STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF DEUEL	THIRD JUDICIAL DISTRICT

IN THE MATTER OF ADMINISTRATIVE APPEAL GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL AND LARETTA KRANZ VS. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION AND CROWNED RIDGE WIND II, LLC and AMBER KAYE CHRISTENSON AND ALLEN ROBISH, Appellants, v. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF, Appellees.	Case No. 19CIV20000021 **APPELLEE COMMISSION STAFF'S RESPONSE BRIEF TO APPELLANTS CHRISTENSON AND ROBISH**

INTRODUCTION

Staff of the South Dakota Public Utilities Commission (Staff)[1] submits this brief in response to the opening brief submitted by Appellants Amber Christenson and Allen Robish (together, Appellants). Appellants have appealed the South Dakota Public Utilities Commission's

[1] Throughout Appellants' brief, references are made to "Appellee PUC". The correct party is not the PUC, but the Staff. The Commission itself is not a party to the docket, nor an Appellee in this matter.

(Commission or PUC) issuance of a wind energy facility permit for the Crowned Ridge Wind II wind farm and ask the Court to remand for a new contested hearing.

For the purposes of this brief, all citations to the administrative record will be referenced as AR. Citations to the transcript of the evidentiary hearing will be referenced as EH. This brief is responsive only to that submitted by Appellants Amber Christenson and Allen Robish. Therefore, any references to Appellants are limited to Ms. Christenson and Mr. Robish. References to Appellants' brief will be referenced as TAB. Staff will submit a separate brief responding to the brief submitted by Attorney A.J. Swanson.

STATEMENT OF THE CASE AND FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC (Crowned Ridge II or Applicant) filed with the Commission an application for a permit to construct an up to 300.6-megawatt (MW) wind project (the Project) in Codington and Grant Counties, South Dakota. The Project will consist of up to 132 wind turbines. (AR 14230, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (Decision or Permit)).

In South Dakota, an energy facility permit from the Commission is required for wind energy facilities with a capacity of 100 MWs or more. SDCL 49-41B-2(7), (13); SDCL 49-41B-4. Where, as in this case, there are intervening parties and no global settlement is reached, the Commission holds a contested case hearing under SDCL Chapter 1-26. Pursuant to SDCL 49-41B-17, Staff is a party to the proceeding, and therefore, may enter into a settlement with Applicant at any time.

Pursuant to ARSD 20:10:22:40, the Commission established an intervention deadline of September 9, 2019, 60 days after Crowned Ridge II's Application was filed. The Commission

held a public input meeting on August 26, 2019, in Watertown, South Dakota. (AR 1387). Ten individuals intervened as parties before the September 9, 2019 deadline, and the Commission granted party status to each intervenor who filed before the intervention deadline. (AR 1193, 1478). Six of those individuals were represented by one attorney.

The Commission established a procedural schedule on September 20, 2019. (AR 3227). Pursuant to the procedural schedule, the Parties submitted prefiled testimony for several witnesses. The Individual Intervenors did not submit prefiled testimony or offer any witnesses.

An evidentiary hearing was held on February 4-6, 2020, pursuant to the rules of civil procedure. (AR 8844). Seventeen witnesses were called to testify at the evidentiary hearing. During the evidentiary hearing, Staff Exhibit S7 was admitted into evidence without objection. As testified to by Staff witness Darren Kearney, Exhibit S7 documented a number of conditions that Staff wanted attached to a permit should the Commission decide to grant a permit to Crowned Ridge II. (AR 13662-13663, EH 553-554). In drafting Exhibit S7 prior to the evidentiary hearing, Staff reached out to all intervenors, asking if they had any recommended conditions. (AR 13663, EH 554:8-10). Two Individual Intervenors responded.

Following the evidentiary hearing, each party had the opportunity to submit post-hearing briefs. (AR 13789). The Commission met on March 17, 2020, to hear oral argument from the Parties and to make its decision on whether to issue the permit to Crowned Ridge II. (AR 13984). After considering all of the information contained in the evidentiary record, reading post-hearing briefs, and hearing oral argument, the Commission voted to grant the permit subject to forty-nine

conditions, including noise and shadow flicker limits, decommissioning requirements, and environmental issues. (AR 14230-14258).

GENERAL LEGAL STANDARD APPLICABLE TO REVIEW OF A COMMISSION DECISION

SDCL 49-41B-30 permits "[a]ny party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit" 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]." SDCL 49-41B-30.[2] Review of the Commission's decision is 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 reviewed under the clearly erroneous standard). "[F]actual findings will not be disturbed unless they are clearly erroneous." *State, Department of Game, Fish and Parks v. Troy Township, Day County*, 2017 S.D. 50, ¶ 36, 900 N.W.2d 840, 854.

