Hughes County Sheriff's Office
3200 E. Highway 34 Ste 9
Pierre, SD 57501
Administration: 605-773-7470 Dispatch: 605-773-7410

THIRD JUDICIAL CIRCUIT

Return # 19930
Process # C19-01747
Docket # 14CIV19-290
Reference # 19-003

STATE OF SD: In the Matter of the Application by Crowned Ridge Wind, LLC for a Permit of a Wind Energy Facility in Grant and Codington Counties
Plaintiffs,

- vs -

KAREN KRAMER
Defendant

SHERIFF'S RETURN OF SUBSTITUTED PERSONAL SERVICE

I hereby certify that on the **22nd day of August, 2019**, **a Notice of Appeal** , in the above entitled action, came into my hand for service. That on the **29th day of August, 2019** at **3:59 PM**, in said county, the person to be served could not be conveniently found so **I did serve the documents on KAREN KRAMER** by substituting service to a family member over 14 years of age.
By then and there delivering to and leaving with: **ADAM DEHUECK (PERSON AUTHORIZED TO ACCEPT SERVICE ON BEHALF OF KAREN KRAMER C/O SD PUBLIC UTILITIES COMMISSION)** at **500 E CAPITOL AVE, PIERRE, SD 57501**

Item	Disburse To	Amount Owed	Amount Paid
Civil Process Fee	HUGHES COUNTY TREASURER	$50.00	$0.00
Mileage Fee	HUGHES COUNTY TREASURER	$5.00	$0.00
		Total Owed	**$55.00**
		Total Paid	**$0.00**
		Uncollectible	**$0.00**
		Remaining	**$55.00**

Invoice # 19-04104
GASS LAW PC ATTORNEYS & ADVISORS
PO BOX 486, BROOKINGS, SD 57006

Comments

Date Returned 9/4/19

Cody W Hall

Signed

Deputy Cody Hall
Hughes County Sheriff's Office
3200 E Hwy 34 Ste 9
Pierre, SD 57501
Phone: (605) 773-7470
Fax: (605) 773-7417

Hughes County Sheriff's Office
3200 E. Highway 34 Ste 9
Pierre, SD 57501
Administration: 605-773-7470 Dispatch: 605-773-7410

THIRD JUDICIAL CIRCUIT

Return # 19874
Process # C19-01698
Docket # 14CIV19-290
Reference # 19-003

In the Matter of the Application by Crowned Ridge Wind, LLC for a Permit of a Wind Energy Facility in Grant and Codington Counties

Plaintiff,
- vs -
Defendant

SHERIFF'S RETURN OF PERSONAL SERVICE

I, Darin Johnson, Sheriff of Hughes County, South Dakota, hereby certify that on the **23rd day of August, 2019, a Notice of Appeal** , in the above entitled action, came into my hand for service. That on the **23rd day of August, 2019** at **1:27 PM**, in said county, **I did serve the documents on CORPORATION SERVICES COMPANY**. By then and there delivering to and leaving with: **JANESSA LONGBRAKE (PERSON AUTHORIZED TO ACCEPT SERVICE ON BEHALF OF CORPORATION SERVICE CO., RA FOR CROWNED RIDGE WIND, LLC)** at **503 S PIERRE ST, PIERRE, SD 57501**

Item	Disburse To	Amount Owed	Amount Paid
Civil Process Fee	HUGHES COUNTY TREASURER	$50.00	$0.00
Mileage Fee	HUGHES COUNTY TREASURER	$5.00	$0.00
		Total Owed	**$55.00**
		Total Paid	**$0.00**
		Uncollectible	**$0.00**
		Remaining	**$55.00**

Invoice # 19-04055
GASS LAW PC ATTORNEYS & ADVISORS
PO BOX 486, BROOKINGS, SD 57006

Comments

Date Returned 8/26/19

Signed

Chief Deputy Lee Weber
Hughes County Sheriff's Office
3200 E Hwy 34 Ste 9
Pierre, SD 57501
Phone: (605) 773-7470
Fax: (605) 773-7417

Hughes County Sheriff's Office
3200 E. Highway 34 Ste 9
Pierre, SD 57501
Administration: 605-773-7470 Dispatch: 605-773-7410

THIRD JUDICIAL CIRCUIT

Return # 19875
Process # C19-01700
Docket # 14CIV19-290
Reference # 19-003

In the Matter of the Application by Crowned Ridge Wind, LLC for a Permit of a Wind Energy Facility in Grant and Codington Counties

Plaintiff,
- vs -

Defendant

SHERIFF'S RETURN OF PERSONAL SERVICE

I, Darin Johnson, Sheriff of Hughes County, South Dakota, hereby certify that on the **23rd day of August, 2019, a Notice of Appeal** , in the above entitled action, came into my hand for service. That on the **23rd day of August, 2019** at **4:38 PM**, in said county, **I did serve the documents on MS PATRICIA VAN GERPEN**.
By then and there delivering to and leaving with: **AMANDA REISS (PERSON AUTHORIZED TO ACCEPT SERVICE ON BEHALF OF MS PATRICIA VAN GERPEN, EXECUTIVE DIRECTOR, SD PUBLIC UTILITIES COMMISSION)** at **500 E CAPITOL AVE, PIERRE, SD 57501**

Item	Disburse To	Amount Owed	Amount Paid
Civil Process Fee	HUGHES COUNTY TREASURER	$50.00	$0.00
Mileage Fee	HUGHES COUNTY TREASURER	$5.00	$0.00
		Total Owed	**$55.00**
		Total Paid	**$0.00**
		Uncollectible	**$0.00**
		Remaining	**$55.00**

Invoice # 19-04057
GASS LAW PC ATTORNEYS & ADVISORS
PO BOX 486, BROOKINGS, SD 57006

Comments

Date Returned 8/26/19

Cody W Hall

Signed

Deputy Cody Hall
Hughes County Sheriff's Office
3200 E Hwy 34 Ste 9
Pierre, SD 57501
Phone: (605) 773-7470
Fax: (605) 773-7417

Hughes County Sheriff's Office
3200 E. Highway 34 Ste 9
Pierre, SD 57501
Administration: 605-773-7470 Dispatch: 605-773-7410

THIRD JUDICIAL CIRCUIT

Return # 19876
Process # C19-01699
Docket # 14CIV19-290
Reference # 19-003

In the Matter of the Application by Crowned Ridge Wind, LLC for a Permit of a Wind Energy Facility in Grant and Codington Counties

Plaintiff,
- vs -

Defendant

SHERIFF'S RETURN OF PERSONAL SERVICE

I, Darin Johnson, Sheriff of Hughes County, South Dakota, hereby certify that on the **23rd day of August, 2019, a Notice of Appeal** , in the above entitled action, came into my hand for service. That on the **23rd day of August, 2019** at **4:07 PM**, in said county, **I did serve the documents on ATTORNEY GENERAL JASON RAVNSBORG.** By then and there delivering to and leaving with: **RICHARD WILLIAMS (PERSON AUTHORIZED TO ACCEPT SERVICE ON BEHALF OF SD ATTORNEY GENERAL, JASON RAVNSBORG)** at **1302 E HIGHWAY 14, STE 1, PIERRE, SD 57501**

Item	Disburse To	Amount Owed	Amount Paid
Civil Process Fee	HUGHES COUNTY TREASURER	$50.00	$0.00
Mileage Fee	HUGHES COUNTY TREASURER	$5.00	$0.00
		Total Owed	**$55.00**
		Total Paid	**$0.00**
		Uncollectible	**$0.00**
		Remaining	**$55.00**

Invoice # 19-04056
GASS LAW PC ATTORNEYS & ADVISORS
PO BOX 486, BROOKINGS, SD 57006

Comments

Date Returned 8/26/19

Cody W Hall

Signed

Deputy Cody Hall
Hughes County Sheriff's Office
3200 E Hwy 34 Ste 9
Pierre, SD 57501
Phone: (605) 773-7470
Fax: (605) 773-7417

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

JURISDICTIONAL STATEMENT

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

INTRODUCTORY STATEMENT

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

LAW RELATED TO JUDICIAL NOTICE

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

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

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

ISSUES

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

SDCL 49-41B-11 (11) requires that an Applications for a PUC permit include environmental studies relative to the proposed facility. There is no exception in law or administrative rules allowing applicant to ignore environmental studies for portions of the project area. One of the many required environmental studies required by applicant is an Avian Use Survey. Avian use surveys are vital and required because impacts of wind energy facilities on avian species can be direct (e.g., turbine strike mortality) or indirect (e.g., loss of degradation of habitat) (AR 7022).

SWCA Environmental Consultants prepared an Avian Use Survey Report for applicant summarizing the avian use surveys that were completed for the project area from April 1, 2017 through November 30, 2017 (AR 7017). Sarah Sappington testified on behalf of applicant as to the avian use survey. When asked about the avian use survey map submitted with the application *[the relevant map is located at AR 7271*], Ms. Sappington acknowledged that no avian study was completed for the northeast portion of the Crowned Ridge footprint (containing approximately 15,500 acres) formerly known as Cattle Ridge (AR 12317-12318).

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

CONCLUSION

Applicants have the burden to submit a complete application and to show that the Crowned Ridge Wind facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the wind energy facility siting area and that the wind energy facility will not substantially impair the health, safety or welfare of the inhabitants within the siting area. Applicant claims to be in compliance with County standards related to sound and shadow flicker, but as set forth above, has omitted relevant and necessary data from their application and evidence provided to the PUC to give the appearance of compliance. Applicant further claims to be in compliance with all environmental studies but submitted an incomplete application that omitted nearly 30% of the Crowned Ridge

footprint from avian impact studies.

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

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

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

Dated November 8, 2019.

GASS LAW, P.C.

Jared I. Gass

Jared I. Gass
Attorney for Appellants
P.O. Box 486
Brookings, SD 57006
605.692.4277
jared@gasslaw.com

APPENDIX

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

REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

GASS LAW, P.C.

Jared I. Gass

Jared I. Gass
Attorney for Appellants
P.O. Box 486
Brookings, SD 57006
605.692.4277
jared@gasslaw.com

EXHIBIT 1

EXHIBIT A53

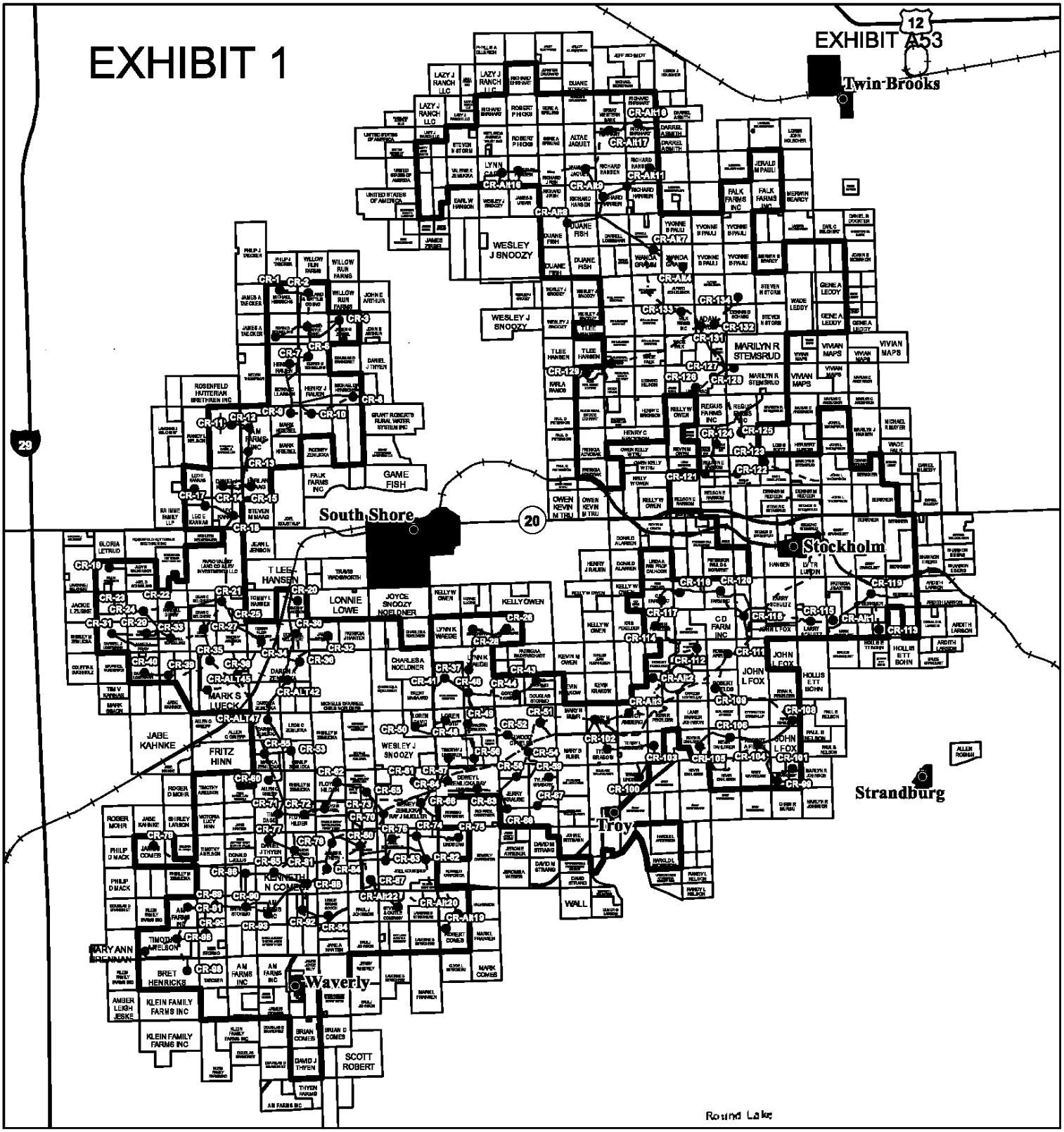


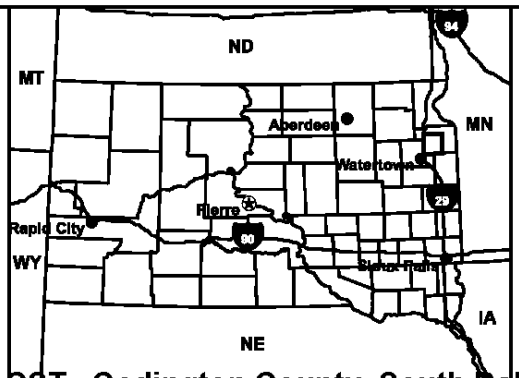
Figure 3a. Project Map

Crowned Ridge Wind Farm

- MET Tower
- Turbine
- City
- Access Road
- Collector Line
- Crane Path
- Railroad
- Interstate Highway
- U.S. Highway
- State Highway
- O&M Facility/ Substation
- Town Boundary
- Project Boundary
- Parcel Boundary

Lease Status

- Leased, Signed
- Under Option but Likely to Expire/Not Resign



Kilometers

0 2.5 5

Miles

0 2.5 5

Base Map: World Light Gray Canvas Base
Sources: Esri, HERE, Garmin, © OpenStreetMap contributors, and the GIS user community
Codington and Grant Counties, South Dakota

Projection: NAD 1983 UTM Zone 14N

SWCA ENVIRONMENTAL CONSULTANTS

Exhibit A15-4

EXHIBIT 2

Dakota Range

Project Map

- Project Boundary
- County Boundary
- Primary Turbine
- Spare Turbine
- Private Access Road
- Public Road
- Underground Collection
- Laydown Yard
- O and M Facility
- Project Substation
- Interconnect Switchyard

Existing Transmission

- 34kV5 - 69kV
- 240kV - 345kV
- 100kV - 138kV

Proposed Transmission

- 240kV - 345kV

Date: 8/8/2016 Author: MR

Coordinate System: NAD 1983 StatePlane South Dakota North FIPS 4301 Feet
Projection: Lambert Conformal Conic
Datum: North American 1983
Units: Feet US

APEX CLEAN ENERGY

Day County
Grant County
Grant County
Codington County
Codington County

148Th St
149Th St
150Th St
151St St
152Nd St
153Rd St
154Th St
155Th St
156Th St
157Th St
158Th St
159Th St
160Th St
161St Ave

453Rd Ave
454Th Ave
455Th Ave
456Th Ave
457Th Ave
458Th Ave
459Th Ave
460Th Ave
461St Ave
462Nd Ave
463Rd Ave
464Th Ave
465Th Ave
466Th Ave
467Th Ave
468Th Ave
469Th Ave
470Th Ave
471St Ave
472Nd Ave
473Rd Ave
474Th Ave
475Th Ave
476Th Ave
477Th Ave
478Th Ave
479Th Ave
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481St Ave
482Nd Ave
483Rd Ave
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597Th Ave
598Th Ave
599Th Ave
600Th Ave

CR 1
CR 2 Cottonwood St
CR 3
CR 7
CR 8
CR 9
CR 14
CR 17
CR 18
CR 26
CR 41
SR 20
Still Lake Rd
Sioux Conifer Rd
Round Lake Rd
Round Lake St
W Lakeview Ave
E Front St
Oak Ave
S Main St
Broadway

A1 A2 A3 A4 A5 A6 A7 A8 A9 A10 A11 A12 A13 A14 A15 A16 A17 A18 A19 A20 A21 A22 A23 A24 A25 A26

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72

Esri, HERE, DeLorme, MapmyIndia, © OpenStreetMap contributors, and the GIS User Community

