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| STATE OF SOUTH DAKOTA ) :SS<br>COUNTY OF DEUEL ) | | IN CIRCUIT COURT<br>THIRD JUDICIAL CIRCUIT |
| *In the Matter of PUC Docket EL 19-027, Application of Crowned Ridge Wind II, LLC for a Permit of a Wind Energy Facility in Deuel, Grant and Codington Counties* | * | 19CIV20-000027<br>(as combined by the Court) |
| AMBER CHRISTENSON, and ALLEN ROBISH,<br>Appellants,<br><br>vs.<br><br>SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and CROWNED RIDGE WIND II, LLC,<br>Appellees. | * | *APPELLANTS' CHRISTENSON and ROBISH'S BRIEF to CIRCUIT COURT* |

Intervenors below and Appellants herein, Amber Christenson and Allen Robish from Codington County and Grant County, respectively, through undersigned counsel, hereby submit this brief as part of their appeal of the administrative hearing decision below and in doing so respectfully request this Court to reverse the erroneous and unwarranted final decision dated April 6, 2020, granting permit to construct the wind facility in question in Deuel County, Codington County and Grant County and, in doing so, remand this matter back to the PUC.

## PRELIMINARY STATEMENT

For ease of reference, Appellants, Amber Christenson and Allen Robish, will typically be referred to as either the "Grant-Codington Co. Appellants", or, "Appellants." Appellees in this matter will be referred to as either "PUC Appellee", or as the "Commission", or as the "PUC", as to "Crowned Ridge Wind-II," or as "CRW-II", or as "Appellee CRW-II." References herein to the extensive administrative hearing record (over 14,255 pages) below will be made by the letters "AR" followed by the applicable administrative record page number(s), where such are able to be so noted.

References to any administrative hearing transcript(s) below will typically be made by the letters "AHT:" followed by the applicable page number(s).

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

As generally referenced above, Appellants Christenson and Robish appeal from PUC Appellee's April 6, 2020, Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; and Notice of Entry as related to its issuance of a wind energy facility permit to Appellee CRW-II. Based on the adverse administrative hearing decision below, the appeal in this matter is taken pursuant to the provisions of SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants each timely and properly filed their respective Notice of Appeals on May 1, 2020 and May 5, 2020, in both Codington and Grant Counties. Thereafter, following PUC Appellee's unopposed motion to change venue (May 11, 2020), the circuit court, pursuant to SDCL § 1-26-31.1, entered its Order changing venue herein (May 19, 2020), and this Court ordered that the Intervenors file(s) would be thereafter combined into this appellate file, 19CIV-000027. On or about July 23-24, 2020, each of the Appellees herein were contacted by your undersigned, on behalf of Appellants, and, given a number of intervening scheduling circumstances for your undersigned, Appellees were courteous enough to agree to Appellants herein filing their jointly filed circuit court brief in this matter by the below-referenced date.

## STATEMENT OF ISSUES

ISSUE 1

*Whether the Agency/PUC's findings of fact were clearly erroneous and its corresponding conclusions of law amounted to reversible error under SDCL § 1-26-36, in part, since Applicant failed to meet its burden of proof and/or its burden of going forward as required by SDCL § 49-41B-22 and/or ARSD 20:10:01:15.01?*

> Over the objection and opposition filed by Intervenors on March 2, 2020 and as outlined again on March 17, 2020, Commission subsequently entered its Findings of Facts (1-73) and Conclusions of Law (1-16). AR pgs. 14232-14245.

ISSUE 1-A

*Whether Appellee Commission committed prejudicial error in violation of statutory provisions insofar as Applicant admittedly failed to carry its burden of proof by its failure to establish compliance with all applicable laws and rules since it relied on an erroneous version of the Grant County Ordinance, not in effect at the time of its 2018 locally approved Conditional Use Permit ("CUP")?*

Appellee PUC wrongly and prejudicially entered Finding of Fact No. 18 (FN. 24) in erroneously finding, in essence, that Appellee CRW-II will be in compliance with applicable laws, including the Grant County Ordinance since, directly contrary to testimony by Jay Haley, that Appellee CRW-II "complies with both versions of the 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 [December 2018 CUP] vote. AHT pgs. 233-234; AR pgs. 9078-9079.

ISSUE 1-B

*Whether Appellee Commission committed error in violation of statutory provisions insofar as Applicant failed to meet the statutory requirements of SDCL § 49-41B-25.2 by and through its failure, at the time of the Commission's hearing on the merits of its wind energy facility permit, of being equipped with - or even having applied for - the necessary and statutorily required aircraft detection lighting system (ADLS)?*

Appellee PUC wrongfully granted the permit on April 6, 2020, prior to Applicant having been approved for or being equipped with the statutorily required and operational aircraft detection lighting system. AHT pgs. 76-77 and AHT pgs. 86-87.

ISSUE 2

*Whether Appellee Commission, failed to receive and consider Appellee Crowned Ridge Wind II, LLC's complete application for a wind energy facility permit through the time of the evidentiary hearing herein contrary to the requirements of South Dakota law, pursuant to SDCL 49-41B-22 (3), including the submission for review of a pre-construction sound or health study in each (or any) of the adversely affected counties?*

Appellee CRW-II failed to initiate or complete a pre-construction sound study in any of the three (3) adversely affected counties in the project area.

## STATEMENT OF FACTS

Crowned Ridge Wind-II, LLC, as a wholly owned indirect subsidiary of NextEra Energy Resources, LLC, filed its Application with the Commission on July 9, 2019, for a Wind Facility Permit for a wind energy conversion facility to be located in in Codington, Grant and Deuel Counties. *See*, AR pgs. 000001, 000011. The proposed Application indicated that the Project was to include up to 132 wind turbine generators, access roads to turbines and associated facilities, underground 34.5-kilovolt (kV) electrical collector lines, underground fiber-optic cable, a 34.5-kV to 230-kV collection

substation, two permanent meteorological towers, and an operations and maintenance facility. As set forth within the Appellee CRW-II's Application, Crowned Ridge Wind-II has entered into a purchase and sale agreement under which it planned to obtain the permit herein and construct the Project and later transfer the Project, along with its facility permits to Northern States Power Company. AR pgs. 000011. Pursuant to state statute then, the Commission was required to issue a written decision within only nine (9) months of receiving Appellee CRW-II's Application.

