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

IN THE MATTER OF ADMINISTRATIVE APPEAL GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, AND LARETTA KRANZ

And

AMBER KAYE CHRISTENSON AND ALLEN ROBISH,

Appellants,

Vs.

CROWN RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,

Appellees

19CIV20-21 and 20-27

MEMORANDUM OPINION

INTRODUCTION

This matter comes before the circuit court on appeal by Appellants Amber Christenson and Allen Robish (collectively "Christenson Appellants")[1], Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz (collectively "Ehlebracht Appellants")[2], appealing the South Dakota Public Utilities Commission Staff's (the "Commission's" or "Staff's") Final Decision and Order Granting Permit to Construct Facility in EL 19-027 dated April 6, 2020. (AR 14230-14258), Final Decision and Order Granting Permit to Construct Facility, Permit Conditions, Notice of Entry (Permit)).[3]

[1] Christenson Appellants – 19CIV20-27
[2] Ehlebracht Appellants – 19CIV20-21.
[3] All citations to the administrative record are referenced as "AR".

STATEMENT OF JURISDICTION

The Christenson Appellants appeal from Commission'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 CRWII, pursuant to 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, South Dakota. Thereafter, following Commission's unopposed motion to change venue (May 11, 2020), the circuit court entered its Order changing venue herein (May 19, 2020), pursuant to SDCL § 1-26-31.1. This Court ordered that the Intervenors files would be thereafter combined into this appellate file, 19CIV20-27.

The Ehlebracht Appellants appeal from the same April 6, 2020, Final Decision and Order, as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants timely and filed their Notice of Appeal on April 29, 2020, in Deuel County, South Dakota.

STATEMENT OF FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC[4] ("Applicant", "Crowned Ridge", or "CRWII") submitted its application for a facility permit for a 300.6-megawatt (MW) wind energy facility to consist of up to 132 wind turbines in Deuel, Grant, and Codington counties (the "Project").[5] (AR 14230-14258). Within its application, CRWII submitted written testimony from six witnesses.[6] (AR 1-1118, 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 Staff issued the Notice of Application; Order for and Notice of Public Input Hearing; and a Notice for Opportunity to Apply for Party Status and established an intervention deadline of September 9, 2019. (AR 1122-1123).

On July 31, 2019, the Commission issued an order granting party status as Intervenors to the Christenson Appellants. (AR 1193-1194). On August 26, 2019, the Commission issued an order granting party status as Intervenors to the Ehlebracht Appellants. (AR 1478). On that same

[4] CRWII is a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC.
[5] Besides the turbines, the Project also includes access roads to the turbines and associated facilities, underground 34.5 kV electrical collector lines, underground fiber-optic cable, a 34.5-kV to 230 kV collection substations, two permanent meteorological towers, and an operations and maintenance facility.
[6] Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter.

day, pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission held the public input meeting in Watertown, South Dakota. (AR 1122-1123, 1274-1477).

On September 20, 2019, CRWII submitted pre-filed Supplemental Testimonies and Exhibits.[7] (AR 2007-3223). On October 21, 2019, CRWII filed Corrected Direct Testimony of Witness Sarah Sappington. (AR 3233-3254). On December 9, 2019, Staff filed Pre-Filed Direct Testimony and Exhibits of five witnesses.[8] (AR 3356-4259). On December 12, 2019, several Ehlebracht Appellants[9] each filed Pre-Filed Direct Testimony in the form of Affidavits. (AR 4251-4264). On January 8, 2020, CRWII submitted Pre-Filed Rebuttal Testimony and Exhibits of seven witnesses[10] (with corrections filed on January 22, 2020, and January 24, 2020). (AR 4267-4338). On January 23, 2020, Staff submitted Pre-Filed Supplemental Testimony of David Lawrence. (AR 7054-7079).

On February 4-6, 2020, the Commission held an evidentiary hearing in Pierre, South Dakota. (AR 8844-13781). CRWII, Staff, and Appellants participated in the evidentiary hearing, presenting testimony, and cross-examining witnesses.[11] (AR 8844-13781). Appellants presented witness testimony,[12] but did not pre-file expert testimony. The Hearing Examiner presided over the hearing and each of the commissioners were present for the entirety of the hearing. On February 27 and March 2, 2020, the Parties filed Post-Hearing Briefs. (AR 13820-13919).

