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

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, Appellees.	19CIV20-000021 **BRIEF OF APPELLEE CROWNED RIDGE WIND II, LLC**

This Court has jurisdiction over the appeal of the South Dakota Public Utilities Commission's ("Commission") April 6, 2020 Order ("Order"), issued in Docket No. EL19-027 that granted an Energy Facility Permit to Crowned Ridge Wind II, LLC's ("Crowned Ridge II") 300.6 megawatt ("MW") wind facility (the "Project").

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STATEMENT OF THE CASE

On July 9, 2019, Crowned Ridge II filed an Application with the Commission for a Facility Permit to construct and operate the Project, which is proposed to be located in Codington, Grant, and Deuel Counties, South Dakota. (AR 1-1041). 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 ten intervenors, three days of evidentiary hearings, the submittal of legal briefs, oral argument, and the issuance of the Order granting a Facility Permit to Crowned Ridge II for the Project.

On April 29, 2020, Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz ("Ehlebracht Appellants") filed a Notice of Appeal of the Order in the Third Circuit Court located in Deuel County followed by a Statement of Issues on May 7, 2020. On May 1, 2020, Amber Christenson and Allen Robish (collectively "Christenson Appellants") filed a Notice of Appeal in the Third Circuit Court in Codington County followed by a Statement of Issues on May 11, 2020. With the consent of the parties, the appeals were consolidated in the Third Circuit Court in Deuel County. On July 13, 2020, Ehlebracht Appellants filed their initial brief. On August 10, 2020, Christenson Appellants filed their initial brief. Contrary to the assertions of Appellants, the Commission's granting of a Facility Permit to the Project was well-reasoned, based on substantial evidence, and within its discretion. Therefore, the Court should affirm the Order in all respects.

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STATEMENT OF THE FACTS

On July 9, 2019, Crowned Ridge II filed an Application and accompanying appendices with the Commission for a Facility Permit to construct and operate the Project, a 300.6 MW wind facility located in Codington, Grant, and Deuel Counties, South Dakota (AR 1-1041). Also, on July 9, 2019, Crowned Ridge II submitted the pre-filed Direct Testimony and exhibits of Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter. (AR 1042-1118; 3233-3254) The commercial operation date of the Project was estimated to be in the fourth quarter of 2020. (AR 11)

On July 11, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and a 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 Monday, August 26, 2019, at 5:30 p.m. CDT, at the Whitewood Room, Watertown Event Center, 1901 9th Ave. SW, Watertown, South Dakota. (AR 1122-1123)

On July 31, 2019, the Commission issued an order granting party status as Intervenors to Amber Christenson, Allen Robish, and Kristi Mogen. (AR 1193-1194) On August 26, 2019, the Commission also issued an order granting party status as Intervenors to Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Loretta Kranz. (AR 1478) On August 26, 2019, the public input hearing was held. (AR 1274-1343)

On September 20, 2019, Crowned Ridge Wind II submitted the pre-filed Supplemental Testimony and Exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Dr. Christopher Ollson, Daryl Hart, Sarah Sappington, Michael MaRous, and Dr. Robert McCunney. (2009-3223)

On October 1, 2019, the Commission issued an Order For and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for February 4-7, 2020 to be conducted in the Matthew Training Center, Foss Building, 523 E. Capital Ave., Pierre, South Dakota. (AR 3229-3230)

On December 9, 2019, Staff submitted the pre-filed Direct Testimony and Exhibits of David Hessler, Darren Kearney, Hilary Meyer Morey, David Lawrence, and Paige Olson. (AR 3356-4259) On December 12, 2019, Intervenors submitted the pre-filed Direct Testimony of Garry Ehlebracht, Steven Greber, Amy Rall, and Laretta Kranz. (AR 4251-4264)

On January 8, 2020, Crowned Ridge Wind II submitted the pre-filed Rebuttal Testimony and Exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson. (AR 4267-4338)

An evidentiary hearing was held on February 4-6, 2020, pursuant to the rules of civil procedure. (AR 8844-9133) Seventeen witnesses were called to testify at the evidentiary hearing. On February 27 and March 2, 2020, post-hearing briefs were filed by Crowned Ridge Wind II, Commission Staff, and Intervenors. (AR 13820-13862; 13878-13969)

On March 17, 2020, after consideration of the evidence of record, applicable law, the post-hearing briefs, and oral arguments of the parties, the Commission voted unanimously to issue a Facility Permit for the Project, subject to certain conditions. (AR 13984-14080) On April 6, 2020, the Commission issued the written Order, granting the Facility Permit to the Project, subject to 49 conditions. (AR 14230-14258)