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0 0.5 1 2 Miles

FOR PUBLIC USE

EXHIBIT

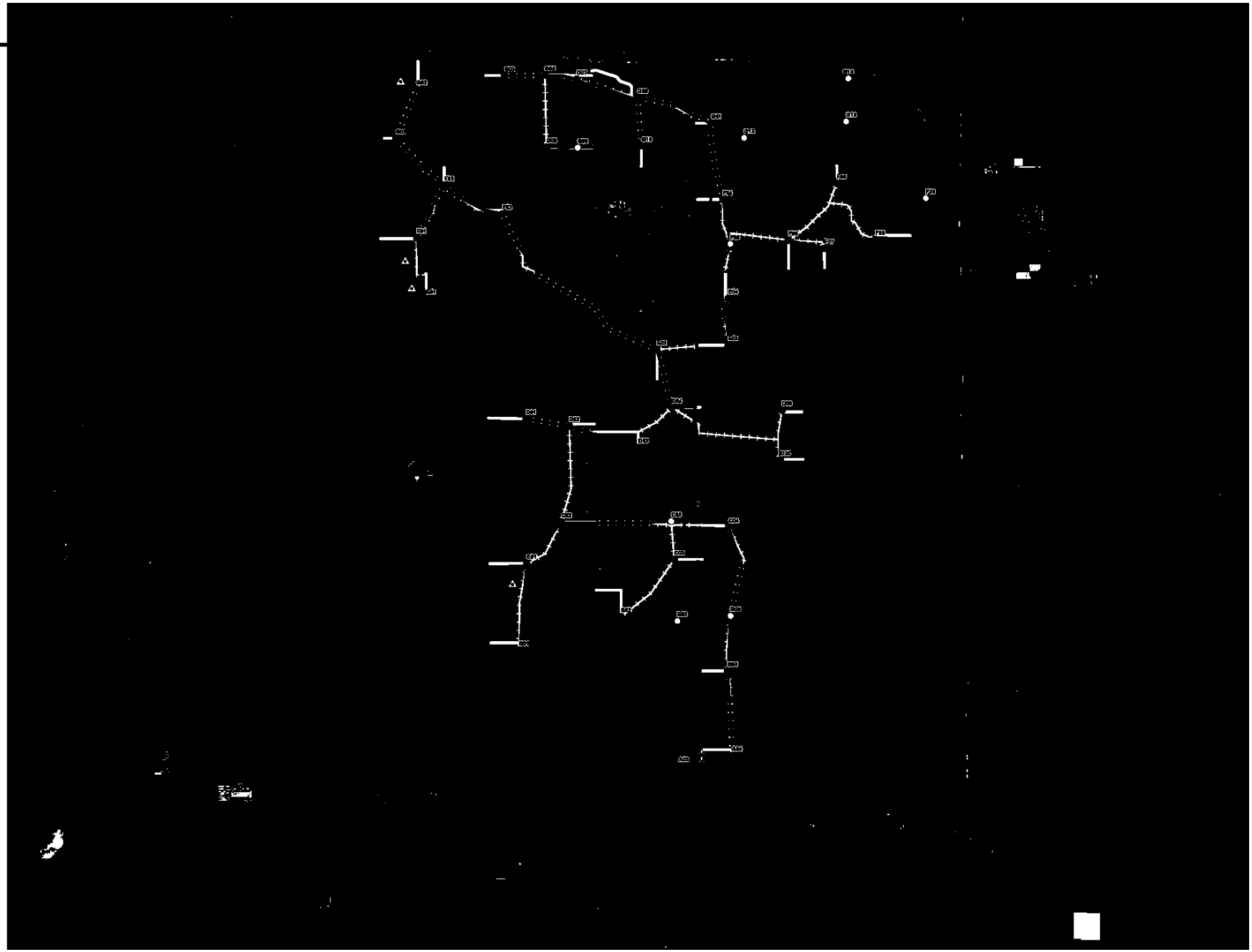
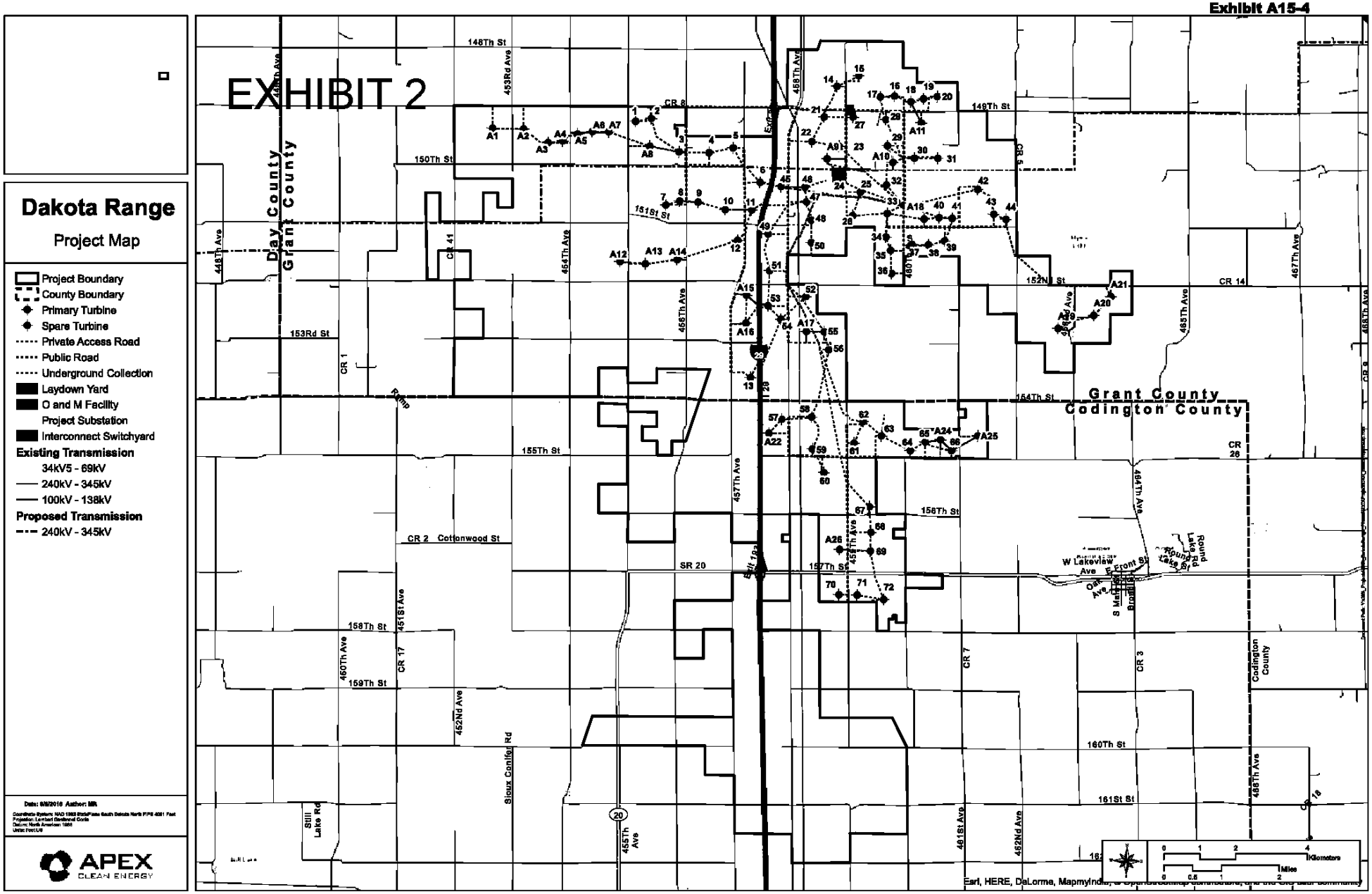
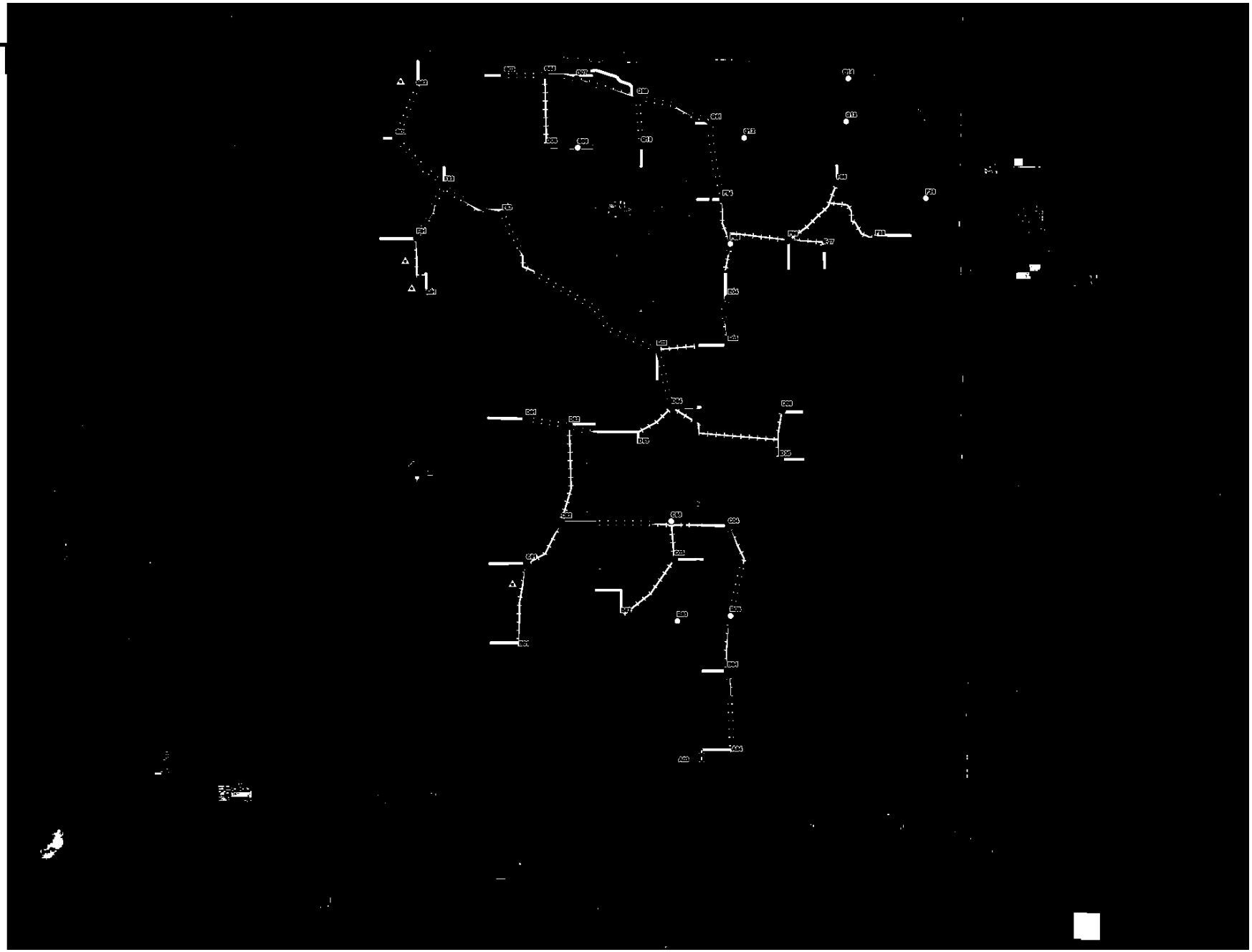


Exhibit A15-4



FOR PUBLIC USE

EXHIBIT



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

I, Jared I. Gass, Attorney for Intervenors in SD PUC Docket EL 19-003, and Appellants herein, certify that on November 8, 2011, Appellant's Brief was filed and served on all parties, through counsel for the parties via Odyssey File and Serve at their email addresses of record and vial US Mail as follows:

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3. Mr. Mikal Hanson
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Dated November 8, 2019.

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STATE OF SOUTH DAKOTA COUNTY OF CODINGTON	IN CIRCUIT COURT THIRD JUDICIAL DISTRICT
AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants, vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **COMMISSION STAFF'S RESPONSE BRIEF**

INTRODUCTION

Staff of the South Dakota Public Utilities Commission (Staff) submits this brief in response to the opening brief submitted by Appellants Amber Kaye Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch (together, Appellants). Appellants have appealed the South Dakota Public Utilities Commission's (Commission) issuance of an energy facility permit for the Crowned Ridge Wind Farm and ask the Court to remand for a new contested hearing.

For the purposes of this brief, all citations to the administrative record will be referenced as AR. Citations to the transcript of the evidentiary hearing will be referenced as EH.

STATEMENT OF THE CASE AND FACTS

I. THE COMMISSION'S PROCESS

On January 30, 2019, Crowned Ridge Wind, LLC (Crowned Ridge or Applicant) filed with the Commission an application for a permit to construct an up to 300-megawatt (MW) wind project

(the Project) in Codington and Grant Counties, South Dakota. The Project will consist of up to 130 wind turbines. (AR 20688, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (Decision or Permit)).

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

Crowned Ridge submitted its Application for the Project to the Commission on January 30, 2019. With the Application, Crowned Ridge also submitted written testimony for five witnesses, two of whom filed jointly. (AR 965-1023). Pursuant to ARSD 20:10:22:40, the Commission established an intervention deadline of April 1, 2019. The Commission held a public input meeting on March 20, 2019, in Waverly, South Dakota. (AR 1026). Five individuals intervened as parties before the April 1, 2019 deadline, and the Commission granted party status to each intervenor who filed before the intervention deadline. (AR 1070, 1322, 1463). The Commission established a procedural schedule on April 5, 2019. (AR 1463).

On April 9, 2019, Crowned Ridge filed written supplemental testimony[1] for five witnesses, two of whom filed jointly. (AR 1467-1944).

[1] ARSD 20:10:22:39 requires an applicant to file testimony upon the filing of an application. Pursuant to a procedural schedule, other all parties must submit written testimony of any witness they intend to call. Unless upon stipulation, no written testimony is admitted into the record without the witness appearing to testify under oath and be subject to cross-examination at the evidentiary hearing.

On April 25, 2019, Intervenors filed a Motion to Deny and Dismiss requesting that the Commission deny and dismiss the Application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss. (AR 2092).

On May 10, 2019, Appellant Allen Robish submitted written testimony of Allen Robish and an affidavit from Jonathan Thompson. (AR 2096-2097). On May 10, 2019, Commission Staff submitted written direct testimony for four witnesses. (AR 2105-3505). Crowned Ridge submitted written rebuttal testimony for ten witnesses, two of whom filed jointly, on May 24, 2019. (AR 3698-4818).

Appellants submitted a Second Motion to Deny and Dismiss on May 17, 2019. The Second Motion was heard by the Commission on June 6, 2019. The Commission denied the Second Motion. (AR 12245-12252).

The Commission held an evidentiary hearing on June 6, 11, and 12, 2019. (AR 20687). At the hearing, Crowned Ridge and Staff presented witness testimony. (AR 11928-12059, 12253-12504, 12521-1283 (Evid. Hrg. Tr.)). Appellants called no witnesses. The Hearing Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing.

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

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

Commission voted unanimously to issue a permit for the Project, subject to 45 conditions. (*See id.*).

On July 26, 2019, the Commission issued the Permit. (AR 20684). The Permit includes conditions related to various aspects of the Project, including noise and shadow flicker limits, decommissioning requirements, and environmental issues. (*See id.*)

GENERAL LEGAL STANDARD APPLICABLE TO REVIEW OF A COMMISSION DECISION

SDCL 49-41B-30 permits "[a]ny party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit" to "obtain judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26 [the Administrative Procedures Act]." SDCL 49-41B-30.[2] Review of the Commission's decision is governed by SDCL 1-26-36, which requires a reviewing court to "give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (agency findings of fact reviewed under the clearly erroneous standard). Appellant raised only allegations of abuse of discretion in this appeal.

The Court will only find the Commission abused its discretion, if its findings, conclusions, or decisions are unsupported by substantial evidence and are unreasonable and arbitrary. *In re Midwest Motor Express*, 431 N.W. 2d 160, 162 (1988). SDCL 1-26-1(9) defines substantial evidence as "relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support the conclusion." It is long settled that a court will not weigh the

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

evidence or substitute its judgment for that of the Commission, but, rather, it is the court's function to determine whether there was substantial evidence in support of the Commission's conclusion or finding. *In re Svoboda*, 74 S.D. 444, 447, 54 N.W. 2d 325, 328 (1952); *In re Dakota Transp., Inc.*, 67 S.D. 221, 230, 233, 236, 291 N.W. 589, 593, 595-596 (1940). In addition, the Supreme Court of South Dakota has determined that to be considered an abuse of discretion the agency's action must be "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." *Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856.

Further, a court also only reverses the Commission's decision when it is "left with a definite and firm conviction that a mistake has been committed." *In re Midwest*, 431 N.W. 2d at 162. In addition, even if the Court finds the Commission abused its discretion, the Commission's decision may not be overturned unless the court also concludes that the abuse of discretion had prejudicial effect. *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856.

APPELLANTS' REQUEST FOR JUDICIAL NOTICE

Appellants request this Court to take judicial notice of Commission Docket Nos. EL18-003 and EL18-046 (Dakota Range Dockets or Dakota Range Projects). While this Appellee would consider stipulating to judicial notice of the fact that the Commission issued a permit for the Dakota Range I and II Projects in Docket No. EL18-003 and a permit for the Dakota Range III Project in Docket No. EL18-046, it is not proper for judicial notice to be taken of the entire dockets. "Adjudicative facts are those which relate to the immediate parties involved—the who, what, when, where[,] and why as between the parties." *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419, *Quoting*, *In re Dorsey & Whitney Tr. Co.*, 2001 S.D. 35, ¶ 19, 623 N.W.2d 468,

474 (citations omitted). The Dakota Range Dockets involved different projects, different parties, and different facts than the Crowned Ridge proceeding.

As to the location of the turbines in the Dakota Range Projects, Appellants rely on the concept of geographic facts to support their request. (*See* App. Br. at 5). The Dakota Range Projects are permitted but have not been constructed. There is no precedent allowing for judicial notice of planned man-made structures of which construction has not commenced. This Appellee is unaware of a current planned construction date for any of the Dakota Range Projects.

Appellants argue that the "trial court has the power to take judicial notice." (*See* App. Br. at 9). This Court is not the trial court; it is the appellate court. SDCL 1-26-35 provides that the review "shall be confined to the record." Because the review is limited to the record, no additional evidence may come in, whether through judicial notice or other means.

Judicial notice is not a tool available in the context Appellants request. The request for judicial notice should be denied.

ARGUMENT

Issue 1: The PUC did not abuse its discretion as it considered the information related to sound studies.

The Commission found that "Applicant modelled sound levels with consideration of the cumulative impacts from Dakota Range I and II and Crowned Ridge, II, LLC wind projects." (AR 20697, Finding of Fact 46). Appellants argue that all turbines should have been included in the sound modeling, not just seventeen of the other projects' turbines. Appellants base this argument on a Crowned Ridge witness's testimony that noise from wind turbines can travel twenty to twenty-five miles. (*See* App. Br. at 8).

The Commission's analysis nonetheless went above and beyond what was required by SDCL 49-41B and ARSD 20:10:22. ARSD 20:10:22:13 states that: "[…] The environmental

effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction."

The above rule applies specifically to energy conversion facilities. Wind energy facilities are not energy conversion facilities. *See* SDCL 49-41B-2(6) and (13). The Legislature made this change in 2005 when it amended SDCL 49-41B-1.1 to explicitly separate a wind energy facility from an energy conversion facility by giving wind energy facilities their own definition. *See* SL 2005, ch 250. It must be assumed that the Legislature knew what it was doing and the effects of the legislation when the legislation was passed. "Courts presume that the legislature acted with deliberation, with knowledge of the effect of its act." 82 C.J.S. Statutes § 376.

Therefore, ARSD 20:10:22:13 does not apply to wind energy facilities, and an applicant is not required by law or rule to assess cumulative impacts.

Even if the administrative rule did apply, at the time of the application when the sound modeling was completed, as well as when the Permit was issued, there were no energy conversion facilities or wind energy facilities operating or under construction in the area. Specifically, the Dakota Range projects were not existing or under construction. Because those projects were not existing or under construction, even under the rule the Applicant would not be required to include them in the modeling. Therefore, the sound modeling and the Commission's analysis went above and beyond the scope of review contemplated in the rule by factoring in the closest permitted wind turbines into the noise and shadow flicker analysis.

Crowned Ridge witness Jay Haley's rebuttal testimony states that "[t]he tables in Exhibit 3 of the supplemental testimony show the cumulative results from *all turbines* in CRW, Crowned

Ridge Wind II, and Dakota Range I and II." (*emphasis added*) (AR 4703m Rebuttal Testimony of Jay Haley, 2:11-13). Mr. Haley also stated that "[a]ll wind turbines from both the Crowned Ridge I and Dakota Range wind farms were included in my analysis so any contributions from those turbines at the receptors in the CRW project are represented in the results of the Sound Study." (AR 1478, Supplemental Testimony of Jay Haley, 4:5-8).

It is clear that all turbines were included in the model based on Mr. Haley's testimony. However, the map showed only the nearest ones. The fact that the map showed only the nearest seventeen turbines appears to have led Appellants to the inaccurate conclusion that only seventeen turbines were included in the model.

Throughout their argument regarding Issue I, Appellants criticize Applicant Witness Jay Haley's credentials and use of the initials "P.E." (*See* App. Br. at 7). At the evidentiary hearing, Appellants' trial attorney conducted a lengthy voir dire of Mr. Haley, after which Attorney Ganje objected to the testimony of Mr. Haley on the grounds that the witness held himself out to be a licensed professional engineer because of the initials behind his signature. (EH 344-351). Appellants' trial attorney also submitted a brief upon making an oral objection. (EH 352; AR 12898-12911).

Commission Staff argued that credibility of a witness can be established by training, education, and experience, and licensing is not the end-all determination. (EH 352:15-20). Chairman Hanson stated that he agreed with Commission Staff's argument. (EH 354:10-17). After taking argument from the parties, the Commission unanimously voted to overrule Attorney Ganje's objection. (EH 355:7-9). The Commission's ruling on the admissibility of Mr. Haley's testimony is not an issue that was included within the Statement of Issues and is, therefore, not subject to this Appeal. *See* SDCL 1-26-31.4. Even if this witness's credibility were an issue in

this Appeal, the Commission's determination of credibility would be reviewed under a clearly erroneous standard. *See*, *Sauder v. Parkview Care Center*, 2007 S.D. 103, ¶ 11, 740 N.W.2d 878, 882.

This issue arises from an incomplete or inaccurate review of the record. Because the Commission was not actually required by law to do a cumulative impact analysis, and because, in spite of that fact, a cumulative impact analysis for sound was performed, the Commission's Order should be affirmed with respect to this issue.

Issue 2: The PUC did not abuse its discretion in granting an Energy Facility Permit based, in part, on the record evidence regarding sound and shadow flicker.

As a preliminary matter, this issue was not included within the exhaustive list of issues filed by Appellants in the Statement of Issues. Furthermore, this issue was not preserved for appeal. Appellants never objected to the admission of Exhibits A57, A67, or A68. (EH 366, 579:10-12). It is proper for the Court to decline to address it for the first time on appeal. See *Alvine Family Ltd. P'ship v. Hagemann, 2010* S.D. 28, ¶ 21, 780 N.W.2d 507, 514 ("We have consistently held that this Court may not review theories argued for the first time on appeal."). Further, Appellants cite no authority for their position nor was any authority provided at the evidentiary hearing to support the contention that more was required in the sound and shadow flicker studies. Therefore, the issue has been waived. "Failure to cite relevant supporting authority is a violation of SDCL 15-26A-60(6) and is deemed a waiver." *Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363, 377, (Citing, *State v. Boston,* 2003 SD 71, ¶ 27, 665 N.W.2d 100, 109).[3]

[3] The cited case involves an appeal to the South Dakota Supreme Court, governed by SDCL 15-26A-60. The corresponding statute for an administrative appeal is SDCL 1-26-33.3.

Appellants cite no legal authority for their claim that the Commission was required to rely on sound and shadow flicker studies that included each and every structure. No such requirement exists in South Dakota Law. SDCL 49-41B-22 requires an applicant to establish 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.

Nowhere in the statute or the administrative rules is it mandated how an applicant must establish those four elements, whether by Iso-line maps, all-inclusive charts, random samplings, or otherwise. Further, while ARSD 20:10:22:33.02(5) requires an applicant to provide information regarding anticipated operational sound, the rules contain no such requirement for a shadow flicker analysis.