On March 17, 2020, the Commission met to consider whether to issue a facility permit for the Project. (AR 13984-14079). At the meeting, the Commission voted unanimously to issue a permit for the Project, subject to 49 conditions. (AR 13994-14079). On April 6, 2020, the Commission issued the Permit. (AR 14230-14258). The Permit includes conditions establishing maximum permissible sound levels and maximum levels of shadow flicker at residences near the Project.[13] (AR 14246-14258).

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[7] These include Mark Thompson, Jay Haley, Tyler Wilhelm, Dr. Cristopher Ollson, Daryl Hart, Sarah Sappington, Michael MaRous, and Dr. Robert McCunney.

[8] These include David Hessler, Darren Kearney, Hilary Meyer Morey, David Lawrence, and Paige Olson.

[9] Amy Rall, Laretta Kranz, Garry Ehlebracht, and Steven Greber.

[10] These include Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson.

[11] Seventeen witnesses testified at this hearing.

[12] On December 12, 2019, Garry Ehlebracht, Steven Greber, Amy Rall, and Laretta Kranz submitted pre-filed direct testimony.

[13] Specifically, Permit Condition 26 limits sound levels emitted from the Project to 45 dBA for non-participating residences and 50 dBA for participating residences, as measured within 25 feet of a residence, with an allowance for a landowner to waive the condition. (AR 14251). Permit Condition 35 restricts Shadow Flicker at residences to 30 hours per year, with an allowance for an owner to waive the condition. (AR 14255).

On April 29, 2020, the 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, the Christenson Appellants filed a Notice of Appeal 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. On September 11, 2020, Staff filed its Response Brief to Christenson Appellants. ("Staff's Brief to Christenson"). On September 23, 2020, CRWII submitted its Response Brief to both Christenson and Ehlebracht Appellants ("CRWII's Brief"). On September 24, 2020, Staff filed its Response Brief to Ehlebracht Appellants. ("Staff's Brief to Ehlebracht"). On October 8, 2020, Christenson Appellants submitted their Reply Brief to both Staff and CRWII. On October 13, 2020, Ehlebracht Appellants submitted their Reply Brief. On November 23, 2020, a hearing was held on the matter in Deuel County, South Dakota

STANDARD OF REVIEW

The regulatory agency here, the Public Utilities Commission, is governed by the Administrative Rules of South Dakota ("ARSD"), specifically ARSD Chapter 20:10:22 ("Energy Facility Siting Rules"). Decisions by the Commission may be appealed to the circuit court:

> Any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit, may obtain judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26.[14]

SDCL § 49-41B-30. Subsequently, SD Ch. 1-26 states the following review procedures:

> 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 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;

[14] "The sections of Title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal." SDCL § 1-26-32.1; *see also* SDCL § 15-6-81(c) ("SDCL Ch. 15-6 does not supersede the provisions of statutes relating to appeal to the circuit courts.").

(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. . ..

SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602.

The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)). A decision is clearly erroneous if, after reviewing the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Steinmetz v. State, DOC Star Academy*, 2008 S.D. 87, ¶ 6, 756 N.W.2d 392, 395 (internal citations omitted). It is well-settled that a court will not weigh the evidence or substitute its judgment for that of the Commission, rather, it is the court's function to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. *See, e.g., Application of Svoboda*, 54 N.W.2d 325, 327 (S.D. 1952) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)).