After receipt of the Application, the Commission received several applications for party status. As applicable herein, party status was thereafter granted for Amber Christenson and Allen Robish, as Intervenors/Appellants herein, at the Commission's regularly scheduled meeting on July 25, 2019; and in addition, on August 21, 2019, Intervenor status was also granted to at least five (5) additional persons, Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall and Laretta Kranz, all being represented by attorney A.J. Swanson, at the Commission's regularly scheduled meeting.

The Commission scheduled a public input meeting for August 26, 2019, in Watertown, SD, during which Appellee CRW-II was to present a brief description of the proposed wind energy facility project to those persons interested in the same and said persons would be permitted to present their views, comments and questions regarding the Application. The Commission also set the deadline for party status (i.e., intervention deadline) for September 9, 2019.

Thereafter, on September 17, 2019, during the PUC's regular meeting, the Commission entered a procedural schedule requiring intervenors to submit pre-filed testimony by December 9, 2019, and indicating for the parties to provide witness lists, exhibit lists, and pre-filed by January 29, 2020. Thereafter, the administrative (evidentiary) hearing was scheduled for February 4-7, 2020. *See*, February 4th: AR pgs. 8844-9133; February 5th: AR pgs. 13309-13625; February 6th: AR pgs. 13630-13771. It was also within and as a part of its pre-hearing meeting (January 29, 2020) that the Commission denied the Motion by Appellee CRW-II attempting to make confidential Section 11.10, the effects clause of the lease(s) offered by the wind farm developer to potential project participants.

None of the intervenors submitted pre-filed expert testimony. Intervenors Garry Ehlebracht, Steven Greber, Amy Rall and Laretta Kranz submitted pre-filed direct testimony on December 12, 2019.

Early in the PUC's evidentiary hearing on February 4, 2020, the hearing parties agreed to the admission of all pre-filed and hearing-related exhibits for foundation purposes. Appellee CRW-II then presented their witnesses and corresponding testimony for Applicant. As part of cross-examination of Applicant's initial witness, senior project manager Tyler Wilhelm, who was responsible for the development, permitting, regulatory compliance, and meeting the commercial operations date of the project, Intervenor Christenson presented and had admitted into the hearing exhibit AC-18, which was actually the Grant County ordinance in effect at the time the Grant County Conditional Use Permit Application was made and approved in 2018. *See*, AR pgs. 8727, 8796; *cf.*, AR pgs. 13074-13112. Ultimately, however, Wilhelm admitted that the project was actually "in compliance" with the different/less stringent requirements that Grant County was "working toward adopting" in ordinance to be in effect on and after January 28, 2019 [i.e., for instance in Grant County, [w]ind turbine noise levels at the less stringent - inapplicable - ordinance requirements of less than 45 dBA "measured twenty-five (25) feet from the perimeter of existing non-participating residences, businesses and buildings..."[1]] AHT pgs. 46-55; AR pgs. 8891-8900.

It should be reiterated that Appellee CRW-II's project is to be built in three northeast South Dakota counties: Deuel, Codington and Grant. Ordinances vary between counties in distance and noise, in particular. Not only does each county vary in its siting distance and noise threshold, but within each county there are separate distances and thresholds for residents within each county,

[1] *See*, Exhibit A19-3, [new] Grant County Ordinance Section 14: *Noise*. AR pgs. 3207-3215; as compared to Exhibit AC-18 at AR pg. 8796: "Noise level shall not exceed 50 dBA ... at the perimeter of the principal *and accessory structures* of existing off-site residences, businesses and buildings..." [Emphasis added.] *See/cf.*, Exhibit A, for ease of comparison of the applicable (2018) Grant Co. noise/sound ordinance provision vs. the inapplicable (2019) Grant Co. noise/sound ordinance provision, as attached hereto and incorporated herewith in full as part of Appellants' Brief.

depending on where the residence is located. Equal protection is not applied to each principal and/or accessory structure(s) in the negatively impacted area of this project. Moreover, as borne out at hearing, Appellee CRW-II failed to provide any evidence on and to include in its key sound study information related to 179 sound receptors (structure locations) in the adversely impacted area.[2]

In addition, later in the PUC's evidentiary hearing, despite knowing that such a facility, pursuant to state statute, can "not substantially impair the health, safety or welfare of [neighboring occupants]" – Applicant, Appellee CRW-II, presented proposed experts who are capable of conducting air quality studies, yet its witnesses seemingly acknowledged that no air quality study was published or submitted, nor, as it was disclosed, did Applicant provide plans to complete an air quality study of the project area. AHT pgs. 313-314; AR pgs. 13373-13374.[3]

Moreover, it was also learned at hearing that, as part of its permit request and prior to the administrative hearing herein, Appellee CRW-II had failed to even apply for the necessary and statutorily required aircraft detection lighting system (hereinafter referenced as "ADLS", where

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[2] *See*, Jay Haley testifying for Appellee CRW-II, Q: "[The CUP] was passed under the old [Grant County] ordinance. So who directed you to drop the accessory structures. A: I don't recall, but -- I can tell you that when -- at the time that the accessory structures were a part of the ordinance we calculated -- we went out and surveyed all of the accessory structures, and I calculated all of them and produced reports with those results. [However] [w]hen the ordinance got changed, I then took all the accessory structures back out." AHT pgs. 233-234; 237-238; AR pgs. 9078-9079; 9082-9083. As a result, Appellee CRW-II could not persuasively testify at hearing in February 2020 that the projected wind farm noise levels would not exceed the new 45 dBA local ordinance requirement. In fact, Exhibit AC-19 (AR pgs. 8686-8723, at pg. 8694 & pgs. 8705-8710) actually indicates that, directly contrary to Appellee PUC's Finding of Fact Nos. 18 & 46, there were and are, in fact, *over fifty* (*50*) locations/structures where the realistic sound would, as shown by and through Appellee CRW-II's own Final Report as to both CRW-I and CRW-II, fall into/exceed that locally prohibited 45-50 dBA range.