A Court will only find the Commission abused its discretion, if its findings, conclusions, or decisions are unsupported by substantial evidence and are unreasonable and arbitrary. *In re Midwest Motor Express*, 431 N.W. 2d 160, 162 (1988). SDCL 1-26-1(9) defines substantial evidence 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

[2] "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.").

evidence or substitute its judgment for that of the Commission, but, rather, it is the court's function to determine whether there was substantial evidence in support of the Commission's conclusion or finding. *In re Svoboda*, 74 S.D. 444, 447, 54 N.W. 2d 325, 328 (1952); *In re Dakota Transp., Inc.*, 67 S.D. 221, 230, 233, 236, 291 N.W. 589, 593, 595-596 (1940). In addition, the Supreme Court of South Dakota has determined that to be considered 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 may only reverse 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. In addition, 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. *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856.

ARGUMENT

Issue 1: The Commission properly found that the Project will comply with all applicable laws, specifically as it relates to decommissioning and disposal of turbines.

The Commission found that the Project, as permitted, will comply with all applicable laws and rules. *See* Findings of Fact 18 and 66. Appellants argue that Crowned Ridge II did not meet its burden with respect to ARSD 20:10:22:31, which requires an applicant to provide a plan for disposal of solid or radioactive waste generated by a project.

However, ARSD 20:10:22:31 does not apply to an application for a wind energy facility permit. The administrative rules applicable to an application for a wind energy facility permit are found in ARSD 20:10:22:05, which provides:

> The application for a permit for a facility shall contain the applicable information specified in §§ 20:10:22:06 to 20:10:22:25, inclusive, 20:10:22:36, and 20:10:22:39. *If the application is for a permit for an energy conversion facility, it shall also contain the information specified in §§ 20:10:22:26 to 20:10:22:33, inclusive*. If the application is for a permit for a transmission facility as defined in SDCL subdivision 49-41B-2.1(1), it shall also contain the information in §§ 20:10:22:34 and 20:10:22:35. If the application is for a permit for a transmission facility as defined in SDCL subdivision 49-41B-2.1(2), it shall also contain the information in §§ 20:10:22:37 and 20:10:22:38. If the application is for a permit for a wind energy facility, it shall also contain the information in §§ 20:10:22:33.01 and 20:10:22:33.02.
>
> The application for a permit for a facility shall contain a list of each permit that is known to be required from any other governmental entity at the time of the filing. The list of permits shall be updated, if needed, to include any permit the applicant becomes aware of after filing the application. The list shall state when each permit application will be filed. The application shall also list each notification that is required to be made to any other governmental entity.

(*emphasis added)*

ARSD 20:10:22:31 applies only to energy conversion facilities. SDCL 49-41B-2(6) defines an energy conversion facility as "any new facility, or facility expansion, designed for or capable of generation of one hundred megawatts or more of electricity, but does not include any wind or solar energy facilities."

ARSD 20:10:22:21 sets forth the information required of a wind energy facility when applying for a permit. The rule provides that "the applicant shall provide evidence that the proposed facility will comply with all air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted." Crowned Ridge II provided this information in Section 16 of its Application. (AR 99).

Nonetheless, the Commission went above and beyond what was required, because the Commission did, in fact, hear evidence on the future disposal of wind turbine blades. Further,

Appellants want Crowned Ridge II to prove that the Project complies with disposal requirements when nothing has been disposed of at this time. That is a feat only a time-traveler could do. Beyond an assurance from an applicant that it will comply with the applicable laws for disposal, which could occur decades into the future, there is no other evidence available or better mechanism to ensure environmental compliance at the time wind towers are decommissioned or disposed of. Neither the Applicant nor the Commission has any way of knowing what laws and environmental regulations will be in force at the time the Project is decommissioned.

The Commission properly evaluated the evidence as it related to all applicable rules. The Commission's decision should be affirmed.

Issue 1A: The Commission Properly Determined that the Project will Comply with all Applicable Laws, specifically as it relates to compliance with the Grant County Ordinance.