Appellants argue that the ratio of participating versus non-participating landowners would change should each residence in the towns of Waverly and Stockholm be individually counted. (*See* App. Br. at 9). Such a claim is not supported by the record.

Moreover, contrary to Appellants' assertion that the Commission lacked the appropriate information because the residences in the towns of Waverly and Stockholm were not individually depicted in Exhibits A57, A67, and A68, the record does contain a depiction of what the sound and shadow flicker levels would be at those towns. Exhibit A43-1 is a map detailing shadow flicker Iso-lines for the entire project area. (AR 17225-17231). This map demonstrates that each town is well below the shadow flicker limit in the Final Order. Therefore, even if Applicant were to break out the residences individually, the outcome would not change.

Likewise, the record contains information depicting the sound level for the residences in Waverly and Stockholm. Exhibit A43-2 is a map detailing the sound pressure levels Iso-lines for the entire project area. (AR 17232-17238). This exhibit demonstrates that receptors in the towns of Waverly and Stockholm are also well below the sound limit in the Final Order. Even if the receptors in the towns were shown individually in the sound model chart, the outcome would not change.

Even if we assume *arguendo* that the Commission's reliance on the isoline maps provided in the sound and shadow flicker studies in the record was in error, the Appellants cannot demonstrate prejudice. Indeed, Appellants do not even argue they are prejudiced. (*See* App. Br. at 9-10.). Any threat of prejudice is completely eradicated by the fact that the sound and shadow flicker conditions placed on the Permit by the Commission account for actual, not modeled, sound and shadow flicker. (AR 20708- 20710, Condition 26).

Issue 3. The Commission Did Not Abuse Its Discretion When It Approved the Permit Without a Complete Avian Use Study.

Appellants argue that the Commission could not have reasonably issued a decision in this matter, because the avian use survey the Applicant submitted failed to include data from the northeast portion of the project area, the historic Cattle Ridge portion (Cattle Ridge area) of the

project, and that the Commission overlooked this missing information. Appellants' arguments are not supported by the record nor by legal authority.

Appellants cite no legal authority that an application must contain an avian use survey covering the entire project area. SDCL 49-41B-11(11) does require an application for a permit include environmental studies relative to the proposed facility. ARSD 20:10:22:16 does require an Applicant provide information resulting from surveys to identify and quantify terrestrial ecosystems within the siting area however this rule does not specify how an Applicant must meet this burden. While an avian use survey is often used to assess avian species and populations within a project area, it is just one tool that an Applicant can utilize to meet the filing content requirements of SDCL 49-41B-11(11) and ARSD 20:10:22:16. This Appellee is unaware of any other statute or administrative rule which mandates that Applicant must file a complete avian use survey to meet its burden of proof.

The Appellants err in the assessment that the Commission overlooked the fact that the Avian Use Survey Report (Survey) the Applicant filed with its Application failed to include data from the Cattle Ridge area. In fact, the Survey included a map that was clearly marked and clearly identified the portion of the project area the Applicant studied to prepare the Survey. (AR 7271). The scope of the Survey was discussed at length and on numerous occasions before the Commission. During the evidentiary hearing, Ms. Sappington specifically answered questions about the Survey and its scope and contents. (AR 12317-12318). While Ms. Sappington agreed with Appellants' cross-examination questions that the Survey did not include data collected from the Cattle Ridge area, Ms. Sappington also indicated that Applicant did conduct other studies within the Cattle Ridge area and utilized the data collected to prepare Section 11.3 of the Application. (AR 12317-12318). Following the evidentiary hearing, Appellants addressed the

lack of data collection in the Cattle Ridge area in Intervenors' post-hearing brief filed on July 2, 2019. (AR 2265). This matter was again discussed before the Commission at the July 9, 2019 Commission meeting, during which, the Commission heard oral arguments of each party, asked additional questions of the parties and issued its oral decision. (AR 20565-2652). Finally, the Commission specifically acknowledged Appellants' concerns in Finding of Fact V. 31. of the Permit, but found Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire project. (AR 20694). Clearly, the Commission did not overlook Appellants' concerns about the scope of the Survey.

The record also clearly shows that the Commission made a reasonable determination that the Applicant submitted sufficient evidence to meet the environmental information requirements in SDCL 49-41B-11(11) and ARSD 20:10:22:16 and to meet the Applicant's ultimate burden of proof. This evidence is concisely explained in Findings of Fact V. B. 31 and 32 of the Commission's Permit which state:

> 31. lntervenors argue that Crowned Ridge's Application is materially incomplete since the Avian Use Survey did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the raptor nest surveys did include that area. Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to the SD GF&P. Staff's witness, Mr. Tom Kirschenmann, from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate. The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann. [Footnotes excluded]

> 32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations. There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a game production area. Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project. Applicant committed to file a Wildlife Conservation Strategy, which included both direct and indirect effects as well as the wildlife mitigations measures set forth in the Application, prior to the start of construction. Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Mr. Kirschenmann testified that the Applicant had appropriately coordinated with the SD GF&P on the impact of the Project on wildlife. [Footnotes excluded]

(AR 20693-20694, See Also Ex. A1-E; Evid. Hrg. Tr. At 178; Evid. Hrg. Tr. At 180; Ex S3 at 6; Ex. A1; Ex. A42 at 4; S8; Ex. A42 at 10; Permit Conditions ¶ 29; Ex. A42 at 6 and Evid. Hrg. Tr. At 212-213 (June 11, 2019); Permit Conditions ¶ 30; and Ex. S3 at 3-5). As evident in Finding of Fact 31 and 32, the Applicant presented ample environmental and wildlife evidence to supplement any deficiencies in the avian use survey.

Even assuming, *arguendo,* that the Commission erred when it relied on the Survey, Appellants make no argument that they were prejudiced by the Commission's decision to grant the Permit. Additionally, the Commission included a number of conditions on the Permit, applicable to the entire project area, to further ensure that the facility does not adversely affect wildlife in the project area. (AR 20710 and 20714, Conditions 29, 30 and 45). .

Given that there is no specific requirement that an Applicant submit a avian use survey of the entire project area to meet its burden of proof, the Commission's decision to issue a Permit based on the totality of the evidence presented was not an abuse of discretion. The Commission's decision in this matter should be affirmed.

CONCLUSION

The Commission's Decision in this matter is based on an administrative record that consists of more than 21,000 pages. Appellants ask the Court to second-guess the Commission, but Appellants' arguments are not supported by the substantial record in this matter or the law. Additionally, the second issue was not preserved for appeal. Accordingly, Commission Staff respectfully requests that the Court affirm the Commission's Decision.

Dated this 19th day of December 2019.

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STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF CODINGTON — THIRD JUDICIAL DISTRICT

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants, vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **CERTIFICATE OF SERVICE**

The undersigned, attorney for Defendant, hereby certifies that on the 19th day of December 2019, she served via electronic mail a true and correct copies of the foregoing **Commission Staff's Response Brief** in the above-entitled matter upon the following:

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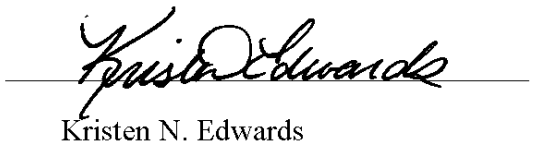

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **BRIEF OF APPELLEE CROWNED RIDGE WIND, LLC**

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal of the South Dakota Public Utilities Commission's ("Commission") July 26, 2019 Order, issued in Docket No. EL19-003, granting an Energy Facility Permit ("Facility Permit") to Crowned Ridge Wind, LLC ("Crowned Ridge").

STATEMENT OF THE ISSUES

1. Whether this Court should take judicial notice of exhibits and maps in Commission Docket Nos. EL18-003 *In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility* and EL18-046 *In the Matter of the Application by Dakota Range III for a Permit of a Wind Energy Facility* (collectively referred to as "the Dakota Range Proceedings")?

2. Whether Appellants waived and failed to preserve for appeal Issue No. 2 included in Appellants Brief?

3. Whether the Commission's conclusion that the sound and shadow flicker produced by the Crowned Ridge wind facility ("Project") will not substantially impair the health or welfare of the inhabitants was supported by substantial evidence, and was reasonable and not arbitrary, and, therefore, within the Commission's discretion?

4. Whether the Commission's conclusion that the Project's impact on avian species will not pose a threat of serious injury to the environment was supported by substantial evidence, and was reasonable and not arbitrary, and, therefore, within the Commission's discretion?

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STATEMENT OF THE CASE

On January 30, 2019, Crowned Ridge filed an Application for a Facility Permit to construct and operate the Project to be located in Grant County and Codington County, South Dakota ("Project"). (AR 10-960) The Commission conducted a contested case to review the Application, which included the submission of pre-filed testimony, discovery, the granting of party status to five interveners, four days of evidentiary hearings, the submittal of legal briefs, oral argument, and the issuance of a final order on July 26, 2019 granting a Facility Permit to Crowned Ridge ("Order"). On August 19, 2019, Appellants filed a Notice of Appeal of the Commission's Order followed by a Statement of Issues on August 29, 2019 and an Initial Brief on November 8, 2019. Appellants' Initial Brief asserts that the Commission abused its discretion when making certain findings and conclusions related to sound, shadow flicker, and avian impact. A review of the Commission's Order and the entire record in the context of the relevant statutes and case law, however, shows that the Commission's decisions were within its discretion and its Order should be affirmed in all respects.

STATEMENT OF THE FACTS

On January 30, 2019, Crowned Ridge filed an Application for a Facility Permit to construct and operate an up to 300 megawatt wind facility, *i.e.,* the Project. (AR 10-960; 20684) Crowned Ridge has executed a power purchase agreement with Northern States Power Company ("NSP") to sell NSP the full output of the Project. (AR 20689) On January 30, 2019, Crowned Ridge also filed the direct testimony of Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 961-2023)

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On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply for Party Status. Pursuant to SDCL 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on Wednesday, March 20, 2019, at 5:30 p.m., CDT, at Waverly-South Shore School Gymnasium, 319 Mary Place, Waverly, S.D. (AR 1026-1027)

On February 22, 2019, the Commission issued an order granting party status to Amber Christenson, Allen Robish, and Kristi Mogen. (AR 1070-1071) On February 27 and 28, 2019, the Applicant updated Appendix H and I based on participant status. (AR 1078-1135) On March 20, 2019, the public input hearing was held. (AR 20685)

On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR 1322) On April 5, 2019, the Commission issued a procedural schedule and granted party status to Patrick Lynch.[1] (AR 1461-1462)

On April 9, 2019, Crowned Ridge filed the supplemental testimony of Chris Ollson, Jay Haley, Mark Thomson, Tyler Wilhelm, and Sam Massey. (AR 1474-1944) On April 10, 2019, Sarah Sappington adopted the direct testimony of Kimberly Wells. (AR 1925-1944) On May 10, 2019, the Interveners filed the testimony of John Thompson and Allen Robish (AR 2096-2104),[2] while Staff filed the direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney. (AR 2105-3505)

[1] The Interveners from the underlying proceeding who comprise the Appellants are Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch.

[2] During the evidentiary hearing, the Interveners did not move for their testimony to be made part of the evidentiary record, and, therefore, it is not part of the record. (AR 20686)

On May 10, 2019, the Commission issued an Order For and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for June 11-14, 2019 to be conducted in Room 413, State Capitol Building, 500 E. Capitol Ave., Pierre, South Dakota. (AR 2094-2095)

On May 24, 2019, the Applicant filed the rebuttal testimony of Sarah Sappington, Andrew Baker, Dr. Robert McCunney, Dr. Chris Ollson, Jay Haley, Richard Lampeter, Mark Thomson, Tyler Wilhelm, and Sam Massey. (AR 3098-4818) The rebuttal testimony of witness Haley confirmed that the Project was in compliance with the county sound and shadow flicker thresholds, as well as a self-imposed sound threshold for the Project not to produce sound over 45 A-weighted decibels ("dBA") sound within 50 feet of any nonparticipant's residence and over 50 dBA within 50 feet of any participant's residence. (AR 4701-4747) The testimony of witnesses McCunney and Ollson[3] also showed that if the Project complied with the sound and shadow flicker thresholds implemented by the counties and self-imposed by Crowned Ridge the Project would not have a detrimental impact on the health and welfare of inhabitants. (AR 1563-1924, 3728-3917, 4132-4369)

On June 6, 11, and 12, the Commission held evidentiary hearings, during which Crowned Ridge entered into the record its application, testimonies, and hearing exhibits. (AR 20686; 6944-11404) Among the exhibits submitted, were Exhibits A43-1 and 56 (iso maps) that confirmed that the Project was modelled to be in compliance with the

[3] Witness McCunney is a Harvard-trained medical doctor specializing in occupational medicine (AR 4144) and witness Ollson holds a Ph.D in environmental science. (AR 1587)

modelled sound and shadow flicker thresholds ultimately adopted by the Commission in its Order. (AR 17225-17231; 17821-17834; 20697-20698, 20708-20710, 20712)

On July 2, 2019, post hearing briefs were filed by Crowned Ridge, Staff, and Interveners. (AR 20686)

After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, on July 9, 2019, the Commission voted unanimously to issue a Facility Permit for the Project, subject to certain conditions. (AR 20554-20652)

On July 26, 2019, the Commission issued the written Order granting the Facility Permit to Crowned Ridge. (AR 20684-20714) The Facility Permit included 45 conditions, including conditions on sound and shadow flicker thresholds and avian monitoring and protection. (*Id.*)

SUMMARY OF THE ARGUMENT

Appellants assert the Commission abused its discretion, because it granted the Facility Permit without requiring Crowned Ridge to submit: (1) a sound study that included the impact of 117 proposed turbine locations from the Dakota Range wind projects; (2) sound and shadow flicker studies that included the impact on residents residing within the towns of Stockholm and Waverly; and (3) an avian impact study for the entire Project boundary. The Appellants' assertions, however, are not only based on incorrect and incomplete factual predicates, they ignore the well-reasoned findings and conclusions of the Commission, all of which are based on substantial evidence. It is well-settled that a court cannot overturn a Commission decision as an abuse of discretion unless its findings, conclusions, and decisions are not supported by substantial evidence

and are unreasonable and arbitrary. Any reasonable reading of the Commission's Order clearly shows the Commission's findings and conclusions related to sound and shadow flicker, and avian monitoring and protection are supported by substantial evidence and they are reasonable and not arbitrary. Thus, the Court should affirm the Commission's Order.

STANDARD OF REVIEW

The court affords great weight to the Commission's factual findings and the inferences drawn by the Commission on questions of fact. *See* SDCL 1-26-36. Pursuant to SDCL 1-26-36, a "court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" implicate one of the enumerated criteria associated with Commission error set forth in SDCL 1-26-36. In the instant appeal, Appellants assert that the Commission abused its discretion, which is one of the enumerated criteria. However, the court can only find the Commission abused its discretion, when its findings, conclusions, or decisions are unsupported by substantial evidence and are unreasonable and arbitrary. *See In re Midwest Motor Express*, 431 N.W. 2d 160, 162 (S.D. 1988). Under SDCL 1-26-1(9), substantial evidence is defined as "relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support the conclusion." It is long settled that a court will not weigh the evidence or substitute its judgment for that of the Commission, but, rather, it is the court's function is to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. *In re Svoboda*, 54 N.W. 2d 325, 328 (S.D. 1952); *In re Dakota Transp., Inc.*,

291 N.W. 589, 593, 595-596 (S.D. 1940). In addition, for a court to find an abuse of discretion, the agency's action must be "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." *Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W. 2d 851, 856. Further, a court also only reverses the Commission's decision when it is "left with a definite and firm conviction that a mistake has been committed." *In re Midwest*, 431 N.W. 2d at 162. Lastly, even if the court finds the Commission abused its discretion, for the court to overturn the Commission's decision it must also conclude that the abuse of discretion had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W. 2d at 856.

ARGUMENT

The Court should affirm the Commission's Order granting a Facility Permit to Crowned Ridge, because the Commission acted within its discretion when concluding, pursuant to SDCL 48-41B-22, that: (1) the sound and shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants; and (2) Crowned Ridge's impact on avian species will not pose a threat of serious injury to the environment. The Court should further rule that Appellants waived and failed to preserve for appeal Issue No. 2 as set forth in their Brief, and, also, deny Appellants' request for judicial notice of the Dakota Range Proceedings.

I. The Court should deny Appellants' request to take judicial notice of the Dakota Range Proceedings.

Appellants request that the Court take judicial notice of exhibits and maps in the Dakota Range Proceedings, (Commission Docket Nos. EL18-003 and EL18-046), which Appellants concede are not part of the underlying record. Appellants Br., p. 5. Appellants' request should be denied.

Pursuant to SDCL 19-19-201(b), for a court to take judicial notice of an adjudicative fact, it must find that:

> . . . [the] fact is not subject to reasonable dispute because it:
>
> (1) Is generally known within the trial court's territorial jurisdiction; or
>
> (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

The exhibits and maps in the Dakota Range Proceedings are subject to reasonable dispute, and, therefore, Appellants' request for judicial notice should be denied. The Dakota Range exhibits and maps are not part of the record of underlying proceeding, and, therefore, are not generally known to be within this Court's territorial jurisdiction in the instant appeal. Hence, the first prong of SDCL 19-19-201(b) is not satisfied. Second, the accuracy of the Dakota Range exhibits and maps are subject to question. Crowned Ridge was not a party to the Dakota Range Proceedings, and, therefore, is not in a position to verify the accuracy of the exhibits and maps, and, also has had no opportunity to litigate the accuracy of the exhibits and maps. The exhibits and maps were submitted by the Dakota Range subsidiaries of Apex Clean Energy Holdings, LLC, all of which are companies wholly separate from and unrelated to Crowned Ridge. Thus, there is no basis in this appeal for a finding that the exhibits and maps can be accurately and readily

determined from sources whose accuracy cannot reasonably be questioned. Therefore, second prong of SDCL19-19-201(b) is also not satisfied. *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419 (quoting *In re Dorsey & Whitney Tr. Co.*, 2001 S.D. 35, ¶ 19, 623 N.W.2d 468, 474) (judicial notice of an adjudicative fact is only appropriate when the fact is related to the immediate parties and involves a fact as to the who, what, when, here, and why between the parties); *State ex. rel. LeCompte v. Keckler*, 2001 S.D. 68 ¶ 11, n.7, 628 N.W.2d 749, 754, n. 7 (courts generally refuses to take judicial notice of facts outside the record, unless the fact relates to the matter at issue and involves the same parties). Further, courts refuse to take judicial notice of a fact that is asserted for the truth of the matter, which is precisely what Appellants request the Court to do in this appeal, because Appellants request judicial notice of the Dakota Range exhibits and maps in order to assert the truth of the exact location of the Dakota Range wind turbines. *See KBC Asset Mgmt. N.V. v. Omincare, Inc*. 769 F.3d 455, 468 (6th Cir. 2014); *GE Capital Corp. v. Lease Resolution Corp*., 128 F.3d 1074, 1082 n.6 (7th Cir. 1997) (denying judicial notice under Federal Rules of Evidence 201 (which is identical to SDCL 19-19-201(b)) because the facts were asserted for the truth of the matter). Instructively, this Court can look to other court's decisions in interpreting a state rule of civil procedure that is the equivalent of a federal rule. *See Jacquot v. Rozum*, 2010 S.D. 84, ¶ 15, 790 N.W.2d 498, 503. Accordingly, Appellants request for the Court to take judicial notice of the Dakota Range exhibits and maps is unavailing and, therefore, should be denied. [4]

[4] Appellants cite *Sioux City Boat Club v. Mulhall*, 79 S.D. 668, 117 N.W.2d 92 as holding that courts may take judicial notice of a location of a manmade object on a map. The court, however,

II. The Commission acted within its discretion when it concluded the Project will not substantially impair the health or welfare of the inhabitants.

A. The Commission acted within its discretion when it granted a Facility Permit to Crowned Ridge without first requiring a sound study that included the proposed turbines from the Dakota Range III wind project.

Appellants assert that the Commission abused its discretion when it granted a Facility Permit to Crowned Ridge without requiring a sound study that considered all wind turbines proposed at three Dakota Range wind projects. Appellants Br. at 7-8. Appellants assertion is unavailing, because (1) they make a number of incorrect and incomplete factual assumptions and inferences; and (2) the Commission's finding and conclusions that the sound produced by the Project will not substantially impair the health or welfare of the inhabitants were reasonable, not arbitrary, and supported by substantial evidence.

Appellants' Incorrect and Incomplete Factual Assumptions and Inferences

Appellants' assumption that witness Haley only included 17 Dakota Range wind turbines in his sound models is incorrect. Appellants incorrectly base their assumption that only 17 Dakota Range wind turbines were included in the sound study based on their review of Crowned Ridge iso maps; however, the iso maps are not intended to show all turbines included in the study, but, rather, the maps are used to graphically illustrate compliance with the sound thresholds for participants and nonparticipants. Further,

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made no such holding. The issue in *Sioux City* involved the court recognizing geographic boundaries pertinent to an inquiry as to whether it had jurisdiction. This Court's jurisdiction over the instant appeal is not at issue. Therefore, the issue considered in *Sioux City* is far afield from and not instructive on Appellants' request that this Court take judicial notice of turbine locations set forth in exhibits and maps from the Dakota Range Proceedings.