[3] *See*, Applicant's witness Rich Lampeter was asked by Intervenor Christenson: "Q: Did Crowned Ridge Wind II ask you to perform a preconstruction sound modeling study? A: Yes. That study was conducted and they requested it. Q: And that's the study you were talking about that's not been published or submitted? A: That's correct. We went and collected the data and *put together some draft summary findings*, and that's where it currently stands. … Q: Did Crowned Ridge Wind II ask you to perform any studies or modeling regarding low frequency noise or infrasound. A: *No*. Q: According to your resume, you have experience in air quality modeling. Did Crowned Ridge Wind II ask you to perform any air quality study or model for this project? A: *No*." [2/5/2020, AHT, page 314]; *see also*, ARSD 20:10:22:21: The applicant *shall provide evidence* that the proposed facility will comply with air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted. [Emphasis added.]

appropriate).[4] That is, Tyler Wilhelm also testified at hearing before the Commission that they were not (yet) applying for ADLS approval from the FAA; however, they were "targeting" in their planning to do that in April 2020 – after the PUC's permit decision.[5] In sum, as part of this record, Appellee CRW-II, as Applicant, among other key issues, specifically fell short in establishing by a preponderance of the evidence that it had the required approval *and* necessary operability[6] of ADLS lighting related to the turbines in/for this wind farm project as required by SDCL § 49-41B-25.2.

Given the extensive length of the underlying record in this matter, any additional relevant facts will be discussed, as may be necessary, within Appellants' argument portion of its brief herein.

## ***ARGUMENT:***

*-STANDARD OF REVIEW-*

This Court's review of the South Dakota PUC's decision granting Applicant/Appellee CRW-II's application for a wind energy facility is controlled by SDCL § 1-26-36. *Tebben v. Gil Haugen Const., Inc.,* 2007 SD 18, ¶ 5, 729 NW2d 166, 171. SDCL § 1-26-36, in turn, provides, in pertinent part, as follows:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if

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[4] *See*, § 49-41B-25.2: 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. [Emphasis added.]

[5] Actually, the record only reflects that Appellee CRW-II, indicated to the PUC on March 17, 2020 at Appellee PUC's post-hearing final proceedings that it had submitted such application on or about March 12, 2020. *See*, Wilhelm testimony, AHT pgs. 76-77 and AHT pgs. 86-87 [AR pgs. 8921-8922; AR pgs. 8931-8932]; *cf.*, March 17, 2020, AHT pgs. 7-8; 11-12.

[6] As of early June 2020, Crowned Ridge Wind acknowledged to Appellee PUC that there was, in fact, "an issue with the communication with the on-site ADLS server" and that a "subject matter expert is investigating the issue [with the ADLS]." *See*, June 9, 2020, filed letter to PUC; following fine imposed by Appellee PUC on Crowned Ridge Wind based on a lack of operational ADLS, as noted in the public PUC docket, EL 20-002. https://puc.sd.gov/Dockets/Electric/2020/EL20-002.aspx.

substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. ...

As such, the Commission's factual findings are, of course, reviewed herein under the clearly erroneous standard. *In re Otter Tail Power Co., ex. rel. Big Stone II,* 2008 SD 5, ¶ 26, 744 NW2d 594, 602. Conclusions of Law, however, are to be reviewed based on a de novo standard. *Id.* As the court is also aware, mixed questions of law and fact are fully reviewable. *Kuhle v. Lecy Chiropractic,* 2006 SD 16, ¶ 16, 711 NW2d 244, 247.

Issue 1. Appellee PUC's findings of fact were clearly erroneous and its corresponding conclusions of law amounted to reversible error under SDCL § 1-26-36, in part, since Applicant failed to meet its burden of proof and/or its burden of going forward as required by SDCL § 49-41B-22 and/or ARSD 20:10:01:15.01.

As the Court is aware, SDCL § 49-41B-22, as related to Applicant's minimum threshold burden of proof in administrative hearing matters such as this, provides that:

The applicant has the burden of proof to establish by a preponderance of the evidence that:

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

from the applicable local units of government is in compliance with this subdivision. [Emphasis added.]

*See also*, ARSD 20:10:01:15.01 ("In any contested case proceeding, the… applicant… has the burden of going forward with presentation of evidence…")

Intervenor/Appellants initially point to Appellee CRW-II's failure to meet its burden below, through at least witness Mark Thompson as its Manager of wind engineering within the engineering and construction organization of NextEra Energy, insofar as his failure to provide evidence, let alone a preponderance of evidence, as to when/how/who CRW-II would use or otherwise undertake to properly comply with either federal or state standards and regulations for the project's plan related to "generation, treatment, storage, transport and disposal of solid or radioactive waste generated by the proposed [energy] facility and evidence that all disposal of [such] waste will comply with [such] regulations." ARSD 20:10:22:31. In that regard, at the PUC's administrative hearing below what appears to be the only related exchange with Mr. Thompson on the foregoing topic went as follows:

> Q: …So, at the end of life of this project there will be 396 blades and many more during the life of the project… So just at the end of [the project] life that will require a disposal of 9,980,575 pounds of refuse, or the shipping weight is 11,840,004 pounds of refuse. Not knowing if any of the blades are toxic at this point, which [you] don't believe they are according to you earlier, … where is Crowned Ridge II intending to dump 10 to 12 million pounds? And that number would double if there was the – the other project would be at the same time. And I understand now that those are different projects. So we'll just talk about 10 to 12 million pounds of blade refuse. Where have you made plans to dump that much blade refuse? And that doesn't include any rebar, cement, anything else. Just the blade refuse.
>
> *Thompson:* So as it stands right now, you're correct. They would be disposed of in a landfill, pursuant to applicable laws. The plan – and I assume that you mean at the end of the life of the project.
>
> Q: Yes.
>
> *Thompson:* The plan as it stands now is to cut these blades up into pieces for transport and dispose of them in landfills. Now this is usually a contracted process. And the landfills could either be local or off-site or out of state. Given that we're over 20 years away, we think that there would be, you know, processes that are developed or put in

place to *maybe* recycle some of these. So disposing of these blades in landfills I think is the worst-case scenario or I would say the last resort. So I think with the options that are *possibly under development*, you could see that the amount of refuse going to these landfills could be significantly less. … As far as the weight and the amount of refuse, when you compare that to [some] landfill, it's relatively small for the amount. And, again, *we're hoping that at the end of the day or the end of life [of the project] we'll find a way to recycle these* Fiberglass blades. Or even reuse them.