Regarding questions of fact, the court affords great weight to the findings made and inferences drawn by an agency. *See* SDCL § 1-26-36. The agency's decision may be affirmed or remanded but cannot be reversed or modified absent a showing of prejudice. *Anderson*, 2019 S.D. 11, ¶ 10, 924 N.W.2d at 149 (citing SDCL § 1-26-36) (emphasis added). Even if the court finds the Commission abused its discretion, the Commission's decision may not be overturned unless the court also concludes that the abuse of discretion had prejudicial effect.[15] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Questions of law are reviewed de novo on appeal from an administrative agency's decision. *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, 548) (emphasis added). Matters of reviewable discretion are reviewed for abuse. *Id.* (citing SDCL § 1-

[15] A reviewing court will reverse an administrative agency decision when the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law, are clearly erroneous in light of the entire evidence in the record, or are arbitrary and capricious, or are characterized by abuse of discretion, or are clearly an unwarranted exercise of discretion. SDCL § 1-26-36; *In re One-time Special Underground Assessment by Northern States Power Company in Sioux Falls*, 2001 S.D. 63, ¶ 8, 628 N.W.2d 332, 334. *See also Wise v. Brooks Const. Services*, 2006 S.D. 80, ¶ 16, 721 N.W.2d 461, 466; *Apland v. Butte County*, 2006 S.D. 53, ¶ 14, 716 N.W.2d 787, 791.

26-36(6)) (emphasis added). "An agency's action is arbitrary, capricious or an abuse of discretion only when it is unsupported by substantial evidence and is unreasonable and arbitrary." *In re Midwest Motor Express*, 431 N.W.2d 160, 162 (S.D. 1988) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)) (emphasis added); s*ee also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'") (internal quotation omitted)). "Substantial evidence" is defined as "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL § 1-26-1(9).

Here, Appellants challenge the agency's conclusion that the CRWII wind facility will not harm the social and economic condition of inhabitants in the wind energy facility siting area and that the facility will not substantially impair the health, safety, or welfare of the inhabitants within the siting area as clearly erroneous based upon the record in its entirety.[16] This presents a mixed question of fact and law, reviewable de novo. *Johnson v. Light*, 2006 S.D. 88, ¶ 10, 723 N.W.2d 125, 127 ("Mixed questions of law and fact that require the reviewing Court to apply a legal standard are reviewable de novo.") (quoting *State ex rel. Bennett v. Peterson*, 2003 S.D. 16, ¶ 13, 657 N.W.2d 698, 701)).

PART I: CHRISTENSON APPELLANTS

Burden of Proof

South Dakota law requires the following:

> 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; [and]
> . . .
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants. . ..

SDCL § 49-41B-22. Furthermore, the ARSD also places the burden upon the applicant:

> In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant,

[16] An applicant for a permit is required to establish that the facility "will not substantially impair the health, safety or welfare of the inhabitants" in accordance with SDCL § 49-41B-22(3).

> applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

ARSD 20:10:01:15.01 ("Burden in contested case proceeding").

Christenson Appellants assert that the 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. Under this burden of proof issue, the Christenson appellants assert several issues where the burden of proof failed. The court will address them below.

Solid Waste

Christenson Appellants initially raised the issue of "solid or radioactive waste" in their first brief. Christenson Brief, at 9-11. However, as Appellees PUC and CRWII argued in their responsive briefs, Christenson argued the wrong ARSD, as that did not apply to wind energy facilities, such as this Project.[17] The applicable ARSD in this case is the following:

> The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:
>
> (1) A forecast of the impact on commercial and industrial sectors, . . . solid waste management facilities, . . . and other community and government facilities or services. . ..

ARSD 20:10:22:23 ("Community impact"). Christenson acknowledges the previous error, and then argues this "community impact" regulation in their reply brief. Christenson Reply Brief, at 2-4. Although the incorrect statute was cited, the issue of "solid waste" was argued initially.

[17] Christenson initially argued that CRWII did not comply with ARSD 20:10:22:31, which states "The applicant shall provide information concerning the generation, treatment, storage, transport, and disposal of solid or radioactive waste generated by the proposed facility and evidence that all disposal of the waste will comply with the standards and regulations of any federal or state agency having jurisdiction. . .." However, as PUC argued, ARSD 20:10:22:05 states that ARSD 20:10:22:26 to 20:10:22:33, inclusive, apply for a permit for an *energy conversion* facility. *See* SDCL § 49-41B-2(6) for the definition of an energy conversion facility. Rather, this regulation states that ARSD 20:10:22:33.01 and 20:10:22:33.02 apply for a permit for a *wind energy* facility.