SUMMARY OF THE ARGUMENT

Ehlebracht Appellants assert that the Commission erred in granting a Facility Permit to the Project, because it did not: (1) promulgate fixed rules for the sound and shadow flicker and then apply those rules to the Project; and (2) apply SDCL 43-13-2(8) to the Project, which Appellants assert prohibits the casting of shadow flicker on a landowner's property unless Crowned Ridge II holds an easement from that landowner. Christenson Appellants claim that the Commission erred in granting a Facility Permit to the Project, because: (1) Crowned Ridge II did not carry its burden on whether the sound produced from the Project would substantially impair the health and welfare of the inhabitants; and (2) Crowned Ridge II did not carry its burden to show it would comply with all applicable laws and rules. Both sets of Appellants' assertions, however, ignore the well-reasoned findings and conclusions of the Commission, all of which are based on substantial evidence in the record. Indeed, any reasonable reading of the Commission's Order clearly shows the Commission's findings, conclusions, and conditions are supported by substantial evidence, are reasonable and not arbitrary. Thus, the Court should affirm the Commission's Order.

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STANDARD OF REVIEW

A court affords great weight to the Commission's findings and the inferences drawn by the Commission on questions of fact. *See* SDCL 1-26-36; *In Re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Ctr.*, 2013 S.D. 10, ¶ 48, 826 N.W.2d 649, 662 ("We 'give great weight to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire record.'" quoting *Williams v. S.D. Dept' of Agric.*, 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400). Questions of law are reviewed *de novo*. *Anderson v. South Dakota Retirement System,* 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.,* 2015 S.D. 55, ¶ 11, 866 N.W.2d 545); *State v. Geise*, 2020 S.D. 161, ¶ 10, 656 N.W.2d 30, 36. A court will afford a well-reasoned and fully informed Commission decision with "due regard", unless there is a clear error of judgment or conclusion not supported in fact. *Application of Otter Tail Power Co.*, 2008 S.D. 5, ¶ 29, 744 N.W.2d 594, 603.

In addition, a court does not weigh the evidence or substitute its judgment for that of the Commission, but, rather, the court's function is to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. *Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952); *Application of Dakota Transp., Inc.,* 291 N.W. 589, 593, 595-96 (S.D. 1940). 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." A court only reverses the Commission's factual determinations when it is "left with a definite and firm conviction that a mistake

has been committed." *Application of Midwest Motor Express*, 431 N.W.2d 160, 162-163 (S.D. 1988).

Further, a court can only find an abuse of discretion when the Commission's findings, conclusions, or decisions are unsupported by substantial evidence and are unreasonable and arbitrary. *Application of Midwest Motor Express*, 431 N.W.2d at 162, citing *Application of Dakota Transp.*, 291 N.W. 589. It is also long settled that 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, quoting *Gartner v. Temple*, 2014 S.D. 74, ¶ 7, 855 N.W.2d 846, 850. Lastly, even if the Court finds the Commission abused its discretion, for the court to reverse or modify the Commission's decision it must also conclude that the abuse of discretion had prejudicial effect. *Anderson*, 2019 S.D. 11, ¶ 10, 924 N.W.2d at 149; *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 II's Project, because the Commission, based on substantial record evidence, acted within its discretion when concluding pursuant to SDCL 48-41B-22: (1) that the sound and shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants; and (2) the Project will comply with all applicable laws and rules.

1. The Court should affirm the Commission's conclusion that the Project will not substantially impair the health or welfare of the inhabitants.

A. The Commission was not legally obligated to promulgate fixed sound and shadow flicker rules.

Ehlebracht Appellants assert that the Commission erred by not promulgating fixed rules on wind turbine sound and shadow flicker thresholds pursuant to SDCL 49-41B-35, and, thereafter, applying the fixed rules and thresholds to the Crowned Ridge II Project. (Ehlebracht Appellants Br. at 12-18) Ehlebracht Appellants' assertion, however, misreads the plain language of SDCL 49-41B-35.

It is well-established that when the language of statute or regulatory rule administered by the Commission is "clear, certain and unambiguous," the court's function is to follow the clearly expressed meaning. *In re Black Hills Power,* 2016 SD 92, ¶ 9, 889 N.W.2d 631, 634, quoting *Citibank, N.A. v. S.D. Dep't of Revenue*, 2015 S.D. 67, ¶ 12, 868 N.W.2d 381, 387. In the instant case, the language of SDCL 49-41B-35 is clear, certain, and unambiguous that the Commission has discretion, not the legal obligation, to implement rules:

> To implement the provisions of this chapter regarding facilities, the commission shall promulgate rules pursuant to chapter 1-26. Rules **may be adopted** by the commission:
>
> (1) To establish the information requirements and procedures that every utility must follow when filing plans with the commission regarding its proposed and existing facilities;
>
> (2) To establish procedures for utilities to follow when filing an application for a permit to construct a facility, and the information required to be included in the application; and

> (3) To require bonds, guarantees, insurance, or other requirements to provide funding for the decommissioning and removal of a wind energy facility.

(emphasis added).

