

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF CODINGTON)	THIRD JUDICIAL CIRCUIT
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AMBER KAYE CHRISTENSON,)	
ALLEN ROBISH,)	
KRISTI MOGEN, AND)	
PATRICK LYNCH,)	14CIV19-290
)	
Appellants,)	APPELLANT’S BRIEF
Vs.)	
)	
CROWNED RIDGE WIND, LLC, AND)	
SOUTH DAKOTA PUBLIC UTILITIES)	
COMMISSION,)	
)	
Appellees.)	
)	
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JURISDICTIONAL STATEMENT

This matter comes before the Court on appeal by Appellants herein of the South Dakota Public Utilities Commission’s Final Decision and Order Granting Permit to Construct Facility in EL 19-003 dated July 26, 2019. Notice of Appeal was filed with the Circuit Court on August 21, 2019.

INTRODUCTORY STATEMENT

For demonstrative purposes, a map of the Crowned Ridge Wind project is included in the Appendix as Exhibit 1, a map of the Dakota Range I and Dakota Range II projects is included in the Appendix as Exhibit 2, and a map of the Dakota Range III project is included in the Appendix as Exhibit 3. All references to the Administrative Record are delineated as “AR” followed by the appropriate page number of the record.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Crowned Ridge Wind, LLC (hereinafter “Crowned Ridge”) submitted its Application for a Facility Permit for a wind energy facility on January 30, 2019. With the Application, Crowned

Ridge also submitted written testimony for five witnesses, two of whom filed jointly. (AR 965) Pursuant to ARSD 20:10:22:40, the Commission established an intervention deadline of April 4, 2019. The Commission held a public input meeting on March 20, 2019, in Waverly, South Dakota. (AR 1026) Five individuals intervened as parties before the April 4, 2019 deadline, and the Commission granted party status to each intervenor who filed before the intervention deadline. (AR at 1070, 1322, 1463) The Commission established a procedural schedule on April 5, 2019. (AR 1463)

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses. (AR 1467-1944)

On April 29, 2019, Intervenors filed a Motion to Deny requesting that the Commission deny and dismiss the Application. (AR 1997). A hearing on the Motion to Deny was held before the Commission on May 9, 2019. On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss. (AR 2092)

On May 10, 2019, Appellant Allen Robish submitted his written testimony along with an affidavit from Jonathan Thompson. (AR 2096, 2097). On May 10, 2019, Commission Staff submitted written direct testimony for four witnesses. (AR 2105-3505). Crowned Ridge submitted written rebuttal testimony for nine witnesses on May 24, 2019. (AR 3698-4818)

Appellants submitted a Second Motion to Deny and Dismiss on May 17, 2019. The Second Motion was heard by the Commission on June 6, 2019. The Commission denied the Second Motion through the Final Decision and Order Granting Permit to Construct Facility on July 26, 2019. (AR 12245-12252)

The Commission held an evidentiary hearing on June 6, 11, and 12, 2019. (AR 20687). At the hearing, Crowned Ridge and Staff presented witness testimony. (AR 11928-12059, 12253-12504, 12521-1283 (Evid. Hrg. Tr.).

On June 13, 2019, Tim and Linda Lindgren, represented by an attorney, filed a Late Application for Party Status. (AR 20101). On June 25, 2019, the Commission heard the late-filed request for party status and voted 2-1 to deny the Lindgren's request. (AR 20196-20209)

The parties submitted post-hearing briefs on July 2, 2019. (See AR at 20257 (Appellants), 20445 (Crowned Ridge), 20492 (Staff)). On July 9, 2019, the Commission met to consider whether to issue a facility permit for the Project. (AR at 20565-20652) (Decision Tr.). At that meeting, the Commission voted unanimously to issue a permit for the Project, subject to numerous conditions. (See *id.*)

On July 26, 2019, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions (Permit). (AR 20684). The Permit includes 45 conditions related to various aspects of the Project, including noise and shadow flicker limits, decommissioning requirements, and environmental issues. (See *id.*)

Notice of Appeal was filed with this Court on August 21, 2019. Appellant's Issues on Appeal were filed with this Court on August 29, 2019.