The applicant in a siting permit proceeding has the burden to establish that it will comply with all applicable laws and rules. *See* SDCL 49-41B-22(1). This does not impose upon the Commission the authority to adjudicate the validity of a county conditional use permit. The proper procedure to challenge a county conditional use permit is to seek a writ of mandamus from the proper circuit court, an action which Appellants have undertaken. *See*, 25CIV20000010, *Allen Robish and Amber Christenson v. Grant County Planning Commission, et al.*

SDCL 49-41B-25 provides that when ruling on a wind siting permit application, the Commission may grant; deny; or grant, subject to conditions, the permit. The Commission attached forty-nine conditions to the permit issued to Crowned Ridge II. (AR 14246-14258). Condition 1 requires Crowned Ridge II to obtain all necessary permits from all levels of government. (AR 14246). Condition 2 requires Crowned Ridge II to comply with all applicable permits. *Id*. The effect of these two conditions is that Crowned Ridge II must obtain a valid

conditional use permit (CUP) from the county and comply with the terms of that permit. Should the circuit court overturn the CUP, Crowned Ridge II would be in violation of Conditions 1 and 2 if the facility is constructed and operated without a CUP and would be subject to fines and penalties that the Commission could order in accordance with SDCL 49-41B-34.

Appellants' reliance on *Van Zanten* is misplaced. *In re Conditional Use Permit Granted to Van Zanten*, 1999 SD 79, 598 NW2d 861. *Van Zanten* may be an applicable case regarding the writ of mandamus currently pending in Grant County. *See* 25CIV20000010. However, it has no bearing on this proceeding. *Van Zanten* establishes precedent for the law that is to be applied in a zoning case. This appeal is clearly distinguishable. This appeal is not from a zoning case and is not a review of a county action. The PUC has no zoning authority and does not issue zoning permits.

Even if the Court were to find that the Commission erred in this issue, Appellants can show no 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)). Appellant Allen Robish is the only party to this appeal who resides in Grant County, South Dakota. The sound level modeled for the Robish residence is 30.0dBA. (AR 3419). The Robish residence is located 12,651 feet, or more than two miles, from the nearest turbine. *Id*. This residence can be seen on the full map provided in Exhibit A21-1. (AR 6958). The various sound levels are depicted on iso-maps in the record. (AR 6961). Although the Robish residence is too far outside the Project boundary to appear on the iso-map, a comparison between the full map and the corresponding iso-map demonstrates that the residence is a significant distance from the iso-lines denoting an increase in sound level. (AR 6958, 6961). Therefore, even if the Grant County ordinance is determined to require noise limitations for not just non-participating

residences, but also at the perimeter of principal and accessory structures, as required in the previous version of the ordinance, the residence is well beneath the threshold and no adjustment of the Project layout would be necessary. Thus, the sound level at Mr. Robish's home would be unaffected. Therefore, no appellant in this appeal would personally suffer prejudice if the appropriate Court determines Crowned Ridge II must comply with the previous version of the ordinance.

Moreover, Condition 2 of the Permit requires Crowned Ridge II to comply with all applicable permits, which includes the Grant County CUP. (AR 14246). Therefore, it is incumbent upon Crowned Ridge II to obtain and comply with a valid CUP, regardless of which version of the ordinance ultimately applies. If a Court determines the current CUP is invalid and a CUP must be sought under the previous ordinance, Crowned Ridge II must secure a new CUP and comply with both the noise thresholds established in that CUP and those in the Commission's permit.

Finally, the record shows that Crowned Ridge II had a CUP from Grant County at the time the Commission issued the permit. As there was no decision from a court that vacated or remanded the CUP, this proved prima facie that the Project complies with county ordinances.

The Commission did not err when it found that the Project would comply with all applicable laws and regulations. Therefore, the decision should be affirmed.

Issue 1B: This Permit is Consistent with SDCL 49-41B-25.2.

The Commission's Findings of Fact are not clearly erroneous, as nothing in rule or statute requires an applicant to obtain approval from the Federal Aviation Administration (FAA) for use of an Aircraft Detection Lighting System (ADLS) prior to the issuance of a permit from the Commission. SDCL 49-41B-25.2 provides:

> For any wind energy facility that receives a permit under this chapter after July 1, 2019, the facility shall be equipped with an aircraft detection lighting system that meets the requirements set forth by the Federal Aviation Administration for obstruction marking and lighting in Chapter 14 of FAA Advisory Circular (AC) 70/7460-1L, "Obstruction Marking and Lighting," dated December 4, 2015. Any cost associated with the installation, operation, or maintenance of a system under this section is solely the responsibility of any owner of the wind energy facility.

Nothing in the language of that statute requires or implies that approval from the FAA must be sought or obtained as a prerequisite to the issuance of a PUC permit. The only timing consideration in SDCL 49-41B-25.2 is that the wind energy facility be equipped with ADLS, and it is axiomatic that this cannot happen prior to the issuance of a PUC permit. A project cannot be equipped with anything until the project is built, and a project cannot be built until it is permitted.