SDCL 49-41B-35 plainly provides the Commission with the discretion to implement rules related to informational filing requirements, procedures for the consideration of proposed facilities, and bonds or other financial instruments for the funding of decommissioning, without any reference to a legal requirement to promulgate fixed rules for sound or shadow flicker thresholds. Thus, there is no reading of the clear, certain, and unambiguous language in SDCL 49-41B-35 that can be interpreted as a directive from the South Dakota Legislature to the Commission mandating it to promulgate fixed sound and shadow flicker rules. Ehlebracht Appellants further erroneously reference the prefatory sentence of SDCL 49-41B-35 as a mandate to issue fixed sound and shadow flicker rules. The prefatory sentence of SDCL 49-41B-35 unambiguously requires that any rules adopted by the Commission shall follow the procedural requirements of Chapter 1-26. Unquestionably, the Legislature's directive to follow the procedural requirements of Chapter 1-26 when promulgating rules is not a mandate for the Commission to promulgate any rules, much less fixed rules on sound and shadow flicker thresholds.[1] Thus, contrariwise to the assertion of Ehlebracht Appellants, SDCL 49-41B-35 cannot be read as a legislative mandate for the Commission to adopt fixed rules on sound and shadow flicker, and, therefore, the Commission was well within

[1] For example, SDCL 1-26-4 and its subparts set forth the notice, service, and hearings requirements for the adoption, amendment, or repeal of rules.

its discretion to impose sound and shadow flicker thresholds based on the record in the underlying proceeding.

The Ehlebracht Appellants also speciously cite *Smith v. Canton Sch. Dist. 41-1,* 599 N.W.2d 637 (S.D. 1999) for the proposition that without "fixed" thresholds on sound and shadow flicker the Commission's decision was arbitrary and capricious. (Ehlebracht Appellants Br. at 14) The Court in *Smith* makes no such sweeping holding. Instead, the legal error found by the court in *Smith* was based on the Canton School Board's rewriting and ignoring of court imposed factors when it denied petitioner's request for a minor school boundary change. Unlike *Smith*, there are no court or legislatively imposed factors controlling sound and shadow flicker thresholds, and, therefore, Appellants' citation to *Smith* as authority is unavailing.

Ehlebracht Appellants also make a vague and unsupported assertion that the Commission's imposition of the sound and shadow flicker thresholds based on the record in the underlying proceeding implicates the equal protection clauses of the South Dakota and Federal Constitutions.[2] (Ehlebracht Appellants Br. at 14-15) First, Ehlebracht Appellants, however, did not identify equal protection as an issue in the underlying proceeding nor did they identify it in their Notice of Appeal or Statement of Issues.

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[2] The *Fourteenth Amendment to the United States Constitution* states, "no State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." USConstAmend XIV, § 1, while *Article VI, § 18, of the South Dakota Constitution* provides that "no law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities upon which the same terms shall not equally belong to all citizens or corporations."

Consequently, this argument has been waived. *See Lagler*, 2018 S.D. 53 ¶ 42, 915 N.W.2d 707, 719 (". . . the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified"); *In Re LAC Minerals USA*, 2017 S.D. 44, ¶ 13, 900 N.W.2d 283, 288 (holding that the issue was waived because it was not presented during underlying administrative proceeding).

Second, Ehlebracht Appellants' vague reference to constitutional provisions as applicable to the underlying proceeding is raised without any supporting legal authority, which requires that the assertion be considered waived. *See Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363, 377 ("Failure to cite relevant supporting authority is a violation of SDCL 15-26A-60(6) and is deemed a waiver."), citing *State v. Boston*, 2003 S.D. 71, ¶ 27, 665 N.W.2d 100, 109.

Third, even if the equal protection claim was properly before the Court, Ehlebracht Appellants' assertion has no merit. Equal protection is not implicated provided that the Commission articulates a rational basis for its decision on sound and shadow flicker in light of the legal standard. *Cheyenne River Sioux Tribe Tel. Auth. V. PUC*, 595 N.W.2d 604, 612-614 (S.D. 1999) (Commission's action did not constitute a denial of equal protection clause under the South Dakota and Federal Constitutions when Commission had a rational basis for its application of the statute); *United Hospital v. Thompson,* 383 F.3d 728, 732 (8th Cir. 2004) (federal courts use the rational basis or purpose test to evaluate an agency's action in the context of an equal protection clause challenge). Here, the legal standard does not mandate the use of the same or fixed thresholds as inferred by

Appellants, but, rather, the legal standard requires that the sound and shadow flicker thresholds satisfy the statutory imperative of SDCL 49-41B-22(c) that the Project not substantially impair the health and welfare of the inhabitants. Simply put, provided the Commission articulates a rational basis addressing the statutory imperative, then inhabitants are treated equally under South Dakota and Federal law. As shown in Section I B, *infra*, the Commission articulated an amply rational basis, based on substantial evidence, that the sound and shadow flicker thresholds imposed met SDCL 49-41B-22(c)'s statutory requirement that the Project not substantially impair the health and welfare of inhabitants. Accordingly, if the Court addresses appellant's waived equal protection arguments, the Court should conclude that Commission's decision does not implicate equal protection clauses of the South Dakota and Federal Constitutions.

