-reasoned, and was based on ample and substantial evidence, the Court should affirm the Commission's conclusion that the Project will not pose a threat of serious injury to the environment.

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 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.

CONCLUSION

For the foregoing reasons, Crowned Ridge respectfully submits that the Commission's Order issuing a Facility Permit to Crowned Ridge should be affirmed in all respects.

Respectfully submitted this 20th day of December 2019.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL 15-26A-66(b). Proportionally spaced font Times New Roman l3 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Crowned Ridge's Appellees Brief contains 6,874 words as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

Miles Schumacher of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 20th day of December 2019, he electronically filed the foregoing document with the Clerk of the Third Circuit Court via Odyssey File & Serve, and further certifies that the foregoing document was served via Odyssey File & Serve to:

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