Q: How long have they been using Fiberglass blades in this industry? How many years do you think?

*Thompson:* Oh my God. My first ever wind site that I went to in California … they were Fiberglass blades there. And that site was built in the '80's. So, it's been a long time.

Q: Okay. And they haven't found a way to recycle them as of yet, and that's, oh my gosh, 40 years. …

*Thompson:* Oh, *sometimes things change, really overnight sometimes*. …
[Emphasis added.]; AHT pgs. 185-187; AR pgs. 9030-9032; *see also*, AHT pg. 358.

To be clear, under the legal requirements for Appellee CRW-II to apply and for Appellee PUC to approve or grant such an energy permit, it was not/is not sufficient under ARSD 20:10:22:31 for the Applicant nor Commission to fail to put forward a meaningful plan as compared to a vague (and likely unrealistic) "hope" that "sometimes things change" which may possibly, potentially or, hopefully, lead to a viable and recognizable plan for a wind farm like this to reasonably articulate its lawful plan to appropriately "treat, store, transport and dispose of" the vast amount of "solid or radioactive waste generated by this [energy] facility" as well as to meet its burden to affirmatively provide "*evidence that all disposal of [such] waste will comply with any federal or state regulations* having jurisdiction" over such volumes of uniquely cumbersome waste material, especially in light of the significant amount of such turbines and all turbine blades all being delivered and constructed in the concentrated and/or saturated area of northeastern South Dakota.

Appellants therefore submit that Appellee CRW-II generally relaying that it "hopes" to try to either recycle at least *10-12 million pounds of project-related refuse* or dispose of the same in some landfill(s) somewhere, either in South Dakota or in some other state, is *not* providing information *and*

required evidence that "all disposal of [such] waste will comply with standards and regulations of any federal or state agency having jurisdiction [over such waste removal]." *See*, ARSD 20:10:22:31. As a result, Appellants submit that such a failure amounts to an error of law insofar as Appellee PUC's apparent oversight in this regard failed to make Appellee CRW-II meet its burden of proof in this regard and/or to insure that the facility will comply with all applicable laws and rules or that, in this regard, the facility will not substantially impair the health, safety or welfare of the inhabitants, like Appellants. *See generally*, *In re Black Hills Power, Inc.*, 2016 S.D. 92, ¶¶ 9, 16, 889 NW2d 631, 634 and 636 (Question/issue as to meaning of administrative rule/regulatory language and whether Commission erred in finding that proponent had met its required burden of proof – where, in stark contrast to this case, the PUC took "a great deal of evidence" as related to the administrative rule in question). However, in the instant case, the above-referenced failure by Appellee CRW-II to carry its burden of proof pursuant to ARSD 20:10:22:31, in part, highlights that Findings of Fact Nos. 18 and/or 66 below are, at a minimum, clearly erroneous, to the direct prejudice of local inhabitants like Intervenors and Appellants herein. Furthermore, as outlined, Conclusion of Law No. 9 is erroneous and subject to reversal given Appellee CRW's failure to address/comply with ARSD 20:10:22:31.

> Issue 1-A. Appellee Commission committed prejudicial error in violation of statutory provisions insofar as Appellee CRW-II admittedly failed to carry its burden of proof by its failure to establish compliance with all applicable laws and rules since it relied on an erroneous version of the Grant County Ordinance, not in effect at the time of its 2018 locally approved Conditional Use Permit ("CUP").

As known and understood below by Appellee PUC and Appellee CRW-II, as the Applicant, CRW-II had previously (in 2018) secured from the three (3) counties in this case (Deuel County, Codington County and Grant County) conditional use permit(s) (hereinafter "CUP") in order to attempt to pre-address, so to speak, local laws and rules related to the operation of a large wind farm over the approximately 60,996-acres of land in northeastern South Dakota. In one of those adversely affected counties, Grant County, Appellee CRW-II applied for its CUP on September 17, 2018, and,

ultimately, the Grant County CUP was approved and granted pursuant to and under the local authority of Grant County Ordinance 2004-01.[7] Important to this issue is the fact that such Grant County Ordinance was and is the governing ordinance under which Appellee CRW-II's actions and/or key inactions must now be viewed/reviewed by this Court.

Fortunately, however, in this case the Court has applicable guidance as to how to view and consider this issue. In that regard, Appellants respectfully note that *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, ¶ 14, 598 NW2d 861, 864-865, provides important and applicable clarification and guidance in this matter. In *Van Zanten* it was outlined that, in the summer of 1997, petitioners applied to the Lake County Board of Commissioners for a conditional use permit to construct an 1,100-unit hog-finishing unit. The CUP was approved by Lake County on August 19, 1997. Shortly thereafter, in September 1997, Lake County's CUP decision was appealed to circuit court by the neighboring property owners. On appeal, the circuit court had some housekeeping type concerns with the legal description that had been advertised prior to the earlier CUP hearing and it was essentially agreed by the parties and the court to send the CUP back to the County simply to correct the legal description involved in the (prior) CUP approval. Once the legal description was corrected, the circuit court re-considered the matter. However, in the interim and up to the point of the circuit court re-looking at the CUP, Lake County revised its ordinances related to such CUP(s). In fact, on the very day (January 20, 1998) that Lake County was again approving Van Zanten's CUP – the new/revised CUP ordinance regulations took effect. Thereafter, the circuit court ruled that, as part of the challenge and ruling, that the (new/revised) ordinance in effect at the time of Lake County's subsequent CUP-issuance should govern the review of such CUP. *Van Zanten*, ¶ 10, 598 NW2d at 863. However, the Supreme Court overturned that lower tribunal decision when it specifically ruled, as also applicable herein, that in such a case, "…[T]he law in effect was the ordinance[] and

[7] AR pgs. 13072-13112; Application on September 17, 2018 - CUP granted December 17, 2018; *see also*, Exhibit AC-18, AR pg. 8727

regulations that were at issue on the date the notice of appeal was filed [from the application to the time of approval of the CUP]. ...[A]pplication of a new [subsequent] ordinance, ...was [improper]..." *Van Zanten*, ¶¶ 14-16, 598 NW2d at 864-865.