B. The Commission determination on sound and shadow flicker thresholds for the Project was well-reasoned and based on substantial evidence.

The evidentiary record the Commission relied on to determine the sound and shadow flicker thresholds for Crowned Ridge II includes hundreds pages of studies, reports, and expert testimony from sound and shadow flicker modelers, a Ph.D., and a medical doctor who directly address the applicable statutory question of whether the Project will substantially impair human health or welfare, SDCL 49-41B-22(c). Based on the substantial evidence in the record, the Commission concluded:

> 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

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> be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the receptors were assumed to be downwind of the wind turbines; 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 Deuel Harvest and Crowned Ridge Wind I wind projects. Further, Applicant agreed to Permit Condition No. 27 in order to further reduce certain non-participant sound levels, consistent with the proposal advocated by Staff witness Mr. David Hessler. Pursuant to Permit Condition No. 26, Applicant agreed to a post construction sound protocol to be used in the event the Commission orders post construction sound monitoring.
>
> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow and flicker for the Project to no more than 30 hours for all participants and nonparticipants inclusive of cumulative impacts from Deuel Harvest and Crowned Ridge Wind I, with the understanding that wind turbine CRII-Alt-3 will need to be curtailed to ensure the shadow and flicker is no more than 30 hours at receptor CR1-C10-P. Applicant also used conservative assumptions, such as the greenhouse-mode, no credit for blockage due to tree and assumed the wind turbines were operating 100% of the time to model shadow and flicker, which, in turn, produces conservative results.
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge Wind II 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 Wind II 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 14241-14242 footnotes citing record evidence omitted).

The above passages and the record evidence cited within them demonstrate that the Commission's determination that the sound and shadow flicker thresholds satisfied SDCL 49-41B-22(c)'s requirement that the Project will not substantially

impair the health and welfare of the inhabitants was well-reasoned and support by substantial evidence. *Application of Svoboda*, 54 N.W.2d 325 at 327 ("The court's authority extends only to a determination whether the Commission acted with its power and whether it's determination is supported by substantial evidence."), citing *Application of Dakota Transp., Inc.*, 291 N.W. at 593, 595-96.

In addition, in Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge II 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 and a shadow flicker threshold of no more than 30 hours annually unless consented to by the owner of the residence. (AR 14250-14251 and 14255, Condition Nos. 26 and 35) *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 the resubmittal of the application to consider additional information).

Indeed, much of Ehlebracht Appellants' brief on why the Commission should be required to adopt fixed sound and shadow flicker rests on a factual disagreement with the Commission's sound and shadow flicker thresholds. However, any reasonable reading of the Order demonstrates the Commission's findings and ultimate conclusion that, pursuant to SDCL 49-41B-22(c), the sound and shadow flicker 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. Furthermore, clearly a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge II (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 and shadow flicker 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 as being sufficiently adequate to support the conclusion). Further, the Commission's findings, conclusions, and imposition of the sound and shadow flicker thresholds in Condition Nos. 26 and 35 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 and shadow flicker was within its 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); *Application of 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 Northwestern Pub. Serv. Co.*, 297 N.W.2d 462, 467 (S.D. 1980) ("It is not for this court to weigh the evidence."); *Application of 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 and shadow flicker was well-reasoned, and was based on ample and substantial evidence, the Court should affirm the Commission's conclusion that the sound and shadow flicker produced from the Project will not substantially impair the health or welfare of inhabitants.

Appellants have also 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 25 feet away from the residence of each of the Ehlebracht Appellants is substantially below the 45 dBA nonparticipant threshold established in Condition No. 26: Ehlebracht 42.2 dBA; Greber 41.8 dBA; Rall 40.5 dBA; and Kranz 41.2 dBA. (AR 7030-7034). For additional context, the record shows that the sound produced from the Project for the Ehlebracht Appellants is approximately that of a soft whisper in at a distance of 3 feet. (AR 159) Similarly, for shadow flicker, these Appellants are well below the

Commission-imposed shadow flicker threshold of 30 hours annually established in Condition No. 35: Ehlebracht 3 hours and 14 minutes annually; Greber 14 hours and 22 minutes annually; Rall 13 hours and 27 minutes annually; and Kranz 3 hours and 44 minutes annually. (AR 7030-7034) Consequently, there is no showing of prejudicial effect, because the Project's sound and shadow flicker for the Ehlebracht Appellants are below the Commission-imposed thresholds that the substantial evidence shows will not substantially impair the health and welfare of the inhabitants.