Christenson's argument concentrates upon the issue of identifying, analyzing, and forecasting the end of life disposal of the Project's used blades, concrete, and other refuse. The Staff states that the Commission heard evidence on the future disposal of wind turbine blades and received assurance from CRWII that it would comply with the applicable laws for disposal, which could occur decades into the future. CRWII stated at the November 2020 hearing that the statute is limited to the construction, operation, and maintenance of the facility, and that there is nothing in it regarding the decommissioning or tearing down.

Appellees' arguments are more persuasive here. First, the testimonies provided repeated assurances that the Project would follow the applicable laws. Furthermore, in the Application, this ARSD was specifically addressed, and stated in part, "Construction and operation of the Project . . . is not anticipated to have significant short- or long-term effects on . . . solid waste management facilities." Ex. A1, page 93.

Second, the argument of "disposal" here appears moot. While the incorrect, previously cited ARSD 20:10:22:31 requires proper disposal, the correct, applicable ARSD 20:10:22:23 does not mention the words "disposal" or "decommissioning" at all. It specifically refers to a facility's "construction, operation, and maintenance." Christenson's argument here concerns the *end of life* of the Project, and not the *construction, operation, and maintenance* of the Project. This ARSD does not require specific plans for the *disposal* of blades and refuse; therefore, the Commission did not violate SDCL § 49-41B-22, ARSD 20:10:01:15.01, or ARSD 20:10:22:31.

Thus, regarding the issue of "solid waste," the Commission met its burden of proof and did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for "solid waste."

Compliance with Grant County Ordinance

Christenson Appellants argue the following:

> Appellee PUC wrongly and prejudicially entered Finding of Fact No. 18 (FN. 24) in erroneously finding, in essence, that Appellee CRWII will be in compliance with applicable laws, including the Grant County Ordinance since, directly contrary to testimony by Jay Haley, that Appellee CRWII "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 December 2018 CUP vote."

Christenson Brief, at 3. In the record, FOF 18 states the following:

> FOF 18. The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules.[18] 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.[19]

PUC Staff states that the Commission properly determined that the Project will comply with all applicable laws, specifically as it relates to compliance with the Grant County ordinance. Additionally, CRWII states that the record shows CRWII's commitment and ability to comply with the old and new Grant Country Sound Ordinance.

CRWII applied for its CUP for Grant County on September 17, 2018. On December 17, 2018, Grant County approved this CUP. The original ordinance was as follows:

> 13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects 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.

On December 28, 2018, the new ordinance was adopted, and on January 28, 2019, it became effective. The new ordinance was as follows:

> 14. Noise. Noise level shall not exceed 45 dBA, average A-weighted Sound pressure including constructive interference effects measured twenty-five (25) feet from the perimeter of the existing non-participating residences, businesses, and buildings owned and/or maintained by a governmental entity.

In addition to FOF 18, Christenson Appellants argue that FOF 46 is also clearly erroneous:

> 46. 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

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[18] FOF 18 (Footnote 23): Ex. A1 at 72-76, 111-112 (Application) and Ex. A5 at 8-11 (Wilhelm Direct Testimony).

[19] FOF 18 (Footnote 24): At the evidentiary hearing, pro se Intervenor Christenson questioned whether Applicant was in compliance with the Grant County Ordinance in effect at the time Grant County voted to approve the Project or the Ordinance that was made effective after the County's vote to approve the Project. Applicant testified that Grant County has indicated it intends to apply the Ordinance made effective shortly after approval of the CUP for the Project. Evid. Hrg. Tr. at 47-49 (Wilhelm) (February 4, 2020). 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.

> non-participants' residence and (2) no more than 50 dBA at any participants' residence. . ..[20]

Christenson Brief, at 16. Christenson Appellants argue that Conclusion of Law 9, 13, and 15 are in error:

> COL 9. In the event the Project's contracted life is not extended, the record demonstrates that Applicant has appropriate and reasonable plans for decommissioning. The Project will be decommissioned in accordance with applicable state and county regulations. Applicant has agreed to Permit Condition No. 33 for purposes of decommissioning the Project.
>
> COL 13. Applicant must comply with the applicable requirements in the Deuel County, Grant County, and Codington County ordinances.
>
> COL 15. Based on the preponderance of the evidence presented to the Commission, the Commission concludes that all the requirements of SDCL § 49-41B-22 have been satisfied.