Appellants therefore respectfully submit that *Van Zanten* presents a closely analogous holding is strong supportive authority for their objections raised both below and again here on appeal to the extent that it was entirely improper, in excess of the authority of Appellee PUC and a prejudicial error of law for the Commission and Appellee CRW-II to attempt to allow CRW-II, as Applicant, to essentially attempt to improperly bootstrap their claimed compliance with Grant County Ordinance as to "Noise" to the "new" not-yet-effective and less stringent noise ordinance requirements in this matter – including the prejudicial removal of consideration of nearly 180 noise-receptor locations that Appellee CRW-II wrongfully sought to ignore in 2019.[8]

In fact, Appellants point out what appears to be clear error by Appellee CRW-II in trying to improperly finagle their claimed compliance with such Grant County zoning ordinance requirements, based, in part, on the following exchange at hearing with Tyler Wilhelm, Project Manager CRW-II, about which ordinance(s) were to be applicable as to the important sound/"Noise" level requirements:

> Q: ...The date of the approval for the Grant County Conditional Use Permit was December 17, 2018. Do you agree with that date?
> *Wilhelm:* Yes, I do.
> Q: Okay. Now if you would refer to the Applicant Exhibit 19-3, page 1, in the lower left-hand corner.
> *Wilhelm:* Can you refer to – what document is that? Is that from the county application.
> Q: It's just the county ordinance for Grant County that you submitted...
> Q: ... In the lower left-hand corner of page 1 of that document would you please read to the Commission the date the Grant County ordinance was adopted.
> *Wilhelm:* It shows December 28, 2018.
> Q: Okay. Thank you. December 28, 2018. That would be 11 days *after* you received your Conditional Use Permit [on December 17, 2018]; correct?

[8] *Cf.*, FN. 1, *supra.*

*Wilhelm:* That would be correct, that it was officially adopted after we received our permit approval, but our –

Q: Okay.

*Wilhelm:* - permit application was also 100 percent consistent with everything that was --

Q: Okay. … I'm just clarifying dates.

Q: …Now please read to the Commission the date of the - the effective date of the ordinance. In that same lower corner [of Exhibit A19-3].

*Wilhelm:* January 28, 2019.

Q. Okay. So, like a month and 10 or 11 days after [CRW-II] received [its] Conditional Use Permit. So, at the time you received approval for your Conditional Use Permit for Crowned Ridge II the prior ordinance was in effect governing that Conditional Use Permit, not the version that's submitted in A19-3; correct?

*Wilhelm:* That would be correct.

*See*, AHT pgs. 47-49; AR pgs. 8892-8894;

*(Cont.) Wilhelm:* I do recognize both [Grant County ordinance] documents. And what we provided is Exhibit A19-3 is the markup version of what the final ordinance came to be. And the providing of this was our means of showing what changed in the ordinance so people could track it, and we were a big part of that process and something that we're proud of. So it's just the redline or marked-up version…" AHT pgs. 53-54; AR pgs. 8898-8899.

With the foregoing in mind, then, it's important to note that the actual governing ordinance in and for Grant County as to turbine-related noise from wind farms such as CRW-II under its December 17, 2018, CUP terms and regulations states as follows:

> 13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference *at the perimeter of the principal and accessory structures* of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity. [Exhibit AC-18] [Emphasis added]; *see also*, Appendix/Exhibit A, as attached.

As such, the governing ordinance for this Grant County CUP, *does not differentiate between participants and non-participants* in regard to "noise" as each is provided a sound pressure limit of 50 dBA at the *perimeter of the principal and accessory structures.*[9] *See*, Appendix/Exhibit A.

[9] Appellants jointly submit that it should go without saying that having the additional sound limitation "buffer", so to speak, applicable to and measured from the nearly 180 (additional in-county) sound receptor locations that are, in fact, "accessory structures" specifically identified in and required to be accounted for under the controlling Grant County wind facility ordinance is an extremely important health/safety concern. Moreover,

In addition, according to the Letter of Assurance provided in Applicant's Exhibit A1-K , Appendix K - County Conditional Use Permits, the Grant County CRW-II CUP, Item 3, Subset b, Obligation to Meet Requirements:

> "Applicant agrees that the construction and operation of all WES towers will comply with noise and shadow flicker thresholds *exhibited in the application's noise and shadow flicker analysis*." [Exhibit A1-K.]

It is also very important to note here that in its application to Grant County for the CRW-II CUP, Appellee CRW-II provided a sound study that included accessory structures. [Exhibit AC-19] The sound study included 181 receptors [locations]; but it wrongly excluded nearly all of them under the new ordinance provision.[10] CRW-II's erroneous determination that it could, in spite of the governing

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to perhaps otherwise allow both Appellee PUC and Appellee CRW-II to try to manipulate or skirt around and/or to improperly ignore such important local regulation(s) would inappropriately be serving as an indicator of lack of local government control over such locally approved permit issues. Additionally, to ignore such key local regulation(s) would unlawfully be ceding local authority to either or both state government and/or to out-of-state corporate conglomerates to the direct and irreversible detriment of local county citizens and taxpayers.

[10] Applicant witness Jay Haley testified regarding the sound and flicker studies submitted to/for this docket and to each of the 3-counties for the CRW-II permit hearings for CUPs (Codington and Grant Counties) and a Special Exception Permit (SEP) (Deuel County).