C. Crowned Ridge II carried its burden that the Project will not substantially impair the health or welfare of inhabitants.

The Christenson Appellants assert that Crowned Ridge II did not carry its burden that the Project will not substantially impair the health of inhabitants because it did not submit the following: (1) an infrasound study; (2) a low frequency study; and (3) an ambient sound study. (Christenson Appellants Brief at 18-20) Contrary to Appellants assertion, as established in Section I B, *supra*, the Commission concluded that Crowned Ridge II had met its burden that the Project would not substantially impair the health or welfare of the inhabitants under SDCL 49-41B 22(c). In doing so, the Commission relied on substantial evidence, including Crowned Ridge II's pre-construction sound studies, to find that sound thresholds would not substantially impair the health or welfare of the inhabitants under SDCL 49-41B 22(3). (AR 14241-14242; 14244-14245; 14250-14251). Further, contrary to the inference of Christenson Appellants, there is no statute or regulation that requires an applicant to submit the studies referenced by Christenson Appellants. Notwithstanding the absence of any legal requirement to submit these

studies, Crowned Ridge II also submitted testimony and exhibits from Mr. Lamapter, Dr. Ollson, and Dr. McCunney who demonstrated that the infrasound or low frequency sound studies referenced by Christenson Appellants have no bearing whether the Project will substantially impair the health and welfare of the inhabitants. (AR 1093-1118; 2009-2348; 3048-3179) Therefore, not only is there no legal requirement for Crowned Ridge II to present the sound studies reference by Christenson Appellants, the record in this proceeding shows that infrasound or low frequency sound studies are not required to assess whether the Project will substantially impair the health of the inhabitants. Indeed, the pre-construction sound studies submitted by Crowned Ridge II in the underlying proceeding were the same as submitted in the Crowned Ridge I proceeding, and when deciding similar arguments in the appeal of the Crowned Ridge I wind project, Judge 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). Accordingly, similar to its decision in the Crowned Ridge Wind I proceeding, the Commission's rationale in the Crowned Ridge Wind II Order on sound was well-reasoned, within its discretion, and based on ample and substantial evidence. Therefore, 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.

Christenson Appellants have also failed to show the Commission's actions had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. Similar to Ehlebracht Appellants, Christenson Appellants cannot show prejudicial effect, because their residences are below the Commission-imposed sound threshold: Appellants Christenson's sound was modelled to be 41.2 dBA, while Appellant Robish was modelled to be 30.0 dBA – both well below the Commission-imposed threshold of 45 dBA. (AR 7030-7034)

Christenson Appellants also make vague and unsupported inferences that the health, welfare, and safety concerns were ignored or not adequately answered by Crowned Ridge II and other witnesses. (*See e.g.*, Christenson Appellants Brief at n. 13.) Contrary to these speculative inferences, the Commission's Order is well-reasoned, supported by substantial evidence, and imposed 49 conditions. Christenson Appellants' vague inferences and the unsupported suggestion that the Commission somehow erred by not requiring more information from Crowned Ridge II is an inappropriate attempt to have the appeal devolve into a re-trying of the facts of Crowned Ridge II, including having the Court weigh evidence and second guess the Commission. That is not the Court's role; the Court's role is to determine whether the Order's findings, conclusions, and conditions satisfy the statutory criteria of SDCL 49-41B-22 and were based on substantial evidence. *Presell v. Mont. Dakota Utils., Co.,* 2015 S.D. 81¶ 8, 871 N.W.2d 649 at 652; *Application of Svoboda*, 54 N.W.2d at 328; *In Re Northwestern*, 297 N.W.2d at 467; *Application of Dakota*, 291 N.W. at 593, 595-596. In the instant case, unlike Christenson Appellants' vague references, the Commission's conclusions that the Project

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satisfies the statutory criteria articulated in SDCL 49-41B-22 were based on substantial evidence as well as 49 imposed conditions. (AR 14230-14258) Therefore, the Court should affirm the Commission's conclusions and conditions.

D. There is no legal basis for the Commission to apply SDCL 43-13-2(8) to the Project.

Ehlebracht Appellants claim the Commission should have applied SDCL 43-13-2(8) to the Project.[3] According to Ehlebracht Appellants, this statute, which was enacted in 1877, prohibits the casting of shadow flicker on a landowner's property unless Crowned Ridge II holds an easement from that landowner. (Ehlebracht Appellants Br. at 18-27) Ehlebracht Appellants' assertion is unavailing, because (1) it is not within the Commission's statutory authority to interpret and apply SDCL 43-13-2(8) and (2) there is no controlling law supporting the application of SDCL 43-13-2(8) to the Project.