This court will not weigh the evidence or substitute its judgment for that of the PUC. Rather, it is this court's function to determine whether there was any substantial evidence in support of the PUC's conclusion or finding. The PUC found that CRWII followed the Grant County ordinance, and the findings, cited above, are supported by substantial evidence of reports, testimonies, and studies. CRWII held a valid CUP from Grant County. (AR 14235-14236). Furthermore, the Commission concluded the following:

> The evidence submitted by [CRWII] 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.

Id. (AR 14235 footnotes citing record evidence omitted).

Christenson cites *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, 598 N.W.2d 861, and PUC counters that that case is inapplicable, as its facts and laws relate to a county

[20] FOF 46 (Footnote 98): Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A1-I (Sound Modeling Report); Ex. A14-1 through Ex. A14-3 (Supplemental Testimony Sound Studies); Ex. A21-1; Ex. A21-3; Ex. A28, and Ex. 29 (Updated Rebuttal Sound Results).

zoning ordinance. This is an appeal from an *agency* decision, and not an appeal from a *county* decision. Because this issue is a *county* issue, and currently ongoing in case file 25CIV20-10, the Court will not address the validity of the CUP itself in this case.

Lastly, both Staff and CRWII argue in the alternative that no Appellants are prejudiced by these sound regulations of the Grant County ordinance. The Court refuses to weigh into this argument as it is unnecessary. Because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.

Aircraft Detection Lighting System (ADLS)

The Aircraft Detection Lighting System (ADLS) statute, effective on July 1, 2019, states the following:

> For any wind energy facility that receives a permit under this chapter after July 1, 2019, the facility shall be equipped with an [ADLS] that meets the requirements set forth by the Federal Aviation Administration [FAA]. . ..

SDCL § 49-41B-25.2 (in pertinent part). On April 6, 2020, the Commission issued its permit to CRWII (AR 14230-14258); therefore, this ADLS requirement applies to this permit.

Christenson Appellants argue the following:

> Appellee Commission committed error in violation of statutory provisions insofar as Applicant [CRWII] 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 CRWII's wind energy facility permit, of being equipped with – or even having applied for – the necessary and statutorily required aircraft detection lighting system (ADLS).

Christenson Brief, at 16. Christenson argues that CRWII failed to even apply for ADLS by the time of the administrative hearing seeking approval (February 4-6, 2020), and that the Commission clearly erred in its Findings of Fact 18,[21] 30,[22] and 66.[23]

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[21] *See* Issue 1A: Compliance with Grant County Ordinance, *supra.*

[22] FOF 30. Applicant will install and use lighting required by the [FAA]. Applicant will equip the Project with a FAA-approved [ADLS] to minimize visual impact of the Project starting with the commercial operation date and for the life of the Project, subject to normal maintenance and forced outages.

[23] FOF 66. The Commission finds that the Project, if constructed in accordance with the Permit Conditions of this decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

The Court finds Christenson's argument to be misguided. The plain reading of the statute requires that CRWII, the applicant wind energy facility, which receives a permit, shall be equipped with an ADLS in compliance with the FAA. Christenson appears to argue that CRWII was not equipped with ADLS at the time of the permit, which is a clear misunderstanding of the statute.

Or, alternatively, Christenson argues that CRWII had no plan to install ADLS in its Application for its facility permit (submitted July 9, 2019) at the time of the Commission's Hearing (February 4-6, 2020). This would also be a misunderstanding of the statute, which says a facility that "receives a permit . . . shall be equipped" with an ADLS. Nothing in the statute requires the "merits" of the Applicant's permit being equipped or applied for an ADLS.

Furthermore, this point is moot. Findings of Fact 30 and 51, and Permit Condition 34, all state that CRWII will install and use ADLS in compliance with the FAA. CRWII points to Permit Condition 1 (Applicant will obtain all governmental permits which reasonably may be required by any governmental unit for construction and operation activity of the Project prior to operation) and Permit Condition 34 (Applicant shall apply to the FAA for approval to utilize an ADLS and allow enough time for a FAA determination and system construction prior to operation). FOF 51 requires the Applicant to illuminate the wind turbines as required by the FAA.