Crowned Ridge, on the record, clearly indicated that all 97 of the Dakota Range I and II wind turbines were included in its sound studies. (AR 1477, 2237) Moreover, the Commission's Order recognized that Crowned Ridge included all the Dakota Range I and II wind turbines in its sound models. (AR 20697) Therefore, contrary to Appellants' claim, witness Haley included the Dakota Range I and II wind turbines in the Crowned Ridge sound studies. Indeed, the inclusion of the Dakota Range I and II wind turbines (which were approved by the Commission, but not yet constructed) was an additional conservative assumption in addition to a number of other conservative assumptions used by Crowned Ridge in its sound models.[5] Each of the conservative assumptions are cited in the Order as evidence supporting the conclusion that Crowned Ridge had appropriately minimized the sound level to be produced by the Project. (*Id.*)

The reason that the Dakota Ridge III wind turbines were not added as yet another conservative assumption was the fact that Commission had not granted Dakota Range III a facility permit at the time Crowned Ridge filed its Application. Further, there is no legal requirement that the modeling of sound must include every potential wind turbine that may or may not be constructed and operated. Rather, the pertinent legal obligation is for Crowned Ridge to comply with the sound thresholds imposed by the Commission's Order. (AR 20708, Condition No. 26) Accordingly, Appellants' assertion that the sound

[5] The Commission cited the following conservative assumptions included: "(1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted." (AR 20967) The Commission also cited that "Applicant modelled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects." *Id.*

model should have included prospective wind turbines from Dakota Range III is unsupported and without a legal basis.

In addition, Appellants' representation of the discussion between Commissioner Nelson and witness Haley is incorrect. Witness Haley did not testify that sound from a wind turbine travels 25 miles. Instead, during his discussion with Commissioner Nelson, witness Haley agreed with Commission Nelson that the sound model was apparently picking up "some remnant of sound" from the Dakota Range I and II turbines that were 20 or 25 miles away as it related to two Interveners, Robish and Mogen. (AR 12586-12588) Mr. Haley did not testify that the apparent remnant of sound from the Dakota Range turbines was material or that the sound from these turbines 25 miles away would be realized during operation. It bears repeating, the legal obligation related to the production of sound is for Crowned Ridge to comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26), a point lost on the Appellants as it is not mentioned in its Brief.

The Commission's findings and conclusion were supported by substantial evidence, and were reasonable and not arbitrary

The Commission's findings and conclusion that the sound produced by the Project will not substantially impair the health or welfare of the inhabitants were based on substantial evidence and were reasonable and not arbitrary. *See In re Midwest*, 431 N.W. 2d at 162 (". . . we find that an agency's action is . . . an abuse of discretion only when it is unsupported by substantial evidence and is unreasonable and arbitrary."). The Commission's thorough consideration of sound included the follow rationale:

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants property boundaries for those residences in Codington County. Applicant modelled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects. Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and Applicant. Applicant agreed to a post construction sound protocol to be used in the event the Commission orders post construction sound monitoring.
>
> * * *
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR 20697-20698 footnotes citing record evidence omitted).

In Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge complying with the sound thresholds of 45 dBA for sound within 25 feet of a nonparticipant's residence and 50 dBA for sound within 25 feet of a participant's residence. (AR 20708, Condition No. 26) *See Presell v. Mont. Dakota Utils., Co.,* 2015 S.D. 81¶ 8, 871 N.W. 2d 649, 652 (Commission did not abuse

its discretion when it granted a permit subject to conditions, rather than requiring re-submittal of the application to consider additional information).

Any reasonable reading of the above rationale from the Order and Condition No. 26 demonstrates the Commission's findings and ultimate conclusion that, pursuant to SDCL 49-41B-22, the sound produced from the Project will not substantially impair the health or welfare of the inhabitants were based on substantial evidence, and were reasonable and not arbitrary. Clearly, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including its conservative sound modelling assumptions and the testimony of a Harvard-trained medical doctor specializing in the field occupational health) as supporting the findings and conclusion that the sound to be produced by the Project will not substantially impair the health or welfare of the inhabitants. *See* SDCL 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence sufficiently adequate to supporting the conclusion). Further, the Commission's findings, conclusions, and imposition of the sound thresholds in Condition No. 26 are within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell,* 2015 S.D. 81 ¶ 8, 871 N.W. 2d at 652. Consequently, the Commission's thorough and reasonable consideration of sound was within is discretion, which, in turn, requires that the Commission's factual findings and inferences be afforded great weight pursuant to SDCL 1-26-36, and not second guessed by the Court, as Appellants request. *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W. 2d at 856 (the court will not substitute its judgment for that of the agency when

there is ample evidence in the record to support the agency's finding.); *In re Svoboda*, 54 N.W.2d at 328 (reversing circuit court, and directing it to affirm a Commission order that was based on substantial evidence, concluding that ". . . the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission."); *In re Dakota,* 291 N.W. at 593, 595-596 (reversing circuit court, and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "[t]he ultimate question is whether there was substantial evidence to support the order of the Commission."). Accordingly, as the Commission's rationale on sound was well-reasoned, and was based on ample and substantial evidence, the Court should affirm the Commission's conclusion that the sound produced from the Project will not substantially impair the health or welfare of inhabitants.

Further, even if the Court finds the Commission abused its discretion, which it should not, Appellants have failed to show the Commission's actions had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W. 2d at 856 (even if the decision was an abuse of discretion, court will not overturn an agency's decision unless the abuse produced some prejudicial effect). The record shows that the modelled sound level at 50 feet away from the residence of each of the Interveners-Appellants is substantially below the 45 dBA nonparticipant threshold set forth in Condition No. 26: Robish 29.3 dBA, Christenson 38.6 dBA, Mogen 28.8 dBA, and Lynch 37.3 dBA. (AR 17839) For additional context, the record shows that the sound produced from the Project has been

modelled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less the sound of a library for Mogen and Robish. (AR 184) Consequently, there is no showing of prejudicial effect, because the Project's sound is below the 45 dBA Commission imposed threshold, including for Interveners-Appellants. Thus, the Court should affirm the Commission's conclusion that the sound produced from the Project will not substantially impair the health or welfare of the inhabitants.

B. The Commission acted within its discretion when it accepted Crowned Ridge's sound and shadow models as showing the residents of Stockholm and Waverly were below the sound and shadow flicker thresholds.

1. The Court should disregard Appellants' Issue No. 2 as it was waived and not preserved for appeal.

On August 29, 2019, the Appellants filed a Statement of Issues. It is well settled that if an appellant's Statement of Issues fails to set forth the reasons why the Commission's decision, ruling, or action should be reserved or modified the argument is waived. *See Lagler v. Menard, Inc.*, 2018 S.D. 53 ¶ 42, 915 N.W. 2d 707, 719. It is equally well settled that if an Appellant does not object to the issue in the underlying proceeding the issue is not preserved for appeal. *See City of Watertown v. Dakota, Minn. & E.R.R. Co,* 1996 S.D. 82 ¶ 26, 551 N.W. 2d 571, 577; *American Fed. Sav. & Loan Ass'n v. Kass*, 320 N.W.2d 800, 803 (S.D. 1982). In in the instant appeal, Appellants assert in their Brief under Issue No. 2 that the Commission abused its discretion by granting a Facility Permit to Crowned Ridge when sound and shadow flicker studies were not conducted for all occupied residents within the project area. However, Appellants' Issue No. 2 is not set forth in Appellants Statement of Issues, and, therefore, is waived.

Lagler., 2018 S.D. 53 ¶ 42, 915 N.W. 2d at 719. In addition, Issue No. 2 questions the veracity of Crowned Ridge Hearing Exhibits A67, A68, and A57, none of which Appellants objected to in the underlying proceeding. Hence, Appellants also failed to preserve for appeal a challenge on the veracity of these exhibits. *See City of Watertown,* 1996 S.D. 82 ¶ 26, 551 N.W.2d at 577; *American Fed. Sav.*, 320 N.W.2d at 803. Accordingly, for these reasons, the Court should disregard Appellants' Issue No. 2.

2. If the Court does not disregard the arguments in Appellants' Brief under Issue No. 2, it should affirm because the Commission acted within its discretion when it accepted Crowned Ridge's sound and shadow models as showing the residents of Stockholm and Waverly were below the sound and shadow flicker thresholds.

Appellants' Incorrect and Incomplete Factual Assumptions and Inferences

Appellants' factual assumption that Crowned Ridge did not analyze the impact of sound and shadow flicker on residents of Stockholm and Waverly is incorrect. Appellants Br. at 9-10. Appellants' assumption is incorrect because it is based on a misreading of the sound and shadow flicker tables, while, at the same time, ignoring the balance of the substantial evidence on sound and shadow flicker submitted by Crowned Ridge. For example, Appellants fail to recognize that the sounds iso map in Exhibit A56 and the shadow flicker map in Exhibit A43-1 clearly show that all residences in Stockholm and Waverly are well below the sound threshold for nonparticipating residents of 45 dBA and the 30 hour shadow flicker annual threshold for all residents.[6] (AR

[6] For example, the sound iso map filed as Exhibit A56 shows that all the residents of Stockholm and Waverly are below 35 dBA, which is well below the non-participant threshold of 45 dBA. (AR 17832-17833) Stockholm's results are also confirmed by the stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A57, which are in close proximity to the

17225-17231; 17821-17834) Appellants also fail to recognize that the Commission's Order cites to Exhibits A43-1 and A56 as well as the testimony of witness Haley to reach the conclusion that that the Project's modelled sound and shadow flicker levels were below the Commission imposed sound and shadow flicker thresholds for all non-participating residents, which would include the residents of Stockholm and Waverly. (AR 20697-20698) Therefore, contrary to the faulty inferences of Appellants, Crowned Ridge did show that all the residents of Stockholm and Waverly were modelled to be below the applicable sound and shadow flicker thresholds.

The Commission's findings and conclusion were supported by substantial evidence, and were reasonable and not arbitrary

The Commission's rationale, findings, and conclusion on the sound produced by the Project and its impact on habitants are set forth, *supra*, in Section II A. As Section II A demonstrates, the Commission's conclusion that the sound produced by the Project will not substantially impair the health or welfare of the inhabitants was supported by substantial evidence, and was reasonable and not arbitrary. Further, Appellants are flatly incorrect that Crowned Ridge excluded the residents of Stockholm and Waverly. Thus,

---

Stockholm, and yet their sound is modelled at 35.4 dBA and 36.5 dBA, respectively. (AR 17837). The same holds true for Waverly which is represented by CR1-C4-NP, which is modeled at 38.5 dBA. (AR 17239) Similarly, for shadow flicker, the iso map filed as Exhibit A43-1 shows that the residences of Stockholm will experience less than 10 hours of shadow flicker annually (AR 17236), which again is confirmed when reviewing stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A67, both of which will experience zero hours of shadow flicker (AR 17895). The same holds true for shadow flicker in Waverly; the iso map in Exhibit A43-1 shows that the residences of Waverly will experience less than 10 hours of shadow flicker annually (AR 17237), which again is confirmed when reviewing (CR1-C4-NP) in the table of Exhibit A67 which will experience zero hours of shadow flicker. (AR 17893).

Appellants faulty assertion cannot impact the Commission's well-reasoned rationale on sound that cites to Crowned Ridge's studies, exhibits, and testimony shows the residents of Stockholm and Waverly are below the 45 dBA threshold imposed by the Commission. Accordingly, the Court, for the same reasons set forth in Section II A, should affirm the Commission's conclusion that the sound produced from the Project will not substantially impair the health or welfare of the inhabitants.

With respect to the impact of the Project's shadow flicker on inhabitants, the Commission concluded:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CR 1-C10-P) who is at 36:57 hours of shadow flicker. Applicant modelled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours. Applicant also used conservative assumptions, such as the greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.
>
> (AR 20698) (footnotes citing record evidence omitted).

As with sound, the Commission cited the testimony of Drs. Ollson and McCunney showing no health or welfare impact from 30 hours of annual shadow flicker, and, also, imposed a compliance threshold that shadow flicker at a residence shall not exceed 30 hours of shadow flicker annually, unless waived. (AR 20698, 20711) Therefore, similar to the Commission's well-reasoned rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including its conservative shadow flicker modelling assumptions and testimony of a Harvard-trained medical doctor specializing in the field occupational health) as supporting the

Commission's findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. *See* SDCL 1-26-1(9). Also, the Commission's findings, conclusions, and imposition of the shadow flicker thresholds in Condition No. 34 were within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell,* 2015 S.D. 81¶ 8, 871 N.W.2d at 652. Thus, the Commission's thorough consideration of shadow flicker in the Order was well-reasoned decision and well within the Commission's discretion. Thus, its factual findings and inferences on shadow flicker should be afforded great weight pursuant to SDCL 1-26-36, and not second guessed by the Court. *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856; *In re Svoboda*, 54 N.W.2d at 328; *In re Dakota,* 291 N.W. at 593, 595-596. Accordingly, as the Commission's rationale on shadow flicker was well-reasoned, and was based on ample and substantial evidence, the Court should affirm the Commission's conclusion that the shadow flicker produced from the Project will not substantially impair the health or welfare of inhabitants.

Further, as already established in Section II A, *supr*a, the Appellants cannot show the Commission's actions on sound had a prejudicial effect, as they are all below the Commission's imposed sound threshold. The same holds true for shadow flicker, as each Intervener is below the 30-hour annual compliance threshold: Robish – zero hours, Christenson – 6:56 hours, Mogen – zero hours, and Lynch – zero hours. (AR 17839) Therefore, Appellants cannot show the Commission's actions on shadow flicker had a prejudicial effect. Accordingly, even if this Court were to find the Commission abused

its discretion, which it did not, it should not overturn the Order, because there is no prejudicial effect resulting from the Commission's Order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856.

III. The Commission acted within its discretion when it found there was substantial evidence that the Project will not pose a threat to serious injury to the environment.

Appellants assert that the Commission should not have granted a Facility Permit to the Project because the avian impact study did not cover the acquired Cattle Ridge portion of the Project. Appellants Br. at 11-12. Appellants, however, ignore that the Commission directly addressed this issue in its Order, when pursuant to SDCL 49-41B-22, it concluded that the Project will not pose a threat of serious injury to the environment. Specifically, the Commission rejected the claim that the avian impact study was not adequate, concluding:

> 31. Intervenors argue that Crowned Ridge's Application is materially incomplete since the Avian Use Survey did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the raptor nest surveys did include that area. Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to the SD GF&P. Staff's witness, Mr. Tom Kirschenmann, from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate. The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann.

> 32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations. There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a game production area. Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project. Applicant committed to file a Wildlife Conservation Strategy, which includes both direct and indirect effects as well as the wildlife mitigations measures set forth in the Application, prior to the start of construction. Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Mr. Kirschenmann testified that Applicant had appropriately coordinated with SD GF&P on the impact of the Project on wildlife.

(AR 20693-20694) (footnotes with citations to evidence omitted). In addition, the Commission imposed a number of conditions related to avian monitoring and protection:

> 10. Applicant shall promptly report to the Commission the presence of any critical habitat of threatened or endangered species in the Project Area that Applicant becomes aware of and that was not previously reported to the Commission.
>
> 29. Applicant agrees to undertake a minimum of two years of independently-conducted post construction avian and bat mortality monitoring for the Project, and to provide a copy of the report and all further reports to the United States Fish and Wildlife Services, South Dakota Game, Fish and Parks, and the Commission.
>
> 30. Applicant shall file a Bird and Bat Conservation Strategy (BBCS) prior to beginning construction of the Project. The BBCS shall be implemented during construction and operation of the Project.

(AR 20706, 20710 Condition Nos. 10, 29, 30) The Order's rationale and conditions clearly demonstrate that the Commission directly addressed the Project's impact on avian species, and in so doing cited substantial evidence that a reasonable mind might accept as being sufficiently adequate as supporting the Commission's conclusion that the Project will not pose a threat of serious injury to the environment, including avian species. *See* SDCL 1-26-1(9). Further, the Commission findings, conclusion, and

imposition of conditions related to avian species in light of the entire record were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell,* 2015 S.D. 81¶ 8, 871 N.W.2d at 652. Thus, the Commission's findings and conclusions regarding the Project's impact on avian species, including the imposition of numerous conditions on avian monitoring and protection, was within the Commission's discretion. Accordingly, its factual findings and inferences on avian issues should be afforded great weight pursuant to SDCL 1-26-36, and not second guessed by the Court. *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W. 2d at 856; *In re Svoboda*, 54 N.W.2d at 328; *In re Dakota,* 291 N.W. at 593, 595-596. Put another way, Appellants' assertion on avian studies is squarely an attempt to have the Court weigh the evidence and substitute its judgment for the Commission's, neither of which are the role of the Court. *See In re Svoboda*, 54 N.W. 2d at 328; *In re Dakota,* 291 N.W. at 593, 595-596. Accordingly, as the Commission's rationale on the Project's impact on environment, including avian species, was well-reasoned, and was based on ample and substantial evidence, the Court should affirm the Commission's conclusion that the Project will not pose a threat of serious injury to the environment.

Appellants have also not shown any prejudicial effect from the Commission's action on avian protections, and, therefore, even if the Court were to find the Commission abused its discretion, which it did not, the Court should not overturn the Commission's Order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856.

CONCLUSION

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

Respectfully submitted this 20th day of December 2019.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL 15-26A-66(b). Proportionally spaced font Times New Roman l3 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Crowned Ridge's Appellees Brief contains 6,874 words as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

Miles Schumacher of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 20th day of December 2019, he electronically filed the foregoing document with the Clerk of the Third Circuit Court via Odyssey File & Serve, and further certifies that the foregoing document was served via Odyssey File & Serve to:

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

AMBER KAY CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, And PATRICK LYNCH,	)	
Appellants,	)	CIV 19-290
v.	)	**MEMORANDUM OPINION**
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UNTILITIES COMMISSION,	)	
Appellees.	)	

INTRODUCTION & STATEMENT OF FACTS

This matter comes before the circuit court on appeal by Appellants Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch (collectively "Appellants"), appealing the South Dakota Public Utilities Commission's ("the Commission's") Final Decision and Order Granting Permit to Construct Facility in EL 18-003 dated July 26, 2019. (AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions).

Crowned Ridge Wind, LLC ("Crowned Ridge" or "Applicant") submitted its application for a facility permit for a 300 megawatt (MW) wind energy facility to consist of up to 130 wind turbines in Codington and Grant counties on January 30, 2019 ("the Project"). (AR 10-960). Within its application, Crowned Ridge submitted written testimony from five witnesses[1] (two of whom filed jointly). (AR 965-1023). On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply

[1] The five witnesses included Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 961-2023).

for Party Status. (AR 1026-27). Pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on March 20, 2019, in Waverly, SD. (AR 1026-27). Five individuals intervened as parties before the April deadline and the Commission granted party status to each intervenor who filed before said deadline.[2] (AR 1070, 1322, 1463).

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses (two of whom testified jointly).[3] (AR 1467-1924). On April 10, 2019, Sarah Sappington adopted the direct testimony of Kimberly Wells. (AR 1925-44). On April 25, 2019, the intervenors filed a Motion to Deny and Dismiss the application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. (AR 2055-91, Transcript of Ad Hoc Commission Meeting). On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss and an Order to Amend Application. (AR 2092-93). Also on May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for June 11-14, 2019 to be conducted in Room 413, State Capitol Building, Pierre, SD. (AR 2094-95). Further on May 10, 2019, the intervenors filed the testimony of John Thompson and Allen Robish (AR 2096-2104);[4] while Commission Staff filed the direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney (AR 2105-3505). Intervenors submitted a Second Motion to Deny and Dismiss and brief in support on May 17, 2019. (AR 3523-55). On May 24, 2019, Crowned Ridge submitted written rebuttal testimony for Mark Thompson, Dr. Chris Ollson, Andrew Baker, Dr. Robert McCunney, Richard Lampeter, Sarah Sappington, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 3698-4818). The second motion was heard by

[2] The Commission granted party status to Amber Christenson, Allen Robish, and Kristi Mogen on February 22, 2019. (AR 1070-71). On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR 1322). On April 5, 2019, the Commission granted party status to Patrick Lynch and established a procedural schedule. (AR 1463-64).

[3] The five witnesses included Chris Ollson, Jay Haley, Tyler Wilhelm, Sam Massey, and Mark Thompson.

[4] During the evidentiary hearing, the intervenors did not move for their testimony to be made part of the evidentiary record, and, therefore, it is not part of the record. (AR 20686).

the Commission on June 6, 2019. (AR 12245-52, Motion Hearing Transcript). The Commission denied the second motion.