STANDARD OF REVIEW

Under South Dakota law, 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 (2006); *In re One-time Special Underground Assessment by Northern States Power Company in Sioux Falls*, 628 N.W.2d 332, 334, 2001 SD 63, ¶ 8 (S.D. 2001). See also. *Wise v. Brooks Const. Services*, 721 N.W.2d 461, 466, 2006 SD 80, ¶ 16 (S.D. 2006); *Apland v. Butte County*, 716 N.W.2d 787, 791, 2006 SD 53, ¶ 14 (S.D. 2006).

The South Dakota Supreme Court has clarified that the clearly erroneous standard is

distinct from the substantial evidence standard (the old standard) in that a finding may be supported by substantial evidence, but still be set aside by a reviewing court if clearly erroneous. *Sopko v. C & R Transfer Co., Inc.*, 575 N.W.2d 225, 229, 1998 SD 8, ¶ 7 (S.D. 1998). “On the deference spectrum, clearly erroneous fits somewhere between de novo (no deference) review and substantial evidence (considerable deference) review.” *Id.*, (quoting 1 S. *Childress & M. Davis, Federal Standards of Review*, § 15.03 at 15-17 (2d ed. 1991)). The administrative agency’s factual findings will be reviewed under the clearly erroneous standard, although findings based on deposition testimony and documentary evidence are reviewed de novo. *Wise*, 721 N.W. 2d at, 2006 SD 80, ¶ 16. Questions of law are reviewed de novo. *Id.*

Appellants also challenge the ultimate conclusion of the South Dakota PUC that the Crowned Ridge Wind facility will not harm the social and economic condition of inhabitants or expected inhabitants in the wind energy facility siting area and that the wind energy 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. This application of the facts to the law for an ultimate finding represents a mixed question of fact and law reviewable de novo. *Schroeder v. Dept. of Social Services*, 545 N.W.2d 223, 226, 1996 SD 34, ¶ 4 (S.D. 1996) (citing *Schuck v. John Morrell & Co.*, 529 N.W.2d 894, 896 (S.D. 1995)). In its fresh review of such mixed question, where, as here, it is necessarily based on underlying findings of fact, a reviewing court will reverse a decision and set aside findings as clearly erroneous when the decision is “against the clear weight of the evidence or leaves the court with the firm and definite conviction that a mistake has been made.” [emphasis added] *Application of Nebraska Public Power Dist.*, 354 N.W.2d 713, 719 (S.D. 1984). See also, *Sopko v. C & R Transfer Co., Inc.*, 575 N.W.2d 225, 229, 1998 SD 34, ¶ 6 (S.D. 1998).

LAW RELATED TO JUDICIAL NOTICE

Appellants are asking this Court to take judicial notice of separate but related PUC dockets in the same geographic area (within 25 miles) of the Crowned Ridge Wind facility. Although not part of the formal record in this case, the exhibits and maps generated in the Dakota Range wind projects are relevant and germane to the issues discussed herein and were a point of contention during the evidentiary hearings in the present case. Appellants ask that the Court take judicial notice of those proceedings. Specifically, the Dakota Range wind facility projects are docketed with the PUC as EL18-003 and EL18-046.

Whether a fact will be judicially noticed is left largely to the discretion of the trial court. A trial court has the power to take judicial notice whether requested or not. *SDCL §19-19-201*. The general rule is that a fact judicially noticed must be one not subject to reasonable dispute. Also, the fact must be either known or generally within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *SDCL §19-19-201*.

Courts will take judicial notice of geographic facts and jurisdictional boundaries. The evidence offered on geographic facts may be aided by judicial notice because either the location is a matter of common knowledge or the location is easily found on a map. The location of any manmade object will be judicially noticed if the location is a matter of common knowledge or is easily found on a map. *Sioux City Boat Club v. Mhlhall* (1962) 79 SD 668, 117 NW 2d 92. The number of wind turbines in the Dakota Range facility and the geographic location of the Dakota Range turbines is a matter of common knowledge and easily found on the Dakota Range maps in the public record at the PUC and displayed for the general public on the PUC website.