Therefore, regarding the ADLS, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for ADLS.

Sound and Air Quality Studies

A. Sound Study

Christenson Appellants argue the following:

> Appellee Commission failed to receive and consider Appellee [CRWII'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.

Christenson Brief, at 18. Staff responds that Applicant met is burden of proof with respect to SDCL § 49-41B-22(3). CRWII responds that it carried its burden that the Project will not substantially impair the health or welfare of inhabitants.

South Dakota law states that the "applicant has the burden of proof to establish by a preponderance of the evidence that . . . the facility will not substantially impair the health, safety or welfare of the inhabitants. . .." SDCL § 49-41B-22(3).

Christenson Appellant states that "[a]lthough four (4) proposed experts appeared and gave testimony and evidence at the evidentiary hearing for Appellee CRWII, no infrasound or low frequency sound study was requested to be conducted, nor any study submitted to Appellee PUC for evidentiary analysis and review." Christenson Brief, at 19.

Staff responds that (1) there is no legislative directive as to how an applicant must establish that a project will not substantially impair the health and welfare of the community; and (2) there is no rule that mandates how the applicant must satisfy the burden. Staff's Brief, at 11. Staff then states that the Commission found sufficient evidence in the record to demonstrate that "the sound from the Project would not substantially impair the health and welfare of the community." *Id.*, (Findings of Fact 68, AR 14244). This finding was supported by substantial evidence in the record, including "expert testimony from both health experts and acousticians, with no corresponding intervenor testimony to contradict these experts." *Id.*

Again, the statute, SDCL § 49-41B-22, does not require an act that Appellants claim exists. Rather, it simply states that CRWII must prove its facility will not substantially impair the health, safety or welfare of the inhabitants. As Staff argued, there are no specific mandates on completing this task.

Therefore, regarding the sound study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the sound study.

B. Air Quality Study

Christenson Appellants argue that "contrary to the regulatory requirements of ARSD 20:10:22:21, no air quality study was requested nor submitted to Appellee PUC for review." Christenson's Brief, at 20. This ARSD states the following:

> The applicant shall provide evidence that the proposed facility will comply with all air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted.

ARSD 20:10:22:21.

CRWII argues that in its Application, it explained in detail that the Project's operations did not implicate air quality standards. CRWII's Brief, at 30. (AR 99-100). 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." *Id.*; (AR 14237).

This ARSD does not require that an air quality study be submitted, only that it would comply with standards and regulations. Therefore, regarding the air quality study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the air quality study.

As to each of these issues raised the Commissions finding that the applicant has met its burden of proof as to the applicable rules and laws and that the Project will not negatively impact the health and welfare of the inhabitants was not clearly erroneous and is affirmed by this court.

PART II: EHLEBRACHT APPELLANTS

This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. This court will not address the arguments of easements or takings, the histories of regulatory limitations of shadow flicker borrowed from German standards, or whether this is a discharge of light in accordance with SDCL § 43-13-2(8). This is not the proper place nor time for these arguments. This court does not have the jurisdiction to hear these argument, rendering them moot in this appeal. The court does however, address the following issues raised by Ehlebracht Appellants.

Minimal Adverse Effect

Ehlebracht Appellants argue the following issue:

> Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL § 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effect," may proceed on a case-by-case or *ad hoc* basis to permit a burden of "effects" upon both citizens and their properties under

> variable regulatory limits developed by others, including those interested in the promotion of wind development.

Ehlebracht Brief, at 2, 12. This South Dakota statute states the following:

> 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 solar or wind energy facility.

SDCL § 49-41B-35 ("Promulgation of rules").

Ehlebracht's argument of the *ad hoc* basis is that the Commission has permitted more stringent standards for other wind energy facilities, specifically Prevailing Wind Park,[24] than others, such as the CRWII Project here. These standards include "effects" such as noise and shadow flicker.