A well understood maxim of administrative law is that an agency, such as the Commission, is a creature of statute. *Sunnywood Common Sch. Dist. No. 46 v. County Bd. of Edu.* 131 N.W.2d 105, 110 (S.D. 1964). SDCL 43-13-2 resides in a statutory scheme related to easements, which is wholly outside the statutes the Legislature enacted for the Commission to administer. In the instant case, the statutory mandate is for the Commission to evaluate the Project against the criteria set forth in SDCL 49-41B-22, none of which mandate the application SDCL 43-13-2(8) to wind energy facilities. The Commission, therefore, properly did not apply SDCL 43-13-2(8) to the Project, as it is

[3] 43-13-2(8) reads: "The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances, and are called easements: . . . (8) The right of receiving air, light, or heat from or over, or discharging the same upon or over land;"

not a statute it has been directed by the Legislature to administer. Further, it is axiomatic that the Commission is not a court, and, therefore, is not legally empowered to decide the private property rights Ehlebracht Appellants allege arise under SDCL 43-13-2(8). *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp.*, 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions.") quoting *Application of Svoboda*, 54 N.W.2d at 327. Thus, absent controlling South Dakota precedent interpreting SDCL 43-13-2(8) as prohibiting the casting of shadow flicker on the property of a non-easement holder, the Commission correctly did not seek to interpret the statute in the context of the Project. Tellingly, even the Ehlebracht Appellants concede that there is no controlling South Dakota *corpus juris* on SDCL 43-13-2. (Ehlebracht Br. at 19: "The South Dakota statute [SDCL 43-13-2] has gone unnoticed, or at least uncited, in reported cases."). Hence, fundamentally, Ehlebracht Appellants' hypothetical that SDCL 43-13-2(8) could be interpreted as prohibiting the Project from casting shadow flicker on a non-easement holder's property is a wholly insufficient basis to find that there was a mandatory legal nexus for the Commission to apply the statute to the Project.

E. The Commission's Order does not constitute a regulatory taking of property without compensation or a *per se* nuisance.

The Ehlebracht Appellants loosely infer that the Commission's Order constitutes a taking of property without compensation and a *per se* nuisance, because they have not consented to the casting of shadow flicker on their property. (Ehlebracht Appellants Br.

at 27-31) However, neither of these claims are supported any authority, which requires that the claims be considered waived. *See Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d at 377. Further, even if not considered waived, Ehlebracht Appellants' mere speculation as to a future impact of the Project is insufficient to create a ripe controversy for a taking claim. *Muscarello v. Winnebago County Bd. ("Winnebago County")*, 702 F.3d 909, 913 (7th Cir. 2012) (holding that "no property of the plaintiff's has yet been taken, or will be until and unless a wind farm is built near her property – and probably not even then.") In addition, and tellingly, Appellant Ehlebracht testified in response to a series of questions from Commission Nelson that any impact from the Project no matter how minor or *de minimis* was a taking of his property.[4] (AR 13494-13495) Unquestionably, as a matter of law, minor or *de minimis* impacts do not constitute a regulatory taking of property without compensation. *Winnebago County*, 702 F.3d at

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[4] COMMISSIONER NELSON: . . . . So in responding to Commissioner Fiegen, you indicated that your property had been taken.
THE WITNESS: Yes, sir.
COMMISSIONER NELSON: Your physical property has been taken? Explain to me what has been taken or what will be taken.
THE WITNESS: It will be taken by the effects that the Applicant, what do you want to say, puts on a participant by the means of -- I could read it. "Audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radiofrequency interference, and any other effects attributable to the wind farm or activity located on the owner's property or on or adjacent property over and across owner's property effect easement."
COMMISSIONER NELSON: And so as it relates to any of those things, is there a level of those effects that you would not consider a taking of your property, or is a de minimis amount of any of those something you'd consider a taking of your property?
THE WITNESS: Honestly?
COMMISSIONER NELSON: Yes. Please.
THE WITNESS: It's going to be every one of them. Every one of them is going to affect me.
COMMISSIONER NELSON: No matter how small the amount. Is that what I'm understanding? Or is there a small amount that you wouldn't consider to be a taking of your property?
THE WITNESS: Honestly, no. They're going to take it all from me.

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913 (A taking within the meaning of the *takings clause of the U.S. Constitution* has to be an actual transfer of ownership or possession of property, or the enforcement of a regulation that renders the property essentially worthless to its owner. . . . . The 2009 Winnebago ordinance does not transfer possession of any of the plaintiff's land or limit her use of it.") (citations omitted) Similar to *Winnebago County*, not only is Ehlebracht Appellants' taking claim not ripe for adjudication, the Commission's Order does not transfer possession of Ehlebracht Appellants' property or limit their use, and, therefore, the Commission's Order does not result in a regulatory taking of property.