Appellee CRW-II witness Haley: "Q: In the Grant County Conditional Use Permit Letter of Assurance, which is Exhibit A1-K... Okay. It says on page 11, item 3 --...Oh, sorry. It's subset 3 -- or subset B. I'll just read it to you... "Applicant agrees that the construction and operation of all WES towers will comply with noise and shadow flicker thresholds exhibited in the Application's Noise and Shadow Flicker Analysis." In the studies presented in this docket there are four receptors listed for Grant County. In Exhibit AC-19, which is probably in your folder on the corner there. My late-filed exhibit. A: You said AC-19?... Q: That's the Grant County...sound and flicker report? A: Yep. Q: If you go to page 17 and the following four pages, so a total of five pages, you'll see those are all receptors for Grant County. And I counted 181 receptors in Grant County for that permit. A: Uh-huh. Yes. Q: And, like I say, the sound and flicker -- or the sound study submitted to this docket has four. A: Yes. Q. So how could you possibly be able to know if you're in compliance with the Conditional Use Permit if you're missing 179 receptors for study? ...A: This is a report from 2018. Q: Yes. This is your Conditional Use Permit that you have to abide by showing -- showing how the sound profile travels out into the county. But there's no receptors in your PUC sound study showing that. A: This report is from 2018, and the layout and the ordinance are completely different today than they were when this report was generated. Q: But the governing ordinance for that Conditional Use Permit and the Letter of Assurance that's been submitted to this docket say that you have to abide by these shadow and sound studies that you submitted to Grant County. You understand? A: I think I do." [Transcript 2/4/2020, page 236 - page 237; page 238 line 6, line 17 - page 239, line 5], [Exhibits A1-K and AC-19]. In addition, and as also included in Exhibit AC-19, the Application to Grant County for a Conditional Use Permit, it was indicated that the Dakota Range turbines added to the sound profile of CRWI and CRWII. However, the entire project of Dakota Range turbines were, for what seem questionable and unexplained reason(s), <u>not</u> truthfully and accurately included in the sound study submitted to this PUC docket, Docket EL19-027. The questions below were posed to Mr. Haley by Appellant Christenson on February 5, 2020 (Hearing Day No. 2) to correct his erroneous statement the prior day, when he thought Dakota Range turbines were included in the sound study of this PUC docket: CRW-II attorney, Murphy: "Q: Yesterday in response to questions you were asked whether Dakota Range turbines were

Grant County CUP requirements, in 2019 attempt to misleadingly try to sidestep Grant County's original – more stringent – sound/noise regulations by claiming that it was perhaps generally "consistent" with both (2018 and 2019) ordinance provisions cannot be overlooked or approved. Instead, it must be noted that Appellee CRW-II failed to put on sufficient evidence, by any measure, that it was, truth in fact, in full compliance with the governing (original) Grant County ordinance requirements. Appellee CRW-II not being held to account for failing to carry its burden in proving its mandatory compliance with the applicable local governing laws and regulations as to critically-important/safety-related noise regulations is both a prejudicial error of law under SDCL § 1-26-36; but also, to both Appellants and to their equally concerned neighbors direct detriment, runs directly afoul of SDCL § 49-41B-22(1) and/or (3).

As a result of the above-referenced error(s), including Appellee CRW-II's failure to comply with the applicable noise and noise distance monitoring laws and rules, Appellants therefore submit that Appellee PUC's Finding of Fact Nos. 18 and 46 are, in fact, clearly erroneous and constitutes reversible error. In addition, Appellee PUC's decision is, as outlined above, at odds with and therefore in error under Conclusion of Law Nos. 9, 13 and 15. That is, in light of the less stringent noise criteria that Appellee CRW-II attempted to sidestep in its improper effort(s) to try to be (less) governed by, such is prejudicial to persons in the adversely affected areas as to increased and intolerable noise levels – especially for all those good neighbors and taxpaying northeast South Dakota folks subject to

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included in your studies. Can you elaborate on correcting that statement? CRW-II witness Haley: A: Yes. The Dakota Range turbines are not included in the Crowned Ridge II study. I think when she said Dakota Range my brain heard Deuel Harvest. But, in fact, the Deuel Harvest turbines were included, not Dakota Range." [2/5/2020 AHT, pg. 262; AR pg. 13322]; *see also*, Statement of Facts, FN. 2, *supra*.

Consequently, Appellee CRW-II additionally failed to establish that its Application was in compliance with SDCL § 49-41B-22 (1) insofar as failing to demonstrate compliance with "all applicable laws and rules" since there was no study of all receptors, and not all possible influencing projects were appropriately submitted as part of its purported sound study. To state the fairly obvious, it was/is not possible. Appellee CRW-II therefore, to the direct prejudice of Appellants and the prospective adverse sound effects to which they would otherwise be subject, failed to meet its statutory burden and Appellee PUC failed in not denying same. *See/cf.*, SDCL § 49-41B-22 (1) thru (4); ARSD 20:10:22:04 (5) (mandatory truthful and accurate applications required).

any such excessive noise over time at either their nearby residences or at or working in their vitally important *accessory structures* as related to their once protected residences and/or farming operations.

> Issue 1-B. Appellee Commission committed error in violation of statutory provisions insofar as Applicant failed to meet the statutory requirements of SDCL § 49-41B-25.2 by and through its failure, at the time of the Commission's hearing on the merits of Appellee CRW-II's wind energy facility permit, of being equipped with - or even having applied for - the necessary and statutorily required aircraft detection lighting system (ADLS).

Beginning on July 1, 2019,[11] the South Dakota Legislature passed an important regulatory requirement for wind energy facilities in this state to - now - to apply for and be approved by the Federal Aviation Administration (FAA) to include aircraft detection lighting systems ("ADLS"). That is, SDCL 49-41B-25.2 was enacted, and it provides and requires that:

> 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. [Emphasis added.]

In spite of this pivotal requirement, however, Appellee CRW-II failed to even apply for the necessary ADLS system by the time of the February 2020 administrative hearing in seeking approval for its wind facility permit. *See/cf.*, Statement of Facts, FN. 5, *supra.* Additionally, as also outlined in the earlier Statement of Facts, what generally appears to be the after-thought that was or is the idea of equipping this large wind farm project with the required ADLS lighting is not something that has proven to be effective or in any way an efficient or prioritized safety-first process in this matter. *See*, Statement of Facts, FN. 6, *supra. See generally, Berne Area Alliance for Quality Living v. Dodge*

[11] That is, only 8-days prior to Appellee CRW-II submitting its Application (July 9, 2019) to Appellee PUC herein.