Staff argues that the Commission is not required to promulgate rules defining "minimal adverse effects," but rather is permitted this rulemaking authority. Staff's Brief to Ehlebracht, at 7. Furthermore, Staff argues that the state statute instructs the Commission to review permit applications on case-by-case or ad hoc bases.[25] CRWII likewise makes the same argument, the Commission has discretion, not the legal obligation to adopt rules. CRWII's Brief, at 8-9.

The state statutes and ARSD clearly permit the Commission to adopt rules and procedures. Ehlebracht's argument here focuses on requiring the Commission to adopt a standard that applies to all windfarms. Currently, the laws require that the Commission defers to local county ordinances. As evidenced within this case itself, there are three counties (Codington, Deuel, and Gran), each with their own separate standards.

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[24] This wind energy facility is in Bon Homme, Yankton, and Charles Mix counties.
[25] *See* SDCL §§ 49-41B-11 through 49-41B-25, inclusive.

Therefore, regarding this issue, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.[26]

Issue 2: Easements and Servitudes

Ehlebracht Appellants argue the following issue:

> Whether SDCL § 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner.

Ehlebracht Brief, at 18. This South Dakota statute states the following:

> 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 . . .

SDCL § 43-13-2(8).

Ehlebracht Appellants argue that the right to discharge light upon or over land is an affirmative easement. Ehlebracht Brief, at 21. Staff argues that the "Commission is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines." Staff's Ehlebracht Brief, at 12. CRWII argues that this statute "is wholly outside the statute the Legislature enacted for the Commission to administer." CRWII's Brief, at 20; *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").

[26] Ehlebracht Appellants also casually state that the equal protection laws are violated (Art. 6, 18, S.D. Const.; 14th Amendment, U.S. Const.). The Court finds this argument without merit, as it does not provide evidence aside for claims that one county ordinance has a more stringent ordinance than that of another county on the other side of the state.

Here, the Court agrees with the appellees that this issue is outside its jurisdiction. This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. Therefore, regarding this issue, the Court will not weigh into the question of easements.

Taking and *Per Se* Nuisance

Ehlebracht Appellants argue the following issue:

> Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, but without an easement being conferred in favor of Applicant and without the provisions of SDCL § 21-35-31 having been invoked, is a taking of Appellants' private property interests?

Ehlebracht Brief, at 27. Ehlebracht Appellants state that they will be subject to the Effects given off by the Project (such as noise and shadow flicker). Without the appellants granting permission, this would in effect "accomplish[] a *taking* of the property interests of these Appellants." *Id.*, at 29.

Staff argues that the Commission's order granting CRWII a permit to construct a wind energy facility is not a taking or a *per se* nuisance. Regarding a "taking," Ehlebracht fails each of the four theories under South Dakota case law. *Benson v. State*, 710 N.W.2d 131, 149 (S.D. 2006) (a regulatory physical taking; a permanent physical invasion of property; depriving owner of all economically beneficial uses of property; and a land-use exaction violating standards). Regarding *per se* nuisance, Staff argues that Ehlebracht's claim is not ripe, nor do the appellants submit sufficient evidence for the court to determine a taking has occurred. *See Boever, v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747 (S.D. 1995). CRWII argues that the per se nuisance is insufficient to create a ripe controversy. *See Boever*, 526 N.W.2d at 750.

The Court here agrees with Appellees' arguments. Ehlebracht has not established that noise and shadow flicker is a taking under South Dakota law, and the per se nuisance is not ripe for controversy. Therefore, the court will not address either of these issues.

CONCLUSION

Considering the Commission's findings, inferences, and conclusions, the Commission was not clearly erroneous and did not abuse its discretion in granting the permit to Crowned Ridge II. The Commission's decision was supported by extensive findings and conclusions that were supported by an exhaustive and complete administrative record. Therefore, the court affirms the Commission's decision and denies all of issues raised by each group of Appellants (Christensen and Ehlebracht). Counsel for the Appellee is directed to prepare an Order affirming the Decision of the Public Utilities Commission.

BY THE COURT:

Dawn Elshere
Circuit Court Judge
Third Judicial Circuit