On June 6, 11, and 12, the Commission held evidentiary hearings, during which Crowned Ridge entered into the record its application, testimonies, and hearing exhibits. (AR 6944-11404). Among the exhibits submitted were Exhibits A43-1 and 56 (isoline maps) that confirmed the Project was demonstrated to be in compliance with the modeled sound and shadow flicker thresholds ultimately adopted by the Commission in its Order (AR 17225-31; 17821-34; 20697-98; 20708-710; 20712). At the hearing, Crowned Ridge and Commission Staff presented witness testimony. (AR 11928-12059, 12253-12504, 12521-12823). Appellants did not call any witnesses. The Hearing Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing. On June 13, Tim and Linda Lindgren, represented by counsel, filed a Late Application for party status. (AR 20101-104) On June 25, 2019, the Commission heard the late-filed request for party status and voted 2-1 to deny the Lindgrens' request. (AR 20189-192, 20196-20209, 20222-23). The parties submitted post-hearing briefs on July 2, 2019. (AR 20257-20358, Intervenor-Appellants; 20445-491, Crowned Ridge; 20492-20510, Commission Staff).

On July 9, 2019, the Commission met to consider whether to issue a facility permit for the project. (AR 20565-20652). After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, the Commission voted unanimously to issue a Facility Permit for the Project, subject to certain conditions (AR 20554-20652). On July 26, 2019, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions (AR 20684-20714). The Facility Permit included 45 conditions, including sound and shadow flicker thresholds and avian monitoring and protection. *Id.* Appellants' issues on appeal were filed August 29, 2019, and an initial brief on November 8, 2019.

The Commission filed its response brief on December 19, 2019, and Appellee Crowned Ridge filed its brief on December 20, 2019. This court affirms the Commission's decision.

STANDARD OF REVIEW

SDCL § 49-41B-30 permits any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission to obtain judicial review of that decision by filing a notice of appeal in circuit court. "The review procedures shall be the same as that for contested cases under Chapter 1-26 [the Administrative Procedures Act.]"[5] *Id.* The review procedures are governed by SDCL § 1-26-36, which requires a reviewing court "to give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (agency findings of fact are reviewed under the clearly erroneous standard).

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 § 1-26-36(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). *See also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a

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

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). The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)) (emphasis added). 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)). The court affords great weight to the findings made and inferences drawn by an agency on questions of fact. *See* SDCL § 1-26-36, providing in relevant part:

> 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;
> (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.

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 at ¶ 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.[6] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Here, Appellants primarily assert that the Commission abused its discretion when making certain findings and conclusions related to sound, shadow flicker, and avian impact–and ultimately in granting Crowned Ridge's application for a facility permit.[7] The proper standard of review for findings of fact, however, is clearly erroneous. Appellants also challenge the agency's conclusion that the Crowned Ridge 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.[8] 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)).

APPLICABLE LAW AND ANALYSIS

A. Judicial Notice of the Dakota Range Proceedings

[6] 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.

[7] Appellants argue that certain findings and conclusions are an abuse of discretion on the part of the Commission. However, the ultimate decision (to grant the permit) would be reviewed under abuse of discretion, while the agency's findings of fact would be reviewed under the clearly erroneous standard. Despite these differences, the outcome is still the same: the appeal should be denied.

[8] 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).

Appellants request that the court take judicial notice of exhibits and maps in the Dakota Range Proceedings.[9] Appellants argue that although not a part of the record in this case, the exhibits and maps generated in the Dakota Range wind projects are relevant to the issues here and were a point of contention during the evidentiary hearings in the present case. SDCL § 19-19-201 governs judicial notice of adjudicative facts.[10] That statute provides:

> **(a) Scope.** This section governs judicial notice of an adjudicative fact only, not a legislative fact.
> **(b) Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
> (1) Is generally known within the trial court's territorial jurisdiction; or
> (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
> **(c) Taking notice.** The court:
> (1) May take judicial notice on its own; or
> (2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.
> **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
> **(e) Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
> **(f) Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

The general rule is that a fact judicially noticed must not be one subject to reasonable dispute. *See* SDCL § 19-19-201(b). It must be either generally known within the trial court's territorial jurisdiction, or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Id.*

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[9] Commission Docket Nos. EL18-003, *In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility*, and EL18-046, *In the Matter of the Application by Dakota Range III for a Permit of a Wind Energy Facility.* These dockets are separate, but related, and in the same geographic area (within 25 miles) of the proposed Crowned Ridge wind facility.

[10] "Adjudicative facts are those which relate to the immediate parties involved—the who, what, when, where, and why as between the parties." *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419 (quoting *In re Dorsey & Whitney Tr. Co.*, 2001 S.D. 35, ¶ 19, 623 N.W.2d 468, 474) (internal citations omitted).

Appellants cite to *Sioux City Boat Club v. Mulhall* to support the assertion that courts will take judicial notice of the location of a manmade object on a map. 117 N.W.2d 92 (S.D. 1962). However, in *Sioux City Boat Club*, the issue involved the court recognizing geographic boundaries pertinent to an inquiry as to whether it had jurisdiction. The issue in *Sioux City Boat Club* is not analogous or instructive on Appellants' request that this court take judicial notice of turbine locations set forth in exhibits and maps from the Dakota Range proceedings.

The number of wind turbines in the Dakota Range facility and the geographic location of the turbines is not a matter of common knowledge generally known within the trial court's jurisdiction. *See* SDCL § 19-19-201(b)(1). Additionally, the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. *See* SDCL § 19-19-201(b)(2). Further, Crowned Ridge was not a party to the Dakota Range proceedings and cannot verify the accuracy of the exhibits and maps.[11] Because there is no basis for a finding that the exhibits and maps from the Dakota Range proceedings are either generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned, this court declines to take judicial notice of the Dakota Range proceedings.

B. Appellants' Arguments Regarding Sound Studies

Appellants argue the Commission abused its discretion when it approved Crowned Ridge's application, alleging the Commission relied on incomplete and inaccurate information related to sound studies. However, on findings of fact the proper analysis is the clearly erroneous standard. Therefore, this court analyzes if the Commission's findings of fact were clearly erroneous based on the record as it pertains to sound studies. Here, the Commission's conclusion that the sound produced by the project would not substantially impair the health or welfare of the inhabitants was

[11] The exhibits and maps were submitted by Apex Clean Energy Holdings, LLC, a Dakota Range subsidiary wholly separate from and unrelated to Crowned Ridge.

supported by substantial evidence in the record, was reasonable and not arbitrary, therefore within their discretion.

SDCL § 49-41B-22 requires a permit applicant 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.[12]

The statute does not require *how* the applicant must establish the four elements: whether by maps, charts, random samplings, or otherwise. Here the Commission thoroughly considered the following information regarding sound (among other things):

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound

[12] However, this version of SDCL § 49-41B-22 has only been in effect since July 1, 2019. While the Commission issued its decision granting the facility permit for the project on July 26, 2019, all hearings were held prior to July 1, 2019. The prior version of SDCL § 49-41B-22, effective through June 30, 2019, reads as follows:
The applicant has the burden of proof to establish 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;
(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.

The 2019 update to the statute did not materially change the law, but instead clarified that wind energy facilities must comply with this statute.

> emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants' property boundaries for those residences in Codington County. Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects. Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and Applicant. Applicant agreed to a post-construction sound protocol to be used in the event the Commission orders post-construction sound monitoring.
> * * * *
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR 20697-20698, footnotes citing record evidence omitted).

In Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge complying with the sound thresholds of 45 dBA for sound within 25 feet of a non-participant's residence and 50 dBA for sound within 25 feet of a participant's residence. (AR 20708, Condition No. 26). *See Pesall v. Montana Dakota Utils., Co.*, 2015 S.D. 81, ¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring re-submittal of the application to consider additional information.). The Commission's analysis went above and beyond what was required by SDCL § 49-41B and ARSD 20:10:22. ARSD 20:10:22:13 provides in part:

> ... The environmental effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction...

Even considering this administrative rule, if it applies to wind energy facilities, at the time of the application for the Project when the sound modeling was completed (as well as at the time the permit was issued) there were no energy conversion facilities or wind energy facilities operating or under construction in the area.[13] Therefore, the sound modeling and the Commission's analysis went above and beyond the scope of review contemplated in the rule by factoring in the closest permitted wind turbines into the noise and shadow flicker analysis. The inclusion of the Dakota Range I and II wind turbines (which were approved by the Commission, but not yet constructed) was an additional conservative assumption in addition to several other conservative assumptions used by Crowned Ridge in its sound models.[14] The reason the Dakota Ridge III wind turbines were not added as yet another conservative assumption was the fact that Commission had not granted Dakota Range III a facility permit at the time Crowned Ridge filed its application. Crowned Ridge witness Jay Haley's rebuttal testimony states that "the tables in Exhibit 3 of the supplemental testimony show the cumulative results from *all turbines* in CRW, Crowned Ridge Wind II, and Dakota Range I and II." (emphasis added) (AR 4703, Rebuttal Testimony of Jay Haley, 2:11-13).

Appellants make a number of incorrect and incomplete factual assumptions and inferences. Appellants allege that only 17 Dakota Range turbines were included in the sound study based on a review of the Crowned Ridge isoline maps. But the maps are not intended to show all turbines included in the study—rather, they are used to graphically illustrate compliance with the sound thresholds for participants and non-participants. Crowned Ridge clearly indicated on the record

[13] The Dakota Range projects were not existing or under construction at this time. Because of this, even under the administrative rule Applicant was not required to include them in the modeling. Further, there is no legal requirement that the modeling of sound include every potential wind turbine that may or may not be constructed and operated.
[14] The Commission cited the following conservative assumptions included: "(1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted." (AR 20967). The omission also cited that "Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects." *Id.*

that all 97 of the Dakota Range I and II wind turbines were included in its sound studies (AR 1477, 2237). Further, the Commission's order recognized that Crowned Ridge included all the Dakota Range I and II turbines in its sound models (AR 20697). The fact that the map showed only the nearest 17 turbines appears to have led Appellants to the inaccurate conclusion that only 17 were included in the model. [Even so,] the Commission found that "Applicant modeled sound levels with consideration of the cumulative impacts from Dakota Range I and II and Crowned Ridge, II, LLC wind projects." (AR 20697, Finding of Fact 46).

Appellants also criticize witness Jay Haley's credentials and the use of the initials P.E. (indicating he is a professional engineer). At the evidentiary hearing, Appellants' trial attorney conducted a lengthy voir dire of Haley, after which Attorney Ganje objected to Haley's testimony on the grounds that the witness had held himself out to be a licensed professional engineer because of the initials behind his signature. Appellants' trial counsel also submitted a brief upon making an oral objection. Commission staff argued that credibility of a witness can be established by training, education, and experience, and licensing is not the end-all determination. (EH 352:15-20). Chairman Hanson stated that he agreed with Commission staff's argument. (EH 354:10-17). After taking argument from the parties, the Commission unanimously voted to overrule attorney Ganje's objection. (EH 355:7-9). The Commission's ruling on the admissibility of Haley's testimony is not an issue that was included within the Statement of Issues and is not subject to this appeal. *See* SDCL § 1-26-31.4.

The Commission's findings and conclusions that the sound produced by the project will not substantially impair the health or welfare of the inhabitants were reasonable, not arbitrary, and

supported by substantial evidence.[15] *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence sufficiently adequate to supporting the conclusion). Based on the information in the administrative record, the Project will comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26).[16] This court gives great deference to the Commission's findings pursuant to SDCL § 1-26-36. *Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952) (reversing the circuit court and directing it to affirm a Commission order that was based on substantial evidence, concluding that "... the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission.); *In re Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589, 593-96 (S.D. 1940) (reversing circuit court and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "the ultimate question is whether there was substantial evidence to support the order of the Commission.") Commission's thorough and reasonable consideration of sound was within its discretion.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to show that the Commission's actions had any prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its

[15] The testimony of witnesses McCunney and Ollson showed that if the Project complied with the sound and shadow flicker thresholds implemented by the counties and self-imposed by Crowned Ridge the Project would not have a detrimental impact on the health and welfare of inhabitants. (AR 1563-1924, 3728-3917, 4132-4369).

[16] The rebuttal testimony of witness Haley confirmed that the Project was in compliance with the county sound and shadow flicker thresholds, as well as a self-imposed sound threshold for the Project not to produce sound over 45 A-weighted decibels ("dBAs") sound within 50 feet of any nonparticipant's residence and over 50 dBA within 50 feet of any participant's residence. (AR 4701-4747).

discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). The record shows that the modeled sound level at 50 feet away from the residence of each of the Appellants is substantially below the 45 dBA non-participant threshold set forth in Condition 26.[17] The sound produced from the Project has been modeled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less than the sound of a library for Mogen and Robish. (AR 184). The sound is below the 45 dBA threshold imposed by the Commission. Appellants have failed to demonstrate any prejudicial effect, and their appeal on this issue should be denied.

C. Appellants' Arguments Regarding Shadow Flicker

Appellants argue that the Commission abused its discretion when it approved Crowned Ridge's application for a permit without sound and shadow flicker studies that encompassed all occupied residences within the siting area.[18] Applicant argues that Appellants failed to preserve this issue for appeal. It is well settled that if an Appellant does not object to the issue in the underlying proceeding, the issue is not preserved for appeal. *See, e.g., City of Watertown v. Dakota, Minnesota & E.R. Co.*, 1996 S.D. 82, ¶ 26, 551 N.W.2d 571, 577; *American Fed. Sav. & Loan Ass'n v. Kass*, 320 N.W.2d 800, 803 (S.D. 1982). This issue questions the veracity of Crowned Ridge hearing exhibits A67, A68, and A57, none of which Appellants objected to in the underlying proceeding. They also failed to preserve for appeal a challenge on the veracity of these exhibits. *See City of Watertown*, 1998 S.D. 82, ¶ 26, 551 N.W.2d at 577.

Applicant also argues that Appellants failed to include this issue in its Statement of Issues.[19] Applicant argues that it is well settled that if an appellant's Statement of Issues fails to set forth

[17] Robish: 29.3 dBA, Christenson: 38.6 dBA, Mogen: 28.8 dBA, Lynch: 37.3 dBA (AR 17839).
[18] As previously mentioned, however, the proper standard of review would be analyzing whether the factual findings and conclusions regarding shadow flicker were clearly erroneous.
[19] See Statement of Issues, filed by Appellants on August 29, 2019, listing 31 separate issues.

the reasons why the Commission's decision, ruling, or action should be reserved or modified, the argument is waived, citing *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 42, 915 N.W.2d 707, 719. However, that is not necessarily what *Lagler* says. The cited paragraph reads as follows:

> Once the circuit court's jurisdiction to review a particular decision, ruling, or action has been established—either through the filing of a notice of appeal or a notice of review—the question then becomes one of issue waiver. As indicated above, the appellant must file a statement of the issues to be presented on appeal, and the appellee may file such a statement as well. SDCL 1–26–31.4. In other words, once jurisdiction is established, the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified. *While the failure to specify a decision, ruling, or action in a notice of appeal or notice of review results in a lack of jurisdiction to review the same, the failure to file a statement of issues results in a waiver of argument.* And while either lack of jurisdiction or waiver of argument results in a denial of relief on appeal, they do so in fundamentally different ways (a lack of jurisdiction—which may be raised at any time—is a mandatory restraint on the court's power to act, but waiver is a restraint on a party's arguments that gives a court discretion to disregard them).

(emphasis added). This paragraph does not necessarily state that the failure to state the exact issue in the Statement of Issues constitutes a waiver, but rather, that the failure to file a Statement of Issues altogether results in a waiver of argument. Here, in Appellants' Statement of Issues, Issue 8 is "[w]hether the PUC acted arbitrarily and capriciously when it failed to consider testimony regarding trespass violations for shadow flicker and infrasound."

The court finds that Appellants Issue 8 is sufficient enough to allow the court to consider this issue on appeal. While Appellants certainly would have been better served had they objected to the admission of Exhibits A57, A67, or A68. (EH 366, 579:10-12), the court will consider argument on this issue.

Appellants' factual assumption that Crowned Ridge did not analyze the impact of shadow flicker on residents of Stockholm and Waverly is incorrect and not supported by the record. Appellants fail to recognize that the sounds isoline map in Exhibit A56 and the shadow flicker

map in Exhibit A43-1 clearly show that all residences in Stockholm and Waverly are well below the sound threshold for nonparticipating residents of 45 dBA and the 30-hour shadow flicker annual threshold for all residents.[20] (AR 17225-17231, 17821-17834). Exhibit A43-1 is a map detailing shadow flicker isolines for the entire project area (AR 17225-17231). This map demonstrates that each town is well below the shadow flicker limit in the Final Order.

Further, no requirement exists in South Dakota law for sound and shadow flicker studies that include each and every structure in the siting area. Again, nowhere in the statute or the administrative rules is it mandated how an applicant must establish the four elements in SDCL § 49-41B-22: whether by isoline maps, all-inclusive charts, random samplings, or otherwise. Further, while ARSD 20:10:22:33.02(5) requires an applicant to provide information regarding anticipated operational sound, the rules contain no such requirement for a shadow flicker analysis. With respect to the impact of the Project's shadow flicker on inhabitants, the Commission concluded:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CR1-C10-P) who is at 36:57 hours of shadow flicker. Applicant modeled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours. Applicant also used conservative assumptions, such as greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.

[20] For example, the sound isoline map filed as Exhibit A56 shows that all the residents of Stockholm and Waverly are below 35 dBA, which is well below the non-participant threshold of 45 dBA. (AR 17832-17833). Stockholm's results are also confirmed by the stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A57, which are in close proximity to Stockholm, and yet their sound is modeled at 35.4 dBA and 36.5 dBA respectively. (AR 17837). The same holds true for Waverly, which is represented by CR1-C4-NP, which is modeled at 38.5 dBA. (AR 17239). Similarly, for shadow flicker, the isoline map filed as Exhibit A43-1 shows that the residences of Stockholm will experience less than 10 hours of shadow flicker annually (AR 17236) which is again confirmed when reviewing stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A67, both of which will experience zero hours of shadow flicker. (AR 17895). The same holds true for shadow flicker in Waverly; the isoline map in Exhibit A43-1 shows that the residences of Waverly will experience less than 10 hours of shadow flicker annually (AR 17237) which again is confirmed when reviewing CR1-C4-NP in the table of Exhibit A67 which will experience zero hours of shadow flicker. (AR 17893).

(AR 20698) (footnotes citing record evidence omitted).

As with sound, the Commission cited the testimony of Drs. Ollson and McCunney showing no health or welfare impact from 30 hours of annual shadow flicker per year, and also imposed a compliance threshold that shadow flicker at a residence shall not exceed 30 hours of shadow flicker annually, unless waived. (AR 20698-20711). Therefore, similar to the Commission's rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including conservative shadow flicker modeling assumptions and testimony of a medical doctor specializing in the field of occupational health) as supporting the findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. See SDCL 1-26-1(9). Also, the Commission's findings, conclusions, and imposition of the shadow flicker thresholds in Condition No. 34 were within the range of permissible choices given the record, and therefore were reasonable and not arbitrary. The Commission's factual findings regarding the sound produced from the Project were not clearly erroneous and were supported by substantial evidence.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to demonstrate prejudice. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). Appellants do not even argue that they are prejudiced. Any threat of prejudice is eradicated by the fact that the sound and shadow flicker conditions placed on the permit by the Commission account for actual, not modeled, sound and shadow flicker (AR 20708-20710, Condition 26). Additionally, each intervenor is well below

the 30-hour annual compliance threshold for shadow flicker.[21] As such, Appellants' arguments regarding shadow flicker are denied.

D. Appellants' Arguments Regarding Avian Use Studies

Finally, Appellants argue that the Commission could not have reasonably issued a decision in this matter because the avian use survey[22] submitted by Applicant "did not include data from the northeast portion of the project area, the historic Cattle Ridge portion of the project, and that the Commission overlooked this missing information." These arguments are not supported by the record or by legal authority. The Commission directly addressed this issue in its Order, when pursuant to SDCL § 49-41B-22, it concluded that the project will not pose a threat of serious injury to the environment. Specifically, the Commission rejected the claim that the avian impact study was not adequate, concluding in relevant part:

> 31. Intervenors argue that Crowned Ridge's application is materially incomplete since the Avian Use Survey did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the raptor nest surveys did include that area. Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to SD GF & P. Staff's witness, Mr. Tom Kirschenmann from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate. The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann.
>
> 32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations. There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a

[21] Robish: zero hours, Christenson: 6:56 hours, Mogen: zero hours, Lynch: zero hours. (AR 17839).

[22] SDCL § 49-41B-11(11) requires that an application for a permit include environmental studies relative to the proposed facility. One of the many required environmental studies required by applicant is an Avian Use Study. Avian use surveys are vital and required because impacts of wind energy facilities on avian species can be direct (e.g. turbine strike mortality) or indirect (e.g. loss of degradation of habitat). (AR7022). SWCA Environmental Consultants prepared an Avian Use Survey Report for Applicant summarizing the avian use surveys that were completed for the project area from April 1, 2017 through November 30, 2017 (AR 7017).