*County Board of Commissioners*, 694 NW2d 577 (Minn. App., 2005) (Applicant applied for a CUP for a "feedlot" permit and such was granted by the County. However, following a challenge, court held that such feedlot permit must first be processed to be approved by the PCA [Pollution Control Agency]). By way of a general analogy then, Appellants urge that it be required that – prior to Appellee PUC's issuance of any such wind energy permit herein – Appellee CRW-II should have been required to obtain the required ADLS permit and to be able to establish, prior to such permitting, that the required ADLS would be operational and functional. This is especially true here since Appellee CRW-II strongly alluded to – contrary to the clear statutory requirement – legally challenging any such need for ADLS if certain events or conditions may later signal it from so doing.[12] As a result, Appellants submit that – knowing the key and beneficial life/safety/health attributes to and from the need for ADLS associated with such invasive wind farm sites – Appellee PUC failed to properly consider the strong possibility of the life/safety/health risk(s) to local inhabitants should Appellee CRW-II fail to obtain *and* to make effective and safely operable the required ADLS lighting as compared to potentially having such need challenged in court – *after* CRW-II was otherwise (prematurely and improperly) granted such a wind energy permit in this case.

Appellants therefore submit that Appellee PUC's Finding of Fact Nos. 18, 30 and 66 are, in fact, clearly erroneous and constitute reversible error in regard to the lack of the required operational ADLS. In addition, Appellee PUC's decision is, as outlined above, at odds with and therefore in error under Conclusion of Law Nos. 9 and 15.

> Issue 2. Appellee Commission failed to receive and consider Appellee Crowned Ridge Wind II, LLC's complete application for a wind energy facility permit through the time of the evidentiary hearing herein contrary to the requirements of South Dakota law, pursuant to SDCL 49-41B-22 (3), including the submission for review of a pre-construction sound or health study in each (or any) of the adversely affected counties.

[12] *See*, the following telling exchange with a PUC Commissioner at the administrative hearing below: "Am I to infer from your statement on page 6 that I stated -- am I to infer that if the FAA were to state that you did not need the ADLS and yet the PUC said as a condition that you would have ADLS, would you contest that in Circuit Court?" Appellee CRW-II Witness, Wilhelm: "I would say yes." 2/4/2020, AHT page 86, AR 8931.

Once again, as applicable herein, SDCL § 49-41B-22 (3), as related to Appellee CRW-II's minimum threshold burden of proof in such matter, provides that:

The applicant ha[d] the burden of proof to establish by a preponderance of the evidence that:

(3) The facility will not substantially impair the health, safety or welfare of the inhabitants…

However, pursuant to the above-referenced requirement as to such large wind facilities, Appellee CRW-II failed in its burden of proof and/or its burden of going forward to the extent that no pre-construction sound study was submitted to Appellee PUC in order to provide a necessary description of the adversely affected area and so as to determine whether such a wind far facility would or would not substantially impair the health, safety or welfare of local inhabitants.

> Question directed to Appellee CRW-II witness Haley: "Q: No pre-construction ambient noise study was conducted by you or anyone else that you're aware of?
> A: That's correct." [2/4/2020, AHT pg. 229; AR pg. 9074.]

> Question directed to Appellee CRW-II witness Lampeter: "Q. Did Crowned Ridge Wind II ask you to perform a pre-construction sound modeling study?
> A. Yes. That study was conducted, and they requested it.
> Q. And that's the study that you were talking about that's *not been published or submitted*?
> A. That's correct. We went and collected the data and put together some draft summary findings, and that's where it currently stands." [2/5/2020, AHT pg. 314; AR pg. 13374.]

Although four (4) proposed experts appeared and gave testimony and evidence at the evidentiary hearing for Appellee CRW-II, no infrasound or low frequency sound study was requested to be conducted, nor any study submitted to Appellee PUC for evidentiary analysis and review.

> Question to Applicant witness Haley: "Did Crowned Ridge Wind II approach you about assessing infrasound or low frequency noise for this project?
> A: No. They did not ask for a specific study on low frequency or infrasound noise." [2/4/2020, AHT pg. 230; AR pg. 9075.]

> Question to Applicant witness Ollson: "Q: …Did Crowned Ridge Wind II retain your service for a study pertaining to infrasound or low frequency noise?
> A: In terms -- it was an overview of the knowledge of the scientific literature … and why we would not be concerned." [2/5/2020, AHT pg. 357; AR pg. 13417.]

Apparently, by Mr. Ollson's answer, a study was neither prepared nor produced, only an unpersuasive and/or non-committal "overview of the knowledge of literature" was considered by CRW-II's witness.

> Question to CRW-II witness Lampeter: "Q: Did Crowned Ridge Wind II ask you to perform any studies or modeling regarding low frequency noise or infrasound?
> A: No." [2/5/2020, pg. 314, lines 12-15.]
>
> Question to Staff witness Hessler: "Q: Okay. Did Staff ask you to do any study in regard to infrasound and/or low frequency noise for this project?
> A: They didn't ask me to do it, but I did talk about it in my direct testimony.
> Q: Okay. Not an actual study, just --
> A: Oh, no. No study." [2/5/2020, AHT pg. 511, AR pg. 13571.]

In addition, contrary to the regulatory requirements of ARSD 20:10:22:21, no air quality study was requested nor submitted to Appellee PUC for review.

> Question to Appellee CRW-II witness Lampeter: "Q: According to your resume, you have experience in air quality modeling. Did Crowned Ridge Wind II ask you to perform any air quality study or model for this project?
> A: No." [2/5/2020, AHT pg. 314; AR pg. 13374.]