Likewise, Ehlebracht Appellants' speculative claim of *per se* nuisance is insufficient to create a ripe controversy. *See also Muscarello v. Ogle County Bd. of Commissioners* ("*Ogle County*"), 610 F.3d 416, 425 (7th Cir. 2010) (holding action for nuisance was not ripe where there had been no construction of the wind turbines). The Court in *Ogle County* concluded, "the windmills have not been built yet, and so it is difficult to see how they might either by causing a trespass on Muscarello's land or creating a nuisance. . . . We cannot see how the permit, unexercised, causes trespass or nuisance. . . ." *Id.*; *see also Winnebago County*, 702 F.3d at 915. Furthermore, in South Dakota it is well settled that:

> Ripeness involves the timing of judicial review and the principle that '[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote.' . . . Courts should not render advisory opinions or decide moot theoretical questions when the future shows no indication of the invasion of a right.

Boever v. South Dakota Bd. of Accountancy, 526 N.W.2d 747, 750 (S.D. 1995) (internal and other citations omitted). The *per se* nuisance claim posed by Ehlebracht Appellants is the very definition of a hypothetical question – a problem neither real, present nor imminent, but, rather, one that is abstract and hypothetical. This claim is, accordingly, is not ripe.

In addition, as already established, the Commission is not a court, and, therefore, its Order is not implicated by Appellants' vague claims of unconstitutional taking and *per se* nuisance, as it is not the role of the Commission to adjudicate such claims. Instructively, similar arguments of an unconstitutional taking and *per se* nuisance were brought against the Deuel County and Codington County approvals of Crowned Ridge II, and those arguments were rejected by the SD Third Circuit Court and South Dakota Supreme Court. *Lindgren v. Codington County*, 14CIV1-000303, Order Granting Motion to Dismiss and Granting Motion for Costs, J. Means (SD 3rd Cir. Dec. 20, 2019); affirmed by Order Directing Issuance of Judgement of Affirmance, (SD June 1, 2020); *In the Matter of Specific Exception Permit Application of Crowned Ridge II*, LLC, 19 CIV18-000061, J. Elshere (SD 3rd Cir. May 19, 2020). Similarly, the Commission's Order should be affirmed, because it does not constitute a regulatory taking or a *per se* nuisance.

2. The Commission properly found that Crowned Ridge II would comply with all applicable laws and rules.

A. The record shows Crowned Ridge II commitment and ability to comply with old and new Grant County Sound Ordinance.

Christenson Appellants assert that the Commission erred because Crowned Ridge II failed to carry its burden that the Project will comply with the Grant County Sound Ordinance in effect at the time the County approved on the Project. Christenson Appellants, however, ignore that the Commission, based on substantive record evidence, concluded that the Project can comply with both the Ordinance in effect at the time the County approved the Project as well as the Ordinance in effect shortly after the County approved the Project:

> The record in this proceeding shows that Crowned Ridge Wind II complies with both versions of the Grant County Ordinance – the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the vote. Evid. Hrg. Tr. at 217-218, 233-234, 237-239 (Haley) (February 4, 2020); Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A14-1 through Ex. A14-4 (Supplemental Testimony Sound and Shadow Flicker Studies); Ex. A21-1 through Ex. A21-3; and Ex. A28 and Ex. 29 (Rebuttal Testimony Sound and Shadow Flicker Results); and Ex. AC-19. Therefore, the record shows that Crowned Ridge Wind II will be in compliance with applicable laws, including the Grant County Ordinance.

(AR 14235) The Commission also found that Crowned Ridge II held a valid Conditional Use Permit ("CUP") from Grant County. (AR 14235-14236) Furthermore, the Commission concluded:

> The evidence submitted by Crowned Ridge Wind II demonstrates that the Project will comply with applicable laws and rules. Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any

> other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit. The record demonstrates that construction and operation of the Project, subject to the Permit Conditions, meets all applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

(AR 14235 footnotes citing record evidence omitted).

Clearly, the above passages demonstrate that the Commission's Order was based on substantial evidence in the record when it determined that Crowned Ridge II held a valid CUP from Grant County, was capable of complying with both versions of the Grant County Ordinance, and imposed Condition No. 2 requiring Crowned Ridge II to comply with all applicable county laws and rules for the construction and operation of the Project. (AR 14235-14236; 14246); *Olson v. Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (a court examines the entire record when determining whether an agency's findings are supported by substantial evidence). Accordingly, given the Commission's conclusions were based on substantial record evidence, the Court should affirm the Commission's conclusion that the Project will comply with all applicable statutes and rules.

Further, even if, *arguendo*, the Court found that the Commission abused its discretion in finding the Project will comply with the Grant County Ordinance in effect at the time Grant County voted on the Project, 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. As already shown in Section I C, *supra*, the sound produced by the Project for Christenson Appellants is below the sound thresholds established by the Commission. Furthermore, the Commission does not establish nor enforce the Grant

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County Sound Ordinance, and, therefore, Christenson Appellants' claims on which Grant County Sound Ordinance Crowned Ridge II should comply with are misdirected at the Commission, as those issues are under the purview of Grant County. Therefore, the Court should affirm the Commission's conclusion that the Project will comply with all applicable laws and rules.