> game production area. Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project. Applicant committed to file a Wildlife Conservation Strategy, which includes both direct and indirect effects as well as the wildlife mitigation measures set forth in the Application, prior to the start of construction. Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Mr. Kirschenmann testified that Applicant had appropriately coordinated with SD GF&P on the impact of the Project on wildlife.

(AR 20693-20694) (footnotes with citations to record evidence omitted). As evidenced by Findings of Fact 31 and 32, the Commission clearly recognized that Applicant did study the full extent of the Project Area, and that the survey methods utilized were reasonable and appropriate.

Additionally, in its final Order, the Commission imposed a number of conditions related to avian monitoring and protection:

> 10. Applicant shall promptly report to the Commission the presence of any critical habitat of threatened or endangered species in the Project Area that Applicant becomes aware of and that was not previously reported to the Commission.
>
> 29. Applicant agrees to undertake a minimum of two years of independently-conducted post-construction avian and bat mortality monitoring for the Project, and to provide a copy of the report and all further reports to the United States Fish and Wildlife Services, South Dakota Game, Fish, & Parks, and the Commission.
>
> 30. Applicant shall file a Bird and Bat Conservation Strategy (BBCS) prior to beginning construction of the Project. The BBCS shall be implemented during construction and operation of the Project.

(AR 20706, 20710, Condition Nos. 10, 29, 30). The Order's rationale and conditions clearly demonstrate the Commission addressed the Project's impact on avian species and in doing so cited substantial evidence that a reasonable mind might accept as being adequate as supporting the Commission's conclusion that the Project will not pose a threat of serious injury to the environment, including avian species. *See* SDCL § 1-26-1(9). Further, the Commission's findings, conclusions, and imposition of conditions related to avian species in light of the entire record were reasonable and not arbitrary. Thus, the Commission's findings and conclusions on the Project's

impact on avian species, including the imposition of numerous conditions on avian monitoring and protection, were within the Commission's discretion and are afforded great deference. *See Pesall*, 2015 S.D. 81, ¶ 8, 871 N.W.2d at 652.

Appellants cite no legal authority that an application must contain an avian use survey covering the *entire* project area. SDCL § 49-41B-11(11) does require an application for a permit to include environmental studies relative to the proposed facility, and ARSD 20:10:22:16 requires an Applicant provide information resulting from surveys to identify and quantify terrestrial ecosystems within the siting area. However, similarly to the issues regarding sound and shadow above, SDCL § 49-41B-22 does not specify how an Applicant must meet this burden. While an avian use survey is often used to assess avian species and populations within a project area, it is just one tool that an applicant can utilize to meet the filing content requirements of SDCL 49-41B-11(11) and ARSD 20:10:22:16. This court is unaware of, and Appellants do not cite, any other statute or administrative rule which mandates Applicant must file a *complete* avian use survey to meet its burden of proof.

Applicant errs in the assessment that the Commission overlooked the fact that the Avian Use Survey Report (Survey) the Applicant filed with its Application failed to include data from the Cattle Ridge area. In fact, the Survey included a map that was clearly marked and clearly identified the portion of the project area the Applicant studied to prepare the survey. (AR 7271). The scope of the Survey was discussed at length and on numerous occasions before the Commission. During the evidentiary hearing, Ms. Sappington specifically answered questions about the Survey and its scope and contents (AR 12317-12318). While Ms. Sappington agreed with Appellants' cross-examination questions that the Survey did not include data collected from the Cattle Ridge area, Ms. Sappington also indicated that applicant did conduct other studies within

the Cattle Ridge area and utilized the data collected to prepare Section 11.3 of the Application. (AR 12317-12318). Following the evidentiary hearing, Appellants addressed the lack of data collection in the Cattle Ridge area in Intervenors' post-hearing brief filed on July 2, 2019. (AR 2265). This matter was again discussed before the Commission at the July 9, 2019 Commission meeting, during which, the Commission heard oral arguments of each party, asked additional questions of the parties, and issued its oral decision. (AR 20565-2652???). Of the Permit, but found Section 11.3 of the Application identified the project's potential effects to wildlife for the entire project. (AR 20694). Clearly the Commission did not overlook Appellants' concerns about the scope of the Survey.

The record also clearly shows that the Commission made a reasonable determination that the Applicant submitted sufficient evidence to meet the environmental information requirements in SDCL 49-41B-11(11) and ARSD 20:10:22:16 and to meet the Applicant's ultimate burden of proof. This evidence is concisely explained in Findings of Fact V. B. 31 and 32 of the Commission's permit which state (). As evidence in Finding of Fact 31 and 32, the Applicant presented ample environmental and wildlife evidence to supplement any deficiencies in the avian use survey.

Even assuming *arguendo* that the Commission erred when it relied on the Survey, Appellants make no argument that they were prejudiced by the Commission's decision to grant the Permit. Additionally, the Commission included a number of conditions on the Permit, applicable to the entire project area, to further ensure that the facility does not adversely affect wildlife in the project area (AR 20710 and 20714, Conditions 29, 30, and 45). Given that there is no specific requirement that an Applicant submit an avian use survey of the entire project area to meet its burden of proof, the Commission's decision to issue a permit based on the totality of the

evidence presented was not an abuse of discretion. In conclusion, Appellants have also not shown any prejudicial effect from the Commission's action on avian protections, and, therefore, even if the Court were to find that the Commission abused its discretion, which it did not, the court should not overturn the Commission's order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. As such, the appeal on this issue is denied.

CONCLUSION

The decision of the South Dakota Public Utilities Commission is hereby affirmed. This court gives great weight to the findings made and inferences drawn by the agency on questions of fact in accordance with SDCL § 1-26-36.

Judicial notice of exhibits and maps from the Dakota Range proceedings is not proper, as the number of wind turbines in the Dakota Range facility is not a matter of common knowledge generally known within the trial court's jurisdiction, and the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. This court declines to take the judicial notice requested by Appellants.

The decision to grant the permit to Crowned Ridge was within the Commission's sound discretion, and extensive factual findings and conclusions of law were made that were supported by the administrative record. These factual findings were not clearly erroneous, and this court reviews those factual findings with great deference to the Commission. Applicant met the burden of submitting a complete application which demonstrated that the Crowned Ridge Project 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 footprint area, and further, that it will not substantially impair the health, safety, or welfare of the inhabitants in the siting area in accordance with SDCL § 49-41B-22.

Counsel for Appellees is directed to file an Order affirming the decision of the Public Utilities Commission.

BY THE COURT:

Carmen Means

Carmen A. Means
Circuit Court Judge
Third Judicial Circuit

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

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **ORDER AFFIRMING DECISION OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

Appellants, Amber Kay Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch, having appealed from the South Dakota Public Utilities Commission's Final Decision and Order Granting Permit to Construct Facility in EL 18-003, and the parties having appeared by counsel of record, and the Court having considered the Briefs submitted by the parties and arguments of counsel, and the Court having issued its Memorandum Opinion on April 15, 2020, which is attached as Exhibit A and incorporated herein by this reference, it is hereby,

ORDERED, ADJUDGED and DECREED that the Decision and Order of the South Dakota Public Utilities Commission is affirmed.

Dated this _____ day of April, 2020.

BY THE COURT:

Signed: 4/20/2020 10:42:34 AM

Attest:
Hartley, Connie
Clerk/Deputy

Honorable Carmen A. Means
Circuit Court Judge
Third Judicial Circuit

ATTEST: Clerk of Courts

By:_____
Deputy

EXHIBIT A

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

AMBER KAY CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, And PATRICK LYNCH,	)	
Appellants,	)	CIV 19-290
v.	)	**MEMORANDUM OPINION**
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UNTILITIES COMMISSION,	)	
Appellees.	)	

INTRODUCTION & STATEMENT OF FACTS

This matter comes before the circuit court on appeal by Appellants Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch (collectively "Appellants"), appealing the South Dakota Public Utilities Commission's ("the Commission's") Final Decision and Order Granting Permit to Construct Facility in EL 18-003 dated July 26, 2019. (AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions).

Crowned Ridge Wind, LLC ("Crowned Ridge" or "Applicant") submitted its application for a facility permit for a 300 megawatt (MW) wind energy facility to consist of up to 130 wind turbines in Codington and Grant counties on January 30, 2019 ("the Project"). (AR 10-960). Within its application, Crowned Ridge submitted written testimony from five witnesses[1] (two of whom filed jointly). (AR 965-1023). On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply

[1] The five witnesses included Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 961-2023).

for Party Status. (AR 1026-27). Pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on March 20, 2019, in Waverly, SD. (AR 1026-27). Five individuals intervened as parties before the April deadline and the Commission granted party status to each intervenor who filed before said deadline.[2] (AR 1070, 1322, 1463).

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses (two of whom testified jointly).[3] (AR 1467-1924). On April 10, 2019, Sarah Sappington adopted the direct testimony of Kimberly Wells. (AR 1925-44). On April 25, 2019, the intervenors filed a Motion to Deny and Dismiss the application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. (AR 2055-91, Transcript of Ad Hoc Commission Meeting). On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss and an Order to Amend Application. (AR 2092-93). Also on May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for June 11-14, 2019 to be conducted in Room 413, State Capitol Building, Pierre, SD. (AR 2094-95). Further on May 10, 2019, the intervenors filed the testimony of John Thompson and Allen Robish (AR 2096-2104);[4] while Commission Staff filed the direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney (AR 2105-3505). Intervenors submitted a Second Motion to Deny and Dismiss and brief in support on May 17, 2019. (AR 3523-55). On May 24, 2019, Crowned Ridge submitted written rebuttal testimony for Mark Thompson, Dr. Chris Ollson, Andrew Baker, Dr. Robert McCunney, Richard Lampeter, Sarah Sappington, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 3698-4818). The second motion was heard by

[2] The Commission granted party status to Amber Christenson, Allen Robish, and Kristi Mogen on February 22, 2019. (AR 1070-71). On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR 1322). On April 5, 2019, the Commission granted party status to Patrick Lynch and established a procedural schedule. (AR 1463-64).
[3] The five witnesses included Chris Ollson, Jay Haley, Tyler Wilhelm, Sam Massey, and Mark Thompson.
[4] During the evidentiary hearing, the intervenors did not move for their testimony to be made part of the evidentiary record, and, therefore, it is not part of the record. (AR 20686).

the Commission on June 6, 2019. (AR 12245-52, Motion Hearing Transcript). The Commission denied the second motion.

On June 6, 11, and 12, the Commission held evidentiary hearings, during which Crowned Ridge entered into the record its application, testimonies, and hearing exhibits. (AR 6944-11404). Among the exhibits submitted were Exhibits A43-1 and 56 (isoline maps) that confirmed the Project was demonstrated to be in compliance with the modeled sound and shadow flicker thresholds ultimately adopted by the Commission in its Order (AR 17225-31; 17821-34; 20697-98; 20708-710; 20712). At the hearing, Crowned Ridge and Commission Staff presented witness testimony. (AR 11928-12059, 12253-12504, 12521-12823). Appellants did not call any witnesses. The Hearing Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing. On June 13, Tim and Linda Lindgren, represented by counsel, filed a Late Application for party status. (AR 20101-104) On June 25, 2019, the Commission heard the late-filed request for party status and voted 2-1 to deny the Lindgrens' request. (AR 20189-192, 20196-20209, 20222-23). The parties submitted post-hearing briefs on July 2, 2019. (AR 20257-20358, Intervenor-Appellants; 20445-491, Crowned Ridge; 20492-20510, Commission Staff).

On July 9, 2019, the Commission met to consider whether to issue a facility permit for the project. (AR 20565-20652). After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, the Commission voted unanimously to issue a Facility Permit for the Project, subject to certain conditions (AR 20554-20652). On July 26, 2019, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions (AR 20684-20714). The Facility Permit included 45 conditions, including sound and shadow flicker thresholds and avian monitoring and protection. *Id.* Appellants' issues on appeal were filed August 29, 2019, and an initial brief on November 8, 2019.

The Commission filed its response brief on December 19, 2019, and Appellee Crowned Ridge filed its brief on December 20, 2019. This court affirms the Commission's decision.

STANDARD OF REVIEW

SDCL § 49-41B-30 permits any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission to obtain judicial review of that decision by filing a notice of appeal in circuit court. "The review procedures shall be the same as that for contested cases under Chapter 1-26 [the Administrative Procedures Act.]"[5] *Id.* The review procedures are governed by SDCL § 1-26-36, which requires a reviewing court "to give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (agency findings of fact are reviewed under the clearly erroneous standard).

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 § 1-26-36(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). *See also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a

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

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). The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)) (emphasis added). 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)). The court affords great weight to the findings made and inferences drawn by an agency on questions of fact. *See* SDCL § 1-26-36, providing in relevant part:

> 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;
> (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.

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 at ¶ 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.[6] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Here, Appellants primarily assert that the Commission abused its discretion when making certain findings and conclusions related to sound, shadow flicker, and avian impact–and ultimately in granting Crowned Ridge's application for a facility permit.[7] The proper standard of review for findings of fact, however, is clearly erroneous. Appellants also challenge the agency's conclusion that the Crowned Ridge 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.[8] 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)).

APPLICABLE LAW AND ANALYSIS

A. Judicial Notice of the Dakota Range Proceedings

[6] 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.

[7] Appellants argue that certain findings and conclusions are an abuse of discretion on the part of the Commission. However, the ultimate decision (to grant the permit) would be reviewed under abuse of discretion, while the agency's findings of fact would be reviewed under the clearly erroneous standard. Despite these differences, the outcome is still the same: the appeal should be denied.

[8] 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).

Appellants request that the court take judicial notice of exhibits and maps in the Dakota Range Proceedings.[9] Appellants argue that although not a part of the record in this case, the exhibits and maps generated in the Dakota Range wind projects are relevant to the issues here and were a point of contention during the evidentiary hearings in the present case. SDCL § 19-19-201 governs judicial notice of adjudicative facts.[10] That statute provides:

> **(a) Scope.** This section governs judicial notice of an adjudicative fact only, not a legislative fact.
> **(b) Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
> (1) Is generally known within the trial court's territorial jurisdiction; or
> (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
> **(c) Taking notice.** The court:
> (1) May take judicial notice on its own; or
> (2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.
> **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
> **(e) Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
> **(f) Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

The general rule is that a fact judicially noticed must not be one subject to reasonable dispute. *See* SDCL § 19-19-201(b). It must be either generally known within the trial court's territorial jurisdiction, or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Id.*

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[9] Commission Docket Nos. EL18-003, *In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility*, and EL18-046, *In the Matter of the Application by Dakota Range III for a Permit of a Wind Energy Facility.* These dockets are separate, but related, and in the same geographic area (within 25 miles) of the proposed Crowned Ridge wind facility.

[10] "Adjudicative facts are those which relate to the immediate parties involved—the who, what, when, where, and why as between the parties." *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419 (quoting *In re Dorsey & Whitney Tr. Co.*, 2001 S.D. 35, ¶ 19, 623 N.W.2d 468, 474) (internal citations omitted).

Appellants cite to *Sioux City Boat Club v. Mulhall* to support the assertion that courts will take judicial notice of the location of a manmade object on a map. 117 N.W.2d 92 (S.D. 1962). However, in *Sioux City Boat Club*, the issue involved the court recognizing geographic boundaries pertinent to an inquiry as to whether it had jurisdiction. The issue in *Sioux City Boat Club* is not analogous or instructive on Appellants' request that this court take judicial notice of turbine locations set forth in exhibits and maps from the Dakota Range proceedings.

The number of wind turbines in the Dakota Range facility and the geographic location of the turbines is not a matter of common knowledge generally known within the trial court's jurisdiction. *See* SDCL § 19-19-201(b)(1). Additionally, the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. *See* SDCL § 19-19-201(b)(2). Further, Crowned Ridge was not a party to the Dakota Range proceedings and cannot verify the accuracy of the exhibits and maps.[11] Because there is no basis for a finding that the exhibits and maps from the Dakota Range proceedings are either generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned, this court declines to take judicial notice of the Dakota Range proceedings.

B. Appellants' Arguments Regarding Sound Studies

Appellants argue the Commission abused its discretion when it approved Crowned Ridge's application, alleging the Commission relied on incomplete and inaccurate information related to sound studies. However, on findings of fact the proper analysis is the clearly erroneous standard. Therefore, this court analyzes if the Commission's findings of fact were clearly erroneous based on the record as it pertains to sound studies. Here, the Commission's conclusion that the sound produced by the project would not substantially impair the health or welfare of the inhabitants was

[11] The exhibits and maps were submitted by Apex Clean Energy Holdings, LLC, a Dakota Range subsidiary wholly separate from and unrelated to Crowned Ridge.

supported by substantial evidence in the record, was reasonable and not arbitrary, therefore within their discretion.

SDCL § 49-41B-22 requires a permit applicant 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.[12]

The statute does not require *how* the applicant must establish the four elements: whether by maps, charts, random samplings, or otherwise. Here the Commission thoroughly considered the following information regarding sound (among other things):

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound

[12] However, this version of SDCL § 49-41B-22 has only been in effect since July 1, 2019. While the Commission issued its decision granting the facility permit for the project on July 26, 2019, all hearings were held prior to July 1, 2019. The prior version of SDCL § 49-41B-22, effective through June 30, 2019, reads as follows:
The applicant has the burden of proof to establish 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;
(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.

The 2019 update to the statute did not materially change the law, but instead clarified that wind energy facilities must comply with this statute.

> emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants' property boundaries for those residences in Codington County. Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects. Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and Applicant. Applicant agreed to a post-construction sound protocol to be used in the event the Commission orders post-construction sound monitoring.
>
> * * * *
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR 20697-20698, footnotes citing record evidence omitted).

In Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge complying with the sound thresholds of 45 dBA for sound within 25 feet of a non-participant's residence and 50 dBA for sound within 25 feet of a participant's residence. (AR 20708, Condition No. 26). *See Pesall v. Montana Dakota Utils., Co.*, 2015 S.D. 81, ¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring re-submittal of the application to consider additional information.). The Commission's analysis went above and beyond what was required by SDCL § 49-41B and ARSD 20:10:22. ARSD 20:10:22:13 provides in part:

> ... The environmental effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction...

Even considering this administrative rule, if it applies to wind energy facilities, at the time of the application for the Project when the sound modeling was completed (as well as at the time the permit was issued) there were no energy conversion facilities or wind energy facilities operating or under construction in the area.[13] Therefore, the sound modeling and the Commission's analysis went above and beyond the scope of review contemplated in the rule by factoring in the closest permitted wind turbines into the noise and shadow flicker analysis. The inclusion of the Dakota Range I and II wind turbines (which were approved by the Commission, but not yet constructed) was an additional conservative assumption in addition to several other conservative assumptions used by Crowned Ridge in its sound models.[14] The reason the Dakota Ridge III wind turbines were not added as yet another conservative assumption was the fact that Commission had not granted Dakota Range III a facility permit at the time Crowned Ridge filed its application. Crowned Ridge witness Jay Haley's rebuttal testimony states that "the tables in Exhibit 3 of the supplemental testimony show the cumulative results from *all turbines* in CRW, Crowned Ridge Wind II, and Dakota Range I and II." (emphasis added) (AR 4703, Rebuttal Testimony of Jay Haley, 2:11-13).

Appellants make a number of incorrect and incomplete factual assumptions and inferences. Appellants allege that only 17 Dakota Range turbines were included in the sound study based on a review of the Crowned Ridge isoline maps. But the maps are not intended to show all turbines included in the study—rather, they are used to graphically illustrate compliance with the sound thresholds for participants and non-participants. Crowned Ridge clearly indicated on the record

[13] The Dakota Range projects were not existing or under construction at this time. Because of this, even under the administrative rule Applicant was not required to include them in the modeling. Further, there is no legal requirement that the modeling of sound include every potential wind turbine that may or may not be constructed and operated.
[14] The Commission cited the following conservative assumptions included: "(1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted." (AR 20967). The omission also cited that "Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects." *Id.*

that all 97 of the Dakota Range I and II wind turbines were included in its sound studies (AR 1477, 2237). Further, the Commission's order recognized that Crowned Ridge included all the Dakota Range I and II turbines in its sound models (AR 20697). The fact that the map showed only the nearest 17 turbines appears to have led Appellants to the inaccurate conclusion that only 17 were included in the model. [Even so,] the Commission found that "Applicant modeled sound levels with consideration of the cumulative impacts from Dakota Range I and II and Crowned Ridge, II, LLC wind projects." (AR 20697, Finding of Fact 46).

Appellants also criticize witness Jay Haley's credentials and the use of the initials P.E. (indicating he is a professional engineer). At the evidentiary hearing, Appellants' trial attorney conducted a lengthy voir dire of Haley, after which Attorney Ganje objected to Haley's testimony on the grounds that the witness had held himself out to be a licensed professional engineer because of the initials behind his signature. Appellants' trial counsel also submitted a brief upon making an oral objection. Commission staff argued that credibility of a witness can be established by training, education, and experience, and licensing is not the end-all determination. (EH 352:15-20). Chairman Hanson stated that he agreed with Commission staff's argument. (EH 354:10-17). After taking argument from the parties, the Commission unanimously voted to overrule attorney Ganje's objection. (EH 355:7-9). The Commission's ruling on the admissibility of Haley's testimony is not an issue that was included within the Statement of Issues and is not subject to this appeal. *See* SDCL § 1-26-31.4.