ISSUES

Issue 1: Whether the PUC abused its discretion when it approved the Application using incomplete and inaccurate information related to sound studies.

Issue 2: Whether the PUC abused its discretion when it approved the Application without sound and shadow flicker studies at all occupied residents within the siting area.

Issue 3: Whether the PUC abused its discretion when it approved the Application without a complete avian use study.

ARGUMENT

Issue 1: The PUC abused its discretion when it approved the application using incomplete and inaccurate information related to sound studies.

Crowned Ridge Wind's footprint is 53,186 acres. In the geographic area of Crowned Ridge are other industrial wind developments known as Dakota Range I, Dakota Range II (PUC Docket EL18-003), and Dakota Range III (PUC Docket EL18-046). Dakota Range I and Dakota Range II wind facilities were granted permits to construct facility by the PUC on July 23, 2018. (PUC Docket EL 18-003). Dakota Range III was granted a permit to construct facility by the PUC on February 22, 2019. A review of the Dakota Range I and II maps show that Dakota Range consist of 72 turbines, all within a 25-mile radius of all non-participating landowner residences in the Crowned Ridge foot print. A review of the Dakota Range III map shows that Dakota Range III consist of 42 turbines, all within a 25-mile radius of many non-participating landowner residences in the Crowned Ridge foot print.

Applicant relied solely on Jay Haley to provide reports and testimony related sound studies in an effort to establish that the proposed Crowned Ridge facility would not pose a

threat of serious injury to the environment nor to the social and economic condition of inhabitants and expected inhabitants of the siting area and that the facility would not substantially impair the health, safety and welfare of the inhabitants. Haley is not a registered engineer has never been a licensed professional engineer in South Dakota. (AR 12539-12540) Nonetheless, Haley appended the initials "P.E." to his sound study report submitted with the Application (AR 394). By appending the initials P.E. to his signature, he represented that he is an engineer and is able to practice engineering in South Dakota. However, Mr. Haley is not permitted by law to use "P.E." to imply he is an actively registered P.E. He is not considered registered and licensed by the state board. His certificate of registration expired on December 31, 2016, three years ago. Nonetheless, Applicant touts that Haley has conducted over 100 sound study reports during his career as a "wind engineer" (AR 12550) and Applicant recognizes him as not only competent but as a leader in his industry using this [sound study] technology (AR 12546).

The noise limits used by Haley in Codington County were 50 decibels at the non-participating property lines (AR 12553). The noise limit used by Haley in Grant County was 45 decibels at non-participating occupied structures and 50 decibels at participating occupied structures (AR 12554). Intervenors are all non-participating landowners and residents of either Grant or Codington County.

Haley's initial sound study report submitted with the application did not consider any of the 114 Dakota Range turbines in determining sound effects in the Crowned Ridge footprint (AR 394-433). In rebuttal testimony submitted on his behalf, he reworked the sound study figures this time taking into consideration only a select few (17 of 114) Dakota Range turbines (AR 4877). Hayley's final Sound Pressure ISO-Lines Overview Map on record at AR 4877 confirms that only 17 of the 114 approved turbines from Dakota Range I, Dakota Range II and Dakota Range III wind facilities were analyzed in determining the sound impact at receptors in the Crowned Ridge Wind footprint.

The affect of turbines from the Dakota Range projects was a point of discussion during Haley's testimony in front of the Commission. When questioned by Commissioner Nelson about the impact of the Dakota Range project on the Robish property, which is located just to the NE of Strandburg, SD., Haley responded that based on the sound studies, it looks like Robish's property is impacted by the Dakota Range turbines in spite of a distance between 20-25 miles between the Robish property and the Dakota Range project (AR 12586). Haley went on to acknowledge that there would be some remnant of sound [from the Dakota Range turbines] that would travel 25 miles [to the Robish property] (AR 12588). Nonetheless, for reasons unexplained in the record Haley only considered 17 of the 72 the Dakota Range turbines in the Crowned Ridge sound study (AR 4877), which begs the question, what impact will the other 97 Dakota Range turbines have on the Robish property and all other properties within the Crowned Ridge footprint?