Further, Condition 34 of the Permit requires Crowned Ridge II to apply to the FAA for approval of its ADLS. In that Condition, the Commission specifically required that application to the FAA "be made to allow enough time for a FAA determination and system construction prior to the commercial operation date of the Project." (AR 14255, Condition 34). Therefore, the Permit was specifically drafted to ensure compliance with SDCL 49-41B-25.2.

The practical effect of what Appellants are asking the Court to do is unworkable. Appellants urge that the Project should be equipped with ADLS at the time a permit is issued. To do this, "construction" as defined by SDCL 49-41B-2(5) would need to take place. This would create a paradox by forcing an applicant for a permit to violate the requirement to obtain a permit prior to construction. *See* SDCL 49-41B-4.

The Commission's Final Decision and Order Granting Permit to Construct Facility should be affirmed, as it is not contrary to SDCL 49-41B-25.2. The Commission found that the Project will utilize ADLS, and that finding was not erroneous. (AR 14238, Finding of Fact No. 30).

Issue 2: Applicant met its burden of proof with respect to SDCL 49-41B-22(3).

Despite the enormity of the administrative record in this proceeding, this particular issue is simple, as it comes down to the fact that there is no legislative directive as to how an applicant must establish that a project will not substantially impair the health and welfare of the community. While SDCL 49-41B-22(3) requires an applicant to establish that a proposed project will not substantially impair health and welfare, neither it nor any other rule mandates how the applicant must satisfy its burden.

The statute is silent as to the mechanism for establishing the burden, whether it is through the testimony of health experts and acousticians, iso-maps, or modeled projections and comparisons. The only specific requirements are that the Applicant must provide a map showing noise sensitive land uses and must provide information concerning the anticipated noise levels during construction and operation. *See* ARSD 20:10:22:18(1)(l) and 20:10:22:33.02(5). It is within the sole discretion of the Commission to determine whether the burden was met utilizing the evidence within the record. Here, the Commission found that there was sufficient evidence in the record to demonstrate that the sound from the Project would not substantially impair the health and welfare of the community. (Finding of Fact 68, AR 14244).

In a similar matter, on appeal regarding this issue, the Honorable Carmen Means concluded that Commission's analysis of sound "went above and beyond what was required by SDCL § 49-41B and ARSD 20:10:22" and the "Commission's thorough and reasonable consideration of sound was within its discretion." *Christenson, Robish et al v. Crowned Ridge Wind, LLC and South Dakota Public Utilities Commission*, Memorandum Opinion at 10-14, CIV 19-290, J. Means Third Circuit Court (April 15, 2020).

Pursuant to SDCL 1-26-36, Courts give great deference to the Commission's findings. *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). The Commission's conclusion that the sound produced by the Project would not substantially impair the health, safety, or welfare of the local inhabitants was supported by substantial evidence in the record, was reasonable and not arbitrary, and was therefore within the discretion of the Commission.

The substantial evidence included expert testimony from both health experts and acousticians, with no corresponding intervenor testimony to contradict these experts. For example, the Applicant provided testimony of Dr. Robert McCunney, addressing the Appellants' concerns and stating that the proposed turbine placements and setbacks proposed by Crowned Ridge II will not substantially impair the health of the inhabitants. (AR 11497, Prefiled Supplemental Testimony of Dr. Robert McCunney).

Appellants contend that Commission Staff should have called a health expert. (TAB at 20). Commission Staff bears no burden of proof, and thus, no responsibility to put on a case or call expert witnesses. Commission Staff, nonetheless, went above and beyond by calling experts in areas where it felt necessary, contacting appropriate government agencies, offering testimony, and putting several hundred pages worth of evidence into the record. The letter from the South Dakota Department of Health stated that the "studies generally conclude that there is insufficient evidence to establish a significant risk to human health." (AR 11983, Letter from Department of Health). Based upon this response from the appropriate government agency, Staff determined there was no need to hire a health expert. If another party disagreed, it was incumbent upon that party to provide expert testimony.

The Commission properly considered all of the evidence in the record and did not abuse its discretion in finding that the Project will not substantially impair health and welfare of the inhabitants. The Commission's decision should be affirmed.

CONCLUSION

The Commission's Decision in this matter is based on an extensive administrative record. Appellants ask the Court to second-guess the Commission, but Appellants' arguments are not supported by the substantial record in this matter or the law. Accordingly, Commission Staff respectfully requests that the Court affirm the Commission's Decision.

Dated this 11th day of September 2020.

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