The Commission's findings and conclusions that the sound produced by the project will not substantially impair the health or welfare of the inhabitants were reasonable, not arbitrary, and

supported by substantial evidence.[15] *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence sufficiently adequate to supporting the conclusion). Based on the information in the administrative record, the Project will comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26).[16] This court gives great deference to the Commission's findings pursuant to SDCL § 1-26-36. *Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952) (reversing the circuit court and directing it to affirm a Commission order that was based on substantial evidence, concluding that "... the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission.); *In re Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589, 593-96 (S.D. 1940) (reversing circuit court and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "the ultimate question is whether there was substantial evidence to support the order of the Commission.") Commission's thorough and reasonable consideration of sound was within its discretion.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to show that the Commission's actions had any prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its

[15] The testimony of witnesses McCunney and Ollson showed that if the Project complied with the sound and shadow flicker thresholds implemented by the counties and self-imposed by Crowned Ridge the Project would not have a detrimental impact on the health and welfare of inhabitants. (AR 1563-1924, 3728-3917, 4132-4369).

[16] The rebuttal testimony of witness Haley confirmed that the Project was in compliance with the county sound and shadow flicker thresholds, as well as a self-imposed sound threshold for the Project not to produce sound over 45 A-weighted decibels ("dBAs") sound within 50 feet of any nonparticipant's residence and over 50 dBA within 50 feet of any participant's residence. (AR 4701-4747).

discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). The record shows that the modeled sound level at 50 feet away from the residence of each of the Appellants is substantially below the 45 dBA non-participant threshold set forth in Condition 26.[17] The sound produced from the Project has been modeled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less than the sound of a library for Mogen and Robish. (AR 184). The sound is below the 45 dBA threshold imposed by the Commission. Appellants have failed to demonstrate any prejudicial effect, and their appeal on this issue should be denied.

C. Appellants' Arguments Regarding Shadow Flicker

Appellants argue that the Commission abused its discretion when it approved Crowned Ridge's application for a permit without sound and shadow flicker studies that encompassed all occupied residences within the siting area.[18] Applicant argues that Appellants failed to preserve this issue for appeal. It is well settled that if an Appellant does not object to the issue in the underlying proceeding, the issue is not preserved for appeal. *See, e.g., City of Watertown v. Dakota, Minnesota & E.R. Co.*, 1996 S.D. 82, ¶ 26, 551 N.W.2d 571, 577; *American Fed. Sav. & Loan Ass'n v. Kass*, 320 N.W.2d 800, 803 (S.D. 1982). This issue questions the veracity of Crowned Ridge hearing exhibits A67, A68, and A57, none of which Appellants objected to in the underlying proceeding. They also failed to preserve for appeal a challenge on the veracity of these exhibits. *See City of Watertown*, 1998 S.D. 82, ¶ 26, 551 N.W.2d at 577.

Applicant also argues that Appellants failed to include this issue in its Statement of Issues.[19] Applicant argues that it is well settled that if an appellant's Statement of Issues fails to set forth

[17] Robish: 29.3 dBA, Christenson: 38.6 dBA, Mogen: 28.8 dBA, Lynch: 37.3 dBA (AR 17839).
[18] As previously mentioned, however, the proper standard of review would be analyzing whether the factual findings and conclusions regarding shadow flicker were clearly erroneous.
[19] See Statement of Issues, filed by Appellants on August 29, 2019, listing 31 separate issues.

the reasons why the Commission's decision, ruling, or action should be reserved or modified, the argument is waived, citing *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 42, 915 N.W.2d 707, 719. However, that is not necessarily what *Lagler* says. The cited paragraph reads as follows:

> Once the circuit court's jurisdiction to review a particular decision, ruling, or action has been established—either through the filing of a notice of appeal or a notice of review—the question then becomes one of issue waiver. As indicated above, the appellant must file a statement of the issues to be presented on appeal, and the appellee may file such a statement as well. SDCL 1–26–31.4. In other words, once jurisdiction is established, the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified. *While the failure to specify a decision, ruling, or action in a notice of appeal or notice of review results in a lack of jurisdiction to review the same, the failure to file a statement of issues results in a waiver of argument.* And while either lack of jurisdiction or waiver of argument results in a denial of relief on appeal, they do so in fundamentally different ways (a lack of jurisdiction—which may be raised at any time—is a mandatory restraint on the court's power to act, but waiver is a restraint on a party's arguments that gives a court discretion to disregard them).

(emphasis added). This paragraph does not necessarily state that the failure to state the exact issue in the Statement of Issues constitutes a waiver, but rather, that the failure to file a Statement of Issues altogether results in a waiver of argument. Here, in Appellants' Statement of Issues, Issue 8 is "[w]hether the PUC acted arbitrarily and capriciously when it failed to consider testimony regarding trespass violations for shadow flicker and infrasound."

The court finds that Appellants Issue 8 is sufficient enough to allow the court to consider this issue on appeal. While Appellants certainly would have been better served had they objected to the admission of Exhibits A57, A67, or A68. (EH 366, 579:10-12), the court will consider argument on this issue.

Appellants' factual assumption that Crowned Ridge did not analyze the impact of shadow flicker on residents of Stockholm and Waverly is incorrect and not supported by the record. Appellants fail to recognize that the sounds isoline map in Exhibit A56 and the shadow flicker

map in Exhibit A43-1 clearly show that all residences in Stockholm and Waverly are well below the sound threshold for nonparticipating residents of 45 dBA and the 30-hour shadow flicker annual threshold for all residents.[20] (AR 17225-17231, 17821-17834). Exhibit A43-1 is a map detailing shadow flicker isolines for the entire project area (AR 17225-17231). This map demonstrates that each town is well below the shadow flicker limit in the Final Order.

Further, no requirement exists in South Dakota law for sound and shadow flicker studies that include each and every structure in the siting area. Again, nowhere in the statute or the administrative rules is it mandated how an applicant must establish the four elements in SDCL § 49-41B-22: whether by isoline maps, all-inclusive charts, random samplings, or otherwise. Further, while ARSD 20:10:22:33.02(5) requires an applicant to provide information regarding anticipated operational sound, the rules contain no such requirement for a shadow flicker analysis. With respect to the impact of the Project's shadow flicker on inhabitants, the Commission concluded:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CR1-C10-P) who is at 36:57 hours of shadow flicker. Applicant modeled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours. Applicant also used conservative assumptions, such as greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.

[20] For example, the sound isoline map filed as Exhibit A56 shows that all the residents of Stockholm and Waverly are below 35 dBA, which is well below the non-participant threshold of 45 dBA. (AR 17832-17833). Stockholm's results are also confirmed by the stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A57, which are in close proximity to Stockholm, and yet their sound is modeled at 35.4 dBA and 36.5 dBA respectively. (AR 17837). The same holds true for Waverly, which is represented by CR1-C4-NP, which is modeled at 38.5 dBA. (AR 17239). Similarly, for shadow flicker, the isoline map filed as Exhibit A43-1 shows that the residences of Stockholm will experience less than 10 hours of shadow flicker annually (AR 17236) which is again confirmed when reviewing stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A67, both of which will experience zero hours of shadow flicker. (AR 17895). The same holds true for shadow flicker in Waverly; the isoline map in Exhibit A43-1 shows that the residences of Waverly will experience less than 10 hours of shadow flicker annually (AR 17237) which again is confirmed when reviewing CR1-C4-NP in the table of Exhibit A67 which will experience zero hours of shadow flicker. (AR 17893).

(AR 20698) (footnotes citing record evidence omitted).

As with sound, the Commission cited the testimony of Drs. Ollson and McCunney showing no health or welfare impact from 30 hours of annual shadow flicker per year, and also imposed a compliance threshold that shadow flicker at a residence shall not exceed 30 hours of shadow flicker annually, unless waived. (AR 20698-20711). Therefore, similar to the Commission's rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including conservative shadow flicker modeling assumptions and testimony of a medical doctor specializing in the field of occupational health) as supporting the findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. See SDCL 1-26-1(9). Also, the Commission's findings, conclusions, and imposition of the shadow flicker thresholds in Condition No. 34 were within the range of permissible choices given the record, and therefore were reasonable and not arbitrary. The Commission's factual findings regarding the sound produced from the Project were not clearly erroneous and were supported by substantial evidence.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to demonstrate prejudice. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). Appellants do not even argue that they are prejudiced. Any threat of prejudice is eradicated by the fact that the sound and shadow flicker conditions placed on the permit by the Commission account for actual, not modeled, sound and shadow flicker (AR 20708-20710, Condition 26). Additionally, each intervenor is well below

the 30-hour annual compliance threshold for shadow flicker.[21] As such, Appellants' arguments regarding shadow flicker are denied.

D. Appellants' Arguments Regarding Avian Use Studies

Finally, Appellants argue that the Commission could not have reasonably issued a decision in this matter because the avian use survey[22] submitted by Applicant "did not include data from the northeast portion of the project area, the historic Cattle Ridge portion of the project, and that the Commission overlooked this missing information." These arguments are not supported by the record or by legal authority. The Commission directly addressed this issue in its Order, when pursuant to SDCL § 49-41B-22, it concluded that the project will not pose a threat of serious injury to the environment. Specifically, the Commission rejected the claim that the avian impact study was not adequate, concluding in relevant part:

> 31. Intervenors argue that Crowned Ridge's application is materially incomplete since the Avian Use Survey did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the raptor nest surveys did include that area. Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to SD GF & P. Staff's witness, Mr. Tom Kirschenmann from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate. The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann.
>
> 32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations. There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a

[21] Robish: zero hours, Christenson: 6:56 hours, Mogen: zero hours, Lynch: zero hours. (AR 17839).

[22] SDCL § 49-41B-11(11) requires that an application for a permit include environmental studies relative to the proposed facility. One of the many required environmental studies required by applicant is an Avian Use Study. Avian use surveys are vital and required because impacts of wind energy facilities on avian species can be direct (e.g. turbine strike mortality) or indirect (e.g. loss of degradation of habitat). (AR7022). SWCA Environmental Consultants prepared an Avian Use Survey Report for Applicant summarizing the avian use surveys that were completed for the project area from April 1, 2017 through November 30, 2017 (AR 7017).

> game production area. Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project. Applicant committed to file a Wildlife Conservation Strategy, which includes both direct and indirect effects as well as the wildlife mitigation measures set forth in the Application, prior to the start of construction. Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Mr. Kirschenmann testified that Applicant had appropriately coordinated with SD GF&P on the impact of the Project on wildlife.

(AR 20693-20694) (footnotes with citations to record evidence omitted). As evidenced by Findings of Fact 31 and 32, the Commission clearly recognized that Applicant did study the full extent of the Project Area, and that the survey methods utilized were reasonable and appropriate.

Additionally, in its final Order, the Commission imposed a number of conditions related to avian monitoring and protection:

> 10. Applicant shall promptly report to the Commission the presence of any critical habitat of threatened or endangered species in the Project Area that Applicant becomes aware of and that was not previously reported to the Commission.
>
> 29. Applicant agrees to undertake a minimum of two years of independently-conducted post-construction avian and bat mortality monitoring for the Project, and to provide a copy of the report and all further reports to the United States Fish and Wildlife Services, South Dakota Game, Fish, & Parks, and the Commission.
>
> 30. Applicant shall file a Bird and Bat Conservation Strategy (BBCS) prior to beginning construction of the Project. The BBCS shall be implemented during construction and operation of the Project.

(AR 20706, 20710, Condition Nos. 10, 29, 30). The Order's rationale and conditions clearly demonstrate the Commission addressed the Project's impact on avian species and in doing so cited substantial evidence that a reasonable mind might accept as being adequate as supporting the Commission's conclusion that the Project will not pose a threat of serious injury to the environment, including avian species. *See* SDCL § 1-26-1(9). Further, the Commission's findings, conclusions, and imposition of conditions related to avian species in light of the entire record were reasonable and not arbitrary. Thus, the Commission's findings and conclusions on the Project's

impact on avian species, including the imposition of numerous conditions on avian monitoring and protection, were within the Commission's discretion and are afforded great deference. *See Pesall*, 2015 S.D. 81, ¶ 8, 871 N.W.2d at 652.

Appellants cite no legal authority that an application must contain an avian use survey covering the *entire* project area. SDCL § 49-41B-11(11) does require an application for a permit to include environmental studies relative to the proposed facility, and ARSD 20:10:22:16 requires an Applicant provide information resulting from surveys to identify and quantify terrestrial ecosystems within the siting area. However, similarly to the issues regarding sound and shadow above, SDCL § 49-41B-22 does not specify how an Applicant must meet this burden. While an avian use survey is often used to assess avian species and populations within a project area, it is just one tool that an applicant can utilize to meet the filing content requirements of SDCL 49-41B-11(11) and ARSD 20:10:22:16. This court is unaware of, and Appellants do not cite, any other statute or administrative rule which mandates Applicant must file a *complete* avian use survey to meet its burden of proof.

Applicant errs in the assessment that the Commission overlooked the fact that the Avian Use Survey Report (Survey) the Applicant filed with its Application failed to include data from the Cattle Ridge area. In fact, the Survey included a map that was clearly marked and clearly identified the portion of the project area the Applicant studied to prepare the survey. (AR 7271). The scope of the Survey was discussed at length and on numerous occasions before the Commission. During the evidentiary hearing, Ms. Sappington specifically answered questions about the Survey and its scope and contents (AR 12317-12318). While Ms. Sappington agreed with Appellants' cross-examination questions that the Survey did not include data collected from the Cattle Ridge area, Ms. Sappington also indicated that applicant did conduct other studies within

the Cattle Ridge area and utilized the data collected to prepare Section 11.3 of the Application. (AR 12317-12318). Following the evidentiary hearing, Appellants addressed the lack of data collection in the Cattle Ridge area in Intervenors' post-hearing brief filed on July 2, 2019. (AR 2265). This matter was again discussed before the Commission at the July 9, 2019 Commission meeting, during which, the Commission heard oral arguments of each party, asked additional questions of the parties, and issued its oral decision. (AR 20565-2652???). Of the Permit, but found Section 11.3 of the Application identified the project's potential effects to wildlife for the entire project. (AR 20694). Clearly the Commission did not overlook Appellants' concerns about the scope of the Survey.

The record also clearly shows that the Commission made a reasonable determination that the Applicant submitted sufficient evidence to meet the environmental information requirements in SDCL 49-41B-11(11) and ARSD 20:10:22:16 and to meet the Applicant's ultimate burden of proof. This evidence is concisely explained in Findings of Fact V. B. 31 and 32 of the Commission's permit which state (). As evidence in Finding of Fact 31 and 32, the Applicant presented ample environmental and wildlife evidence to supplement any deficiencies in the avian use survey.

Even assuming *arguendo* that the Commission erred when it relied on the Survey, Appellants make no argument that they were prejudiced by the Commission's decision to grant the Permit. Additionally, the Commission included a number of conditions on the Permit, applicable to the entire project area, to further ensure that the facility does not adversely affect wildlife in the project area (AR 20710 and 20714, Conditions 29, 30, and 45). Given that there is no specific requirement that an Applicant submit an avian use survey of the entire project area to meet its burden of proof, the Commission's decision to issue a permit based on the totality of the

evidence presented was not an abuse of discretion. In conclusion, Appellants have also not shown any prejudicial effect from the Commission's action on avian protections, and, therefore, even if the Court were to find that the Commission abused its discretion, which it did not, the court should not overturn the Commission's order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. As such, the appeal on this issue is denied.

CONCLUSION

The decision of the South Dakota Public Utilities Commission is hereby affirmed. This court gives great weight to the findings made and inferences drawn by the agency on questions of fact in accordance with SDCL § 1-26-36.

Judicial notice of exhibits and maps from the Dakota Range proceedings is not proper, as the number of wind turbines in the Dakota Range facility is not a matter of common knowledge generally known within the trial court's jurisdiction, and the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. This court declines to take the judicial notice requested by Appellants.

The decision to grant the permit to Crowned Ridge was within the Commission's sound discretion, and extensive factual findings and conclusions of law were made that were supported by the administrative record. These factual findings were not clearly erroneous, and this court reviews those factual findings with great deference to the Commission. Applicant met the burden of submitting a complete application which demonstrated that the Crowned Ridge Project 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 footprint area, and further, that it will not substantially impair the health, safety, or welfare of the inhabitants in the siting area in accordance with SDCL § 49-41B-22.

Counsel for Appellees is directed to file an Order affirming the decision of the Public Utilities Commission.

BY THE COURT:

Carmen Means

Carmen A. Means
Circuit Court Judge
Third Judicial Circuit

FILED
APR 15 2020
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

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

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **NOTICE OF ENTRY OF ORDER AFFIRMING DECISION OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

NOTICE IS HEREBY GIVEN that on April 20, 2020, the Honorable Carmen Means, Circuit Court Judge of the Third Judicial Circuit, signed an Order Affirming Decision of South Dakota Public Utilities Commission, which Order was entered and filed on April 20, 2020. Attached hereto and served herewith is a true and correct copy of said Order.

Dated this 23rd day of April 2020.

/s/ Amanda M. Reiss
Amanda M. Reiss (#4212)
Special Assistant Attorney General
South Dakota Public Utilities Commission
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Pierre, SD 57501
Amanda.reiss@state.sd.us
(605) 773-3201

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 23rd day of April, 2020, a true and correct copy of the foregoing *Notice of Entry of Order Affirming Decision of Public Utilities Commission, Order Affirming Decision of Public Utilities Commission, and Certificate of Service* was filed and served on all parties, through counsel for the parties via the Odyssey File & Serve system at their email addresses of record, upon the following:

Jared Gass
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/s/ Amanda M. Reiss
AMANDA M. REISS

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

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **ORDER AFFIRMING DECISION OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

Appellants, Amber Kay Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch, having appealed from the South Dakota Public Utilities Commission's Final Decision and Order Granting Permit to Construct Facility in EL 18-003, and the parties having appeared by counsel of record, and the Court having considered the Briefs submitted by the parties and arguments of counsel, and the Court having issued its Memorandum Opinion on April 15, 2020, which is attached as Exhibit A and incorporated herein by this reference, it is hereby,

ORDERED, ADJUDGED and DECREED that the Decision and Order of the South Dakota Public Utilities Commission is affirmed.

Filed: 4/23/2020 4:45 PM CST Codington County, South Dakota 14CIV19-000290
- Page 122 -

Dated this _____ day of April, 2020.

BY THE COURT:
Signed: 4/20/2020 10:42:34 AM

Honorable Carmen A. Means
Circuit Court Judge
Third Judicial Circuit

Attest:
Hartley, Connie
Clerk/Deputy

ATTEST: Clerk of Courts

By:_____
Deputy

EXHIBIT A

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

AMBER KAY CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, And PATRICK LYNCH,	)	
Appellants,	)	CIV 19-290
v.	)	**MEMORANDUM OPINION**
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UNTILITIES COMMISSION,	)	
Appellees.	)	

INTRODUCTION & STATEMENT OF FACTS

This matter comes before the circuit court on appeal by Appellants Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch (collectively "Appellants"), appealing the South Dakota Public Utilities Commission's ("the Commission's") Final Decision and Order Granting Permit to Construct Facility in EL 18-003 dated July 26, 2019. (AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions).

Crowned Ridge Wind, LLC ("Crowned Ridge" or "Applicant") submitted its application for a facility permit for a 300 megawatt (MW) wind energy facility to consist of up to 130 wind turbines in Codington and Grant counties on January 30, 2019 ("the Project"). (AR 10-960). Within its application, Crowned Ridge submitted written testimony from five witnesses[1] (two of whom filed jointly). (AR 965-1023). On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply

[1] The five witnesses included Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 961-2023).

for Party Status. (AR 1026-27). Pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on March 20, 2019, in Waverly, SD. (AR 1026-27). Five individuals intervened as parties before the April deadline and the Commission granted party status to each intervenor who filed before said deadline.[2] (AR 1070, 1322, 1463).

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses (two of whom testified jointly).[3] (AR 1467-1924). On April 10, 2019, Sarah Sappington adopted the direct testimony of Kimberly Wells. (AR 1925-44). On April 25, 2019, the intervenors filed a Motion to Deny and Dismiss the application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. (AR 2055-91, Transcript of Ad Hoc Commission Meeting). On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss and an Order to Amend Application. (AR 2092-93). Also on May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for June 11-14, 2019 to be conducted in Room 413, State Capitol Building, Pierre, SD. (AR 2094-95). Further on May 10, 2019, the intervenors filed the testimony of John Thompson and Allen Robish (AR 2096-2104);[4] while Commission Staff filed the direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney (AR 2105-3505). Intervenors submitted a Second Motion to Deny and Dismiss and brief in support on May 17, 2019. (AR 3523-55). On May 24, 2019, Crowned Ridge submitted written rebuttal testimony for Mark Thompson, Dr. Chris Ollson, Andrew Baker, Dr. Robert McCunney, Richard Lampeter, Sarah Sappington, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 3698-4818). The second motion was heard by

[2] The Commission granted party status to Amber Christenson, Allen Robish, and Kristi Mogen on February 22, 2019. (AR 1070-71). On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR 1322). On April 5, 2019, the Commission granted party status to Patrick Lynch and established a procedural schedule. (AR 1463-64).