Furthermore, the record almost shockingly indicates that no health expert was retained by Appellee PUC in an effort to try to protect the public. Instead, PUC staff sought to otherwise attempt to rely on a generic pro forma type letter from the South Dakota Department of Health that specifically did *not* "take[ ] a formal position on wind turbines and human health," apparently as some type of entirely unpersuasive "evidence" of a claimed absence of health impairment by the project. *See*, Ex. DK-3; AR pg. 7357; 2/6/2020, AHT pg. 564; AR pg. 13673; and, also as attached as Appendix/Exhibit B herein. Clearly, such a letter cannot be deemed to meet Appellees (collective) burden of proof under SDCL § 49-41B-22 (3). Instead, in conjunction with other failed and/or overlooked evidence put forward by Appellee CRW-II, such serves to demonstrate that the Appellee PUC's findings of fact, in total, are clearly erroneous and that reversible error occurred as to fully reviewable conclusion of law matters below – all to the direct prejudice and detriment of Appellants, who must (still, for the time being) live and work in the adversely affected area with all remaining health and safety unknowns as

they sought to address below – unfortunately, all to no avail for them and for their concerned friends and neighbors as well.[13]

***CONCLUSION and REQUEST FOR ORAL ARGUMENT:***

For the foregoing reasons, Appellants respectfully request the Court to reverse and remand this pressing and vitally important matter to/for the health, safety and welfare of persons in and around the wind farm project area. Given the relatively weak record herein, Appellants alternatively submit that the Court could elect to entertain the remand option available pursuant to SDCL § 1-26-34. Finally, pursuant to SDCL § 1-26-33.6, if the Court approves, Appellants hereby request the opportunity to

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[13] *See also*, other related health/safety/habitat concerns as essentially ignored and/or not adequately answered below, for instance: No study or proposed conditions concerning safety of travelers on the roadway were submitted to the Commission. This question was directed to Applicant witness Sappington "Q: Did your company conduct any studies concerning shadows on the roadway? A: No." [2/5/2020, pg. 385, lines 4-6.] A question was directed to staff witness Kearney by Appellant Robish regarding safe travel near turbines: "Q: Okay. Some of the turbines proposed will be sited 600 feet or less from a highway or roadway. Will there be a requirement for a placard or warning sign to be placed at such sites by that specific turbine to warn the public of a danger of ice throws? It's been done before. A: Yeah. And there's not a specific proposed permit condition in this one." [2/6/2020, page 612, line 23-page 613, line 4].

Even though CRW-II hired qualified consultants for some studies, it did not perform, nor submit to the Commission and ice throw study for review. Question directed to Applicant witness Haley: "Okay. On line 15 you mentioned you've performed ice throw studies, and you said that in your opening statement. Did you perform any ice throw studies for this project? A: No, I did not. Q: Did Crowned Ridge Wind II ask you or anyone that you are aware of for any ice throw study to be done for this project? A: They did not ask me, and I do not know if they contacted anyone else." [2/4/2020, AHT pg. 229, line 21-pg. 230, line 5]

No study for domestic animals or wildlife for audible noise, air quality, shadow, low frequency noise or infrasound were requested or submitted to the Commission for review. ARSD 20:10:22:18 (1) (3) Question directed to Applicant witness Sappington: "Q: Did your company conduct any study concerning noise, audible and inaudible, including low frequency noise or infrasound on domestic animals? A: No." [2/5/2020 AHT pg. 385.] Question directed to Applicant witness Sappington: "Q: Did your company conduct any study concerning shadow effects on wildlife or domestic animals? A: No." [2/5/2020, AHT pg. 385, lines 7-9]

The density of not only this potential project in combination with existing projects, will affect the precious wildlife of South Dakota. Chairman Hanson and Staff witness Morey from the South Dakota Game, Fish and Parks discuss the egregious effects: "Chairman: Your answers talk about – on page 8 specifically, your answer to question on page 12 state that 'some species will not use grassland or wetland habitat within a certain distance of wind turbines.' And on page 16 you speak of the cumulative impacts. There are a lot of wind towers in that area presently. A lot is a relative term, I suspect. But this one is going to have – if it's approved, would have a *greater concentration of turbines*. With all of those turbines presently there and the potential for these, are you concerned about the cumulative impact, knowing that there's -- there is, in fact, according to your testimony, that some species will not use the grassland areas close to wind towers?" Witness: *Yes. We are concerned with cumulative impacts.* There has been, as you mentioned, a lot of development in this area. And some of the research out of North and South Dakota, there's *seven out of nine breeding grassland bird species will avoid turbines* up to 300 meters, so about a quarter mile - not quite a quarter mile. About two-tenths of a mile." [2/6/2020, AHT pg. 546, line 8 - pg. 547, line 4]. [Emphasis added.]

Appellee CRW-II confidentially filed safety information with Appellee PUC, however, such claimed confidential safety information has not been conveyed to landowners.

further expand and explain its factual and legal argument(s) herein at oral argument before this Court, at the Court's earliest convenience within its pending schedule.

*CERTIFICATE OF COMPLIANCE:*

Tornow Law Office, P.C., by and through R. Shawn Tornow, Appellants' attorney of record herein, submits the following:

The foregoing brief is 22-pages in length. It was typed in proportionately spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, while the right-hand margin is 1.0 inches. Said brief has been heretofore reviewed and referenced as containing 7,228 words and 37,652 characters.

Dated this 10th day of August, 2020.

*/s/ R. Shawn Tornow*

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*CERTIFICATE OF SERVICE:*

Your undersigned, as counsel for Appellants in the above entitled matter, being an appeal from the state administrative agency, South Dakota Public Utilities Commission, Docket EL19-027, and the decision of such agency made and served April 6, 2020, hereby certifies that on the date indicated below, a true copy of the *Appellants' Brief* has been electronically filed with the Clerk of Courts, Deuel County, through the Odyssey File & Serve Program, in the (Grant/Codington County) consolidated case file of 19CIV20-000027, for further service on counsel for the Appellees and others, to wit:

| | |
|---|---|
| Amanda M. Reiss, Special Assistant Attorney General: | amanda.reiss@state.sd.us |
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| Brian J. Murphy, Next Era Energy (Juno Beach): | brian.j.murphy@nee.com |

In addition, Appellants' Brief is being served by e-mail this date as a courtesy on counsel for the other Invervenors in and as part of their parallel (Deuel County) appeal:

A.J. Swanson, Arvid J. Swanson, P.C., (Canton): aj@ajswanson.com

Finally, a scan/courtesy copy of Appellants' Brief has been served also this date by e-mail on:

Circuit Court Judge, Third Circuit, Dawn Elshere: dawn.elshere@ujs.state.sd.us

Dated at this 10th day of August, 2020.

As respectfully submitted,

*/s/ R. Shawn Tornow*
R. Shawn Tornow, for Tornow Law Office, P.C.