In spite of their expert's admission that intervenor Robish's property is impacted by turbines 20-25 miles away, applicant chose not to analyze the effect of all 114 Dakota Range turbines on the Crowned Ridge footprint and by doing so, applicant deliberately misled the PUC and fixed the sound study results so that they would fall within County standards and get a pass from the PUC. Based on his lauded credentials, and his direct testimony acknowledging that sound remnants from turbines could be heard 25 miles away and that those sound remnants from the 17 turbines he analyzed in the Dakota Range project did impact Intervenor Robish's property, Applicant's expert, Haley, knew or should have known that the unaccounted for 97 turbines in the Dakota Range projects would have an some effect on the sound levels at the receptors (both participating and non-participating) within the Crowned Ridge footprint. Nonetheless, he chose to analyze only 17 turbines in the Dakota Range I and II project instead of all 114, thereby ensuring the sound study results met County and PUC standards.

Issue 2: The PUC abused its discretion when it approved the Application without sound and shadow flicker studies at all occupied residents within the project area.

At the close of the evidentiary hearing, Applicant filed two documents, Exhibits A67 and A68, as updated shadow flicker tables, and one Exhibit A57 as an updated sound table. The shadow flicker tables list 70 non-participating receptors and 61 participating receptors, which are homes, with 4 participants listed as pending (AR 17892-17899; AR 17835-17838). The towns of Stockholm and Waverly are located within the Crowned Ridge footprint. There are 42 residents in Stockholm and 17 residents in Waverly that are non-participants in the Crowned Ridge project (AR 93). The updated shadow flicker tables exclude all residences in Stockholm and Waverly. The updated sound tables exclude all residents of Stockholm and analyze only 3 residents of Waverly. Applicant fails to provide information on who is participating, who is not, and the effects of sound and shadow flicker on the homes and residents of Stockholm and Waverly. Of the 131 receptors listed on the table, more than half are non-participants and this table does not include the 56 non-participating receptors in the towns of Waverly and Stockholm inside the Crowned Ridge footprint. This brings the ratio of the non-participants inside the project boundary to 126 vs. 61 participating (AR 17892-17899). Because the residents of Stockholm and Waverly were not included in applicant's sound and shadow flicker study applicant ignored forty-four percent (44%), nearly half, of the non-participating residences within the Crowned Ridge footprint when it analyzed the project for effects of sound and shadow flicker. While the Crowned Ridge project offers setbacks away from the towns of Waverly and Stockholm, setbacks do not address the issue of the effects of sound and flicker on the residences of Waverly and Stockholm. This is especially concerning considering Haley's testimony that sound from turbines 25 miles away could impact intervenor Robish's property. The Applicant's modeling buffer zone, as well as the proposed project site, includes the towns of Waverly and Stockholm, but Applicant did not consider, model or include all the receptors and residences in the two towns. Because Applicant ignored the residents of Stockholm and

Waverly, applicant's evidence is void of material and necessary information concerning the consequences of sound and flicker on the residents of the two towns. The granting of the PUC permit without the relevant and material evidence related to sound and shadow flicker imposed on the residents of Stockholm and Waverly within the project area is arbitrary and capricious. Without the data, there is simply no way the PUC could determine whether the Crowned Ridge project would or would not substantially impair the health, safety or welfare of the inhabitants of the towns of Stockholm and Waverly located within the siting area.

There is no Administrative Rule or South Dakota Laws that allows for an exception to leave a residence out of a sound study or shadow flicker study, whether the residence is located within a municipality or in the country, and indeed, no exception was granted. In their application, applicant acknowledged the number of residents in the towns of Stockholm and Waverly yet applicant chose to ignore all residents of those towns in their shadow flicker study and all but three residents of those towns in their sound study. By doing so, applicant has not given a true picture of how many receptors (homes and property lines) may be impacted by the effects of wind turbine sound and shadow flicker within the Crowned Ridge footprint.