B. The Commission's conditioning of the Project on the installation of an aircraft detection lighting system ("ADLS") is consistent with SDCL 49-41B-25.2.

Christenson Appellants assert that the Commission erred because it issued a Facility Permit prior to Crowned Ridge II applying to the Federal Aviation Administration ("FAA") for approval of an ADLS. (Christenson Br. at 17-18.) However, there is no legal requirement that an applicant must apply for approval of an ADLS prior to the issuance of a Facility Permit. In fact, the clear, certain, and unambiguous language of SDCL 49-41B-25.2, which mandates a wind facility be equipped with an ADLS, imposes no such requirement:

> 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.

Further, consistent with the requirements of SDCL 49-41B-25.2, the Commission-imposed Condition No. 34:

> Applicant shall apply to the Federal Aviation Administration (FAA) for approval to utilize an Aircraft Detection Lighting System. Such application shall be made to allow enough time for a FAA determination and system construction prior to the commercial operation date of the Project. If approved, the system will be operated in accordance with the applicable FAA requirements starting with the commercial operation date and for the life of the Project, subject to normal maintenance and forced outage.

(AD 14255) Condition No. 1 also requires that Crowned Ridge II ". . . file an itemized affidavit with the Commission attesting that all permits were properly obtained prior to commercial operations." Therefore, Condition No. 1 requires Crowned Ridge II show it filed for approval from the FAA for an ADLS, while Condition No. 34 requires the Project be equipped with an ADLS prior to commercial operations. (AD 14246, 14255) These conditions carry out the statutory mandates of SDCL 49-41B-25.2. Accordingly, the Court should affirm the Commission's conclusion that the Project will comply with all applicable statutes and rules, including equipping the Project with an ADLS as required by SDCL 49-41B-25.2.

C. Appellants misread the Commission Rules.

Christenson Appellants infer that ARSD 20:10:22:31 required Crowned Ridge II to provide evidence on how it would comply with federal and state regulations related to the disposal of wind turbine blades. (Christenson Appellants Br. at 9-11). Christenson Appellants, however, misread the Commission's rules, as ARSD 20:10:22:31 does not apply to the Commission's review of a wind facility. The applicable Commission Rule ARSD 20:10:22:05 reads:

> 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*

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> *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.

Under this Rule, "a facility", which includes a wind facility, must comply with the informational requirements of "§§ 20:10:22:06 to 20:10:22:25, inclusive, 20:10:22:36, and 20:10:22:39" as well as "the information in §§ 20:10:22:33.01 and 20:10:22:33.02." None of these sections require a facility to comply with ARSD 20:10:22:31. Instead, ARSD 20:10:22:31 is only applicable to an energy conversion facility, which as defined by SDCL 49-41B-2(6) is "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**." (emphasis added).

As the language of the above quoted Commission rules are clear, certain, and unambiguous, the court's function is to follow their clearly expressed meaning. *In re Black Hills Power*, 2016 SD 92, ¶ 9, 889 N.W.2d at 634, quoting *Citibank, N.A. v. S.D. Dep't of Revenue*, 2015 S.D. 67, ¶ 12, 868 N.W.2d at 387. Here, the language of 20:10:22:05 is clear, certain, and unambiguous that wind projects are not required to comply with ARSD 20:10:22:31. Accordingly, the Court should affirm the Commission's conclusion that the Project will comply with all applicable laws and rules.

Christenson Appellants also incorrectly claim there is a legal requirement for Crowned Ridge II to produce an air quality study. (Christenson Appellants Br. at 20)

The clear, certain, and unambiguous language of Commission Rule ARSD 20:10:22:21 requires that Crowned Ridge II "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." In its Application, Crowned Ridge II addressed this Rule, explaining, in detail, that the Project's operations did not implicate air quality standards, and that, at most, there would be temporary impacts from dust during construction that would be mitigated through best management practices. (AR 99-100) Based on the substantial evidence submitted in the Application, the Commission concluded: "The evidence further demonstrates that there are no anticipated material impacts to existing air and water quality, and the Project will comply with applicable air and water quality standards and regulations." (AR 14237) Hence, Christenson Appellants not only misread ARSD 20:10:22:21 as a legal obligation for Crowned Ridge II to submit an air quality study, Christenson Appellants ignore the substantial evidence relied on by the Commission that the Project does not materially implicate air quality standards and regulations, as well as Crowned Ridge II's commitment to comply with any applicable air standards and regulations. Thus, the Commission's Order should be affirmed with respect to its conclusion that the Project will comply with applicable air quality standards and regulations.

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CONCLUSION

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

Respectfully submitted this 23rd day of September 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 23, 2020, I caused the following document:

- **BRIEF OF APPELLEE CROWNED RIDGE WIND II, LLC**

to be filed and served electronically with the Clerk of Court through Odyssey File & Serve, upon the following:

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