[3] The five witnesses included Chris Ollson, Jay Haley, Tyler Wilhelm, Sam Massey, and Mark Thompson.

[4] During the evidentiary hearing, the intervenors did not move for their testimony to be made part of the evidentiary record, and, therefore, it is not part of the record. (AR 20686).

the Commission on June 6, 2019. (AR 12245-52, Motion Hearing Transcript). The Commission denied the second motion.

On June 6, 11, and 12, the Commission held evidentiary hearings, during which Crowned Ridge entered into the record its application, testimonies, and hearing exhibits. (AR 6944-11404). Among the exhibits submitted were Exhibits A43-1 and 56 (isoline maps) that confirmed the Project was demonstrated to be in compliance with the modeled sound and shadow flicker thresholds ultimately adopted by the Commission in its Order (AR 17225-31; 17821-34; 20697-98; 20708-710; 20712). At the hearing, Crowned Ridge and Commission Staff presented witness testimony. (AR 11928-12059, 12253-12504, 12521-12823). Appellants did not call any witnesses. The Hearing Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing. On June 13, Tim and Linda Lindgren, represented by counsel, filed a Late Application for party status. (AR 20101-104) On June 25, 2019, the Commission heard the late-filed request for party status and voted 2-1 to deny the Lindgrens' request. (AR 20189-192, 20196-20209, 20222-23). The parties submitted post-hearing briefs on July 2, 2019. (AR 20257-20358, Intervenor-Appellants; 20445-491, Crowned Ridge; 20492-20510, Commission Staff).

On July 9, 2019, the Commission met to consider whether to issue a facility permit for the project. (AR 20565-20652). After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, the Commission voted unanimously to issue a Facility Permit for the Project, subject to certain conditions (AR 20554-20652). On July 26, 2019, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions (AR 20684-20714). The Facility Permit included 45 conditions, including sound and shadow flicker thresholds and avian monitoring and protection. *Id.* Appellants' issues on appeal were filed August 29, 2019, and an initial brief on November 8, 2019.

The Commission filed its response brief on December 19, 2019, and Appellee Crowned Ridge filed its brief on December 20, 2019. This court affirms the Commission's decision.

STANDARD OF REVIEW

SDCL § 49-41B-30 permits any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission to obtain judicial review of that decision by filing a notice of appeal in circuit court. "The review procedures shall be the same as that for contested cases under Chapter 1-26 [the Administrative Procedures Act.]"[5] *Id.* The review procedures are governed by SDCL § 1-26-36, which requires a reviewing court "to give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (agency findings of fact are reviewed under the clearly erroneous standard).

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 § 1-26-36(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). *See also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a

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

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). The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)) (emphasis added). 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)). The court affords great weight to the findings made and inferences drawn by an agency on questions of fact. *See* SDCL § 1-26-36, providing in relevant part:

> 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;
> (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.

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 at ¶ 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.[6] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Here, Appellants primarily assert that the Commission abused its discretion when making certain findings and conclusions related to sound, shadow flicker, and avian impact–and ultimately in granting Crowned Ridge's application for a facility permit.[7] The proper standard of review for findings of fact, however, is clearly erroneous. Appellants also challenge the agency's conclusion that the Crowned Ridge 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.[8] 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)).

APPLICABLE LAW AND ANALYSIS

A. Judicial Notice of the Dakota Range Proceedings

[6] 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.

[7] Appellants argue that certain findings and conclusions are an abuse of discretion on the part of the Commission. However, the ultimate decision (to grant the permit) would be reviewed under abuse of discretion, while the agency's findings of fact would be reviewed under the clearly erroneous standard. Despite these differences, the outcome is still the same: the appeal should be denied.

[8] 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).

Appellants request that the court take judicial notice of exhibits and maps in the Dakota Range Proceedings.[9] Appellants argue that although not a part of the record in this case, the exhibits and maps generated in the Dakota Range wind projects are relevant to the issues here and were a point of contention during the evidentiary hearings in the present case. SDCL § 19-19-201 governs judicial notice of adjudicative facts.[10] That statute provides:

> **(a) Scope.** This section governs judicial notice of an adjudicative fact only, not a legislative fact.
> **(b) Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
> (1) Is generally known within the trial court's territorial jurisdiction; or
> (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
> **(c) Taking notice.** The court:
> (1) May take judicial notice on its own; or
> (2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.
> **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
> **(e) Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
> **(f) Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

The general rule is that a fact judicially noticed must not be one subject to reasonable dispute. *See* SDCL § 19-19-201(b). It must be either generally known within the trial court's territorial jurisdiction, or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Id.*

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[9] Commission Docket Nos. EL18-003, *In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility*, and EL18-046, *In the Matter of the Application by Dakota Range III for a Permit of a Wind Energy Facility.* These dockets are separate, but related, and in the same geographic area (within 25 miles) of the proposed Crowned Ridge wind facility.

[10] "Adjudicative facts are those which relate to the immediate parties involved—the who, what, when, where, and why as between the parties." *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419 (quoting *In re Dorsey & Whitney Tr. Co.*, 2001 S.D. 35, ¶ 19, 623 N.W.2d 468, 474) (internal citations omitted).

Appellants cite to *Sioux City Boat Club v. Mulhall* to support the assertion that courts will take judicial notice of the location of a manmade object on a map. 117 N.W.2d 92 (S.D. 1962). However, in *Sioux City Boat Club*, the issue involved the court recognizing geographic boundaries pertinent to an inquiry as to whether it had jurisdiction. The issue in *Sioux City Boat Club* is not analogous or instructive on Appellants' request that this court take judicial notice of turbine locations set forth in exhibits and maps from the Dakota Range proceedings.

The number of wind turbines in the Dakota Range facility and the geographic location of the turbines is not a matter of common knowledge generally known within the trial court's jurisdiction. *See* SDCL § 19-19-201(b)(1). Additionally, the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. *See* SDCL § 19-19-201(b)(2). Further, Crowned Ridge was not a party to the Dakota Range proceedings and cannot verify the accuracy of the exhibits and maps.[11] Because there is no basis for a finding that the exhibits and maps from the Dakota Range proceedings are either generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned, this court declines to take judicial notice of the Dakota Range proceedings.

B. Appellants' Arguments Regarding Sound Studies

Appellants argue the Commission abused its discretion when it approved Crowned Ridge's application, alleging the Commission relied on incomplete and inaccurate information related to sound studies. However, on findings of fact the proper analysis is the clearly erroneous standard. Therefore, this court analyzes if the Commission's findings of fact were clearly erroneous based on the record as it pertains to sound studies. Here, the Commission's conclusion that the sound produced by the project would not substantially impair the health or welfare of the inhabitants was

[11] The exhibits and maps were submitted by Apex Clean Energy Holdings, LLC, a Dakota Range subsidiary wholly separate from and unrelated to Crowned Ridge.

supported by substantial evidence in the record, was reasonable and not arbitrary, therefore within their discretion.

SDCL § 49-41B-22 requires a permit applicant 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.[12]

The statute does not require *how* the applicant must establish the four elements: whether by maps, charts, random samplings, or otherwise. Here the Commission thoroughly considered the following information regarding sound (among other things):

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound

[12] However, this version of SDCL § 49-41B-22 has only been in effect since July 1, 2019. While the Commission issued its decision granting the facility permit for the project on July 26, 2019, all hearings were held prior to July 1, 2019. The prior version of SDCL § 49-41B-22, effective through June 30, 2019, reads as follows:
The applicant has the burden of proof to establish 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;
(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.

The 2019 update to the statute did not materially change the law, but instead clarified that wind energy facilities must comply with this statute.

> emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants' property boundaries for those residences in Codington County. Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects. Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and Applicant. Applicant agreed to a post-construction sound protocol to be used in the event the Commission orders post-construction sound monitoring.
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> * * * *
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR 20697-20698, footnotes citing record evidence omitted).

In Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge complying with the sound thresholds of 45 dBA for sound within 25 feet of a non-participant's residence and 50 dBA for sound within 25 feet of a participant's residence. (AR 20708, Condition No. 26). *See Pesall v. Montana Dakota Utils., Co.*, 2015 S.D. 81, ¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring re-submittal of the application to consider additional information.). The Commission's analysis went above and beyond what was required by SDCL § 49-41B and ARSD 20:10:22. ARSD 20:10:22:13 provides in part:

> ... The environmental effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction...

Even considering this administrative rule, if it applies to wind energy facilities, at the time of the application for the Project when the sound modeling was completed (as well as at the time the permit was issued) there were no energy conversion facilities or wind energy facilities operating or under construction in the area.[13] Therefore, the sound modeling and the Commission's analysis went above and beyond the scope of review contemplated in the rule by factoring in the closest permitted wind turbines into the noise and shadow flicker analysis. The inclusion of the Dakota Range I and II wind turbines (which were approved by the Commission, but not yet constructed) was an additional conservative assumption in addition to several other conservative assumptions used by Crowned Ridge in its sound models.[14] The reason the Dakota Ridge III wind turbines were not added as yet another conservative assumption was the fact that Commission had not granted Dakota Range III a facility permit at the time Crowned Ridge filed its application. Crowned Ridge witness Jay Haley's rebuttal testimony states that "the tables in Exhibit 3 of the supplemental testimony show the cumulative results from *all turbines* in CRW, Crowned Ridge Wind II, and Dakota Range I and II." (emphasis added) (AR 4703, Rebuttal Testimony of Jay Haley, 2:11-13).

Appellants make a number of incorrect and incomplete factual assumptions and inferences. Appellants allege that only 17 Dakota Range turbines were included in the sound study based on a review of the Crowned Ridge isoline maps. But the maps are not intended to show all turbines included in the study—rather, they are used to graphically illustrate compliance with the sound thresholds for participants and non-participants. Crowned Ridge clearly indicated on the record

[13] The Dakota Range projects were not existing or under construction at this time. Because of this, even under the administrative rule Applicant was not required to include them in the modeling. Further, there is no legal requirement that the modeling of sound include every potential wind turbine that may or may not be constructed and operated.

[14] The Commission cited the following conservative assumptions included: "(1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted." (AR 20967). The omission also cited that "Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects." *Id.*

that all 97 of the Dakota Range I and II wind turbines were included in its sound studies (AR 1477, 2237). Further, the Commission's order recognized that Crowned Ridge included all the Dakota Range I and II turbines in its sound models (AR 20697). The fact that the map showed only the nearest 17 turbines appears to have led Appellants to the inaccurate conclusion that only 17 were included in the model. [Even so,] the Commission found that "Applicant modeled sound levels with consideration of the cumulative impacts from Dakota Range I and II and Crowned Ridge, II, LLC wind projects." (AR 20697, Finding of Fact 46).

Appellants also criticize witness Jay Haley's credentials and the use of the initials P.E. (indicating he is a professional engineer). At the evidentiary hearing, Appellants' trial attorney conducted a lengthy voir dire of Haley, after which Attorney Ganje objected to Haley's testimony on the grounds that the witness had held himself out to be a licensed professional engineer because of the initials behind his signature. Appellants' trial counsel also submitted a brief upon making an oral objection. Commission staff argued that credibility of a witness can be established by training, education, and experience, and licensing is not the end-all determination. (EH 352:15-20). Chairman Hanson stated that he agreed with Commission staff's argument. (EH 354:10-17). After taking argument from the parties, the Commission unanimously voted to overrule attorney Ganje's objection. (EH 355:7-9). The Commission's ruling on the admissibility of Haley's testimony is not an issue that was included within the Statement of Issues and is not subject to this appeal. *See* SDCL § 1-26-31.4.

The Commission's findings and conclusions that the sound produced by the project will not substantially impair the health or welfare of the inhabitants were reasonable, not arbitrary, and

supported by substantial evidence.[15] *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence sufficiently adequate to supporting the conclusion). Based on the information in the administrative record, the Project will comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26).[16] This court gives great deference to the Commission's findings pursuant to SDCL § 1-26-36. *Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952) (reversing the circuit court and directing it to affirm a Commission order that was based on substantial evidence, concluding that "... the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission.); *In re Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589, 593-96 (S.D. 1940) (reversing circuit court and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "the ultimate question is whether there was substantial evidence to support the order of the Commission.") Commission's thorough and reasonable consideration of sound was within its discretion.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to show that the Commission's actions had any prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its

[15] The testimony of witnesses McCunney and Ollson showed that if the Project complied with the sound and shadow flicker thresholds implemented by the counties and self-imposed by Crowned Ridge the Project would not have a detrimental impact on the health and welfare of inhabitants. (AR 1563-1924, 3728-3917, 4132-4369).

[16] The rebuttal testimony of witness Haley confirmed that the Project was in compliance with the county sound and shadow flicker thresholds, as well as a self-imposed sound threshold for the Project not to produce sound over 45 A-weighted decibels ("dBAs") sound within 50 feet of any nonparticipant's residence and over 50 dBA within 50 feet of any participant's residence. (AR 4701-4747).

discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). The record shows that the modeled sound level at 50 feet away from the residence of each of the Appellants is substantially below the 45 dBA non-participant threshold set forth in Condition 26.[17] The sound produced from the Project has been modeled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less than the sound of a library for Mogen and Robish. (AR 184). The sound is below the 45 dBA threshold imposed by the Commission. Appellants have failed to demonstrate any prejudicial effect, and their appeal on this issue should be denied.

C. Appellants' Arguments Regarding Shadow Flicker

Appellants argue that the Commission abused its discretion when it approved Crowned Ridge's application for a permit without sound and shadow flicker studies that encompassed all occupied residences within the siting area.[18] Applicant argues that Appellants failed to preserve this issue for appeal. It is well settled that if an Appellant does not object to the issue in the underlying proceeding, the issue is not preserved for appeal. *See, e.g., City of Watertown v. Dakota, Minnesota & E.R. Co.*, 1996 S.D. 82, ¶ 26, 551 N.W.2d 571, 577; *American Fed. Sav. & Loan Ass'n v. Kass*, 320 N.W.2d 800, 803 (S.D. 1982). This issue questions the veracity of Crowned Ridge hearing exhibits A67, A68, and A57, none of which Appellants objected to in the underlying proceeding. They also failed to preserve for appeal a challenge on the veracity of these exhibits. *See City of Watertown*, 1998 S.D. 82, ¶ 26, 551 N.W.2d at 577.

Applicant also argues that Appellants failed to include this issue in its Statement of Issues.[19] Applicant argues that it is well settled that if an appellant's Statement of Issues fails to set forth

[17] Robish: 29.3 dBA, Christenson: 38.6 dBA, Mogen: 28.8 dBA, Lynch: 37.3 dBA (AR 17839).
[18] As previously mentioned, however, the proper standard of review would be analyzing whether the factual findings and conclusions regarding shadow flicker were clearly erroneous.
[19] See Statement of Issues, filed by Appellants on August 29, 2019, listing 31 separate issues.

the reasons why the Commission's decision, ruling, or action should be reserved or modified, the argument is waived, citing *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 42, 915 N.W.2d 707, 719. However, that is not necessarily what *Lagler* says. The cited paragraph reads as follows:

> Once the circuit court's jurisdiction to review a particular decision, ruling, or action has been established—either through the filing of a notice of appeal or a notice of review—the question then becomes one of issue waiver. As indicated above, the appellant must file a statement of the issues to be presented on appeal, and the appellee may file such a statement as well. SDCL 1–26–31.4. In other words, once jurisdiction is established, the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified. *While the failure to specify a decision, ruling, or action in a notice of appeal or notice of review results in a lack of jurisdiction to review the same, the failure to file a statement of issues results in a waiver of argument.* And while either lack of jurisdiction or waiver of argument results in a denial of relief on appeal, they do so in fundamentally different ways (a lack of jurisdiction—which may be raised at any time—is a mandatory restraint on the court's power to act, but waiver is a restraint on a party's arguments that gives a court discretion to disregard them).

(emphasis added). This paragraph does not necessarily state that the failure to state the exact issue in the Statement of Issues constitutes a waiver, but rather, that the failure to file a Statement of Issues altogether results in a waiver of argument. Here, in Appellants' Statement of Issues, Issue 8 is "[w]hether the PUC acted arbitrarily and capriciously when it failed to consider testimony regarding trespass violations for shadow flicker and infrasound."

The court finds that Appellants Issue 8 is sufficient enough to allow the court to consider this issue on appeal. While Appellants certainly would have been better served had they objected to the admission of Exhibits A57, A67, or A68. (EH 366, 579:10-12), the court will consider argument on this issue.

Appellants' factual assumption that Crowned Ridge did not analyze the impact of shadow flicker on residents of Stockholm and Waverly is incorrect and not supported by the record. Appellants fail to recognize that the sounds isoline map in Exhibit A56 and the shadow flicker

map in Exhibit A43-1 clearly show that all residences in Stockholm and Waverly are well below the sound threshold for nonparticipating residents of 45 dBA and the 30-hour shadow flicker annual threshold for all residents.[20] (AR 17225-17231, 17821-17834). Exhibit A43-1 is a map detailing shadow flicker isolines for the entire project area (AR 17225-17231). This map demonstrates that each town is well below the shadow flicker limit in the Final Order.

Further, no requirement exists in South Dakota law for sound and shadow flicker studies that include each and every structure in the siting area. Again, nowhere in the statute or the administrative rules is it mandated how an applicant must establish the four elements in SDCL § 49-41B-22: whether by isoline maps, all-inclusive charts, random samplings, or otherwise. Further, while ARSD 20:10:22:33.02(5) requires an applicant to provide information regarding anticipated operational sound, the rules contain no such requirement for a shadow flicker analysis. With respect to the impact of the Project's shadow flicker on inhabitants, the Commission concluded:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CR1-C10-P) who is at 36:57 hours of shadow flicker. Applicant modeled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours. Applicant also used conservative assumptions, such as greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.

[20] For example, the sound isoline map filed as Exhibit A56 shows that all the residents of Stockholm and Waverly are below 35 dBA, which is well below the non-participant threshold of 45 dBA. (AR 17832-17833). Stockholm's results are also confirmed by the stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A57, which are in close proximity to Stockholm, and yet their sound is modeled at 35.4 dBA and 36.5 dBA respectively. (AR 17837). The same holds true for Waverly, which is represented by CR1-C4-NP, which is modeled at 38.5 dBA. (AR 17239). Similarly, for shadow flicker, the isoline map filed as Exhibit A43-1 shows that the residences of Stockholm will experience less than 10 hours of shadow flicker annually (AR 17236) which is again confirmed when reviewing stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A67, both of which will experience zero hours of shadow flicker. (AR 17895). The same holds true for shadow flicker in Waverly; the isoline map in Exhibit A43-1 shows that the residences of Waverly will experience less than 10 hours of shadow flicker annually (AR 17237) which again is confirmed when reviewing CR1-C4-NP in the table of Exhibit A67 which will experience zero hours of shadow flicker. (AR 17893).

(AR 20698) (footnotes citing record evidence omitted).

As with sound, the Commission cited the testimony of Drs. Ollson and McCunney showing no health or welfare impact from 30 hours of annual shadow flicker per year, and also imposed a compliance threshold that shadow flicker at a residence shall not exceed 30 hours of shadow flicker annually, unless waived. (AR 20698-20711). Therefore, similar to the Commission's rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including conservative shadow flicker modeling assumptions and testimony of a medical doctor specializing in the field of occupational health) as supporting the findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. See SDCL 1-26-1(9). Also, the Commission's findings, conclusions, and imposition of the shadow flicker thresholds in Condition No. 34 were within the range of permissible choices given the record, and therefore were reasonable and not arbitrary. The Commission's factual findings regarding the sound produced from the Project were not clearly erroneous and were supported by substantial evidence.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to demonstrate prejudice. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). Appellants do not even argue that they are prejudiced. Any threat of prejudice is eradicated by the fact that the sound and shadow flicker conditions placed on the permit by the Commission account for actual, not modeled, sound and shadow flicker (AR 20708-20710, Condition 26). Additionally, each intervenor is well below

the 30-hour annual compliance threshold for shadow flicker.[21] As such, Appellants' arguments regarding shadow flicker are denied.

D. Appellants' Arguments Regarding Avian Use Studies

Finally, Appellants argue that the Commission could not have reasonably issued a decision in this matter because the avian use survey[22] submitted by Applicant "did not include data from the northeast portion of the project area, the historic Cattle Ridge portion of the project, and that the Commission overlooked this missing information." These arguments are not supported by the record or by legal authority. The Commission directly addressed this issue in its Order, when pursuant to SDCL § 49-41B-22, it concluded that the project will not pose a threat of serious injury to the environment. Specifically, the Commission rejected the claim that the avian impact study was not adequate, concluding in relevant part:

> 