Issue 3: The PUC abused its discretion when it approved the Application without a complete avian study of the entire Crowned Ridge footprint.

SDCL 49-41B-11 (11) requires that an Applications for a PUC permit include environmental studies relative to the proposed facility. There is no exception in law or administrative rules allowing applicant to ignore environmental studies for portions of the project area. One of the many required environmental studies required by applicant is an Avian Use Survey. 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) (AR 7022).

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). Sarah Sappington testified on behalf of applicant as to the avian use survey. When asked about the avian use survey map submitted with the application [*the relevant map is located at AR 7271*], Ms. Sappington acknowledged that no avian study was completed for the northeast portion of the Crowned Ridge footprint (containing approximately 15,500 acres) formerly known as Cattle Ridge (AR 12317-12318).

Staff witness Tom Kirschenmann, Wildlife Division Deputy Director and Chief of Wildlife for South Dakota Game, Fish & Parks also confirmed that he was not aware of any surveys that were conducted in the northeastern-most portion of the Crowned Ridge foot-print formerly known as Cattle Ridge (AR 12711-12712), and that given the timing surrounding that addition of the Cattle Ridge portion of the project to the overall Crowned Ridge footprint, that applicant would not have sufficient time to conduct the required avian use survey for the previously omitted portion of the Crowned Ridge foot print (AR 12712-12713). In spite of the missing avian use survey for a large portion (nearly 30%) of the Crowned Ridge footprint, the Application was approved.

CONCLUSION

Applicants have the burden to submit a complete application and to show that the Crowned Ridge Wind 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 wind energy facility siting area and that the wind energy facility will not substantially impair the health, safety or welfare of the inhabitants within the siting area. Applicant claims to be in compliance with County standards related to sound and shadow flicker, but as set forth above, has omitted relevant and necessary data from their application and evidence provided to the PUC to give the appearance of compliance. Applicant further claims to be in compliance with all environmental studies but submitted an incomplete application that omitted nearly 30% of the Crowned Ridge

footprint from avian impact studies.

Without an analysis as to the effects of sound emanating from the nearby un-accounted for 97 wind turbines in the Dakota Range footprint on the receptors in the Crowned Ridge footprint, and without an analysis as to the effects of sound and shadow flicker on all of the receptors located in the towns of Stockholm and Waverly located within the Crowned Ridge footprint, the PUC was without relevant and necessary information to make an informed decision as to the effects the Crowned Ridge project will have on the social and economic condition of the inhabitants or expected inhabitants in the wind energy facility siting area and the impacts the Crowned Ridge project will have on the health, safety or welfare of the inhabitants within the siting area.

Without an avian use study completed for a large portion of the Crowned Ridge foot print formerly known as Cattle Ridge, the PUC was without any information as to the avian population and potential impacts of wind turbines on the avian population covering approximately 15,500 acres within the Crowned Ridge foot print. Without the required avian study, how could the PUC make a determination whether the wind turbines located in that portion of the project would pose a threat of serious injury to the environment? The missing avian use study was overlooked and the application was pushed through nonetheless.

Any decision made by the PUC based on an incomplete application omitting vital avian use studies and without relevant and necessary information to aid in the decision-making process regarding sound and shadow flicker is arbitrary and an abuse of discretion. Whether the sound and shadow flicker analysis addressed above was deliberately left out by applicants or whether the testing requirements were simply ignored by applicant and the PUC, this Court must reverse the PUC's decision to grant the permit to Crowned Ridge Wind, LLC and set aside findings as clearly erroneous because there is no other conclusion to be drawn other than that a mistake has been made.

Dated November 8, 2019.

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APPENDIX

Please see Exhibits 1, 2 and 3 filed as separate attachments to this brief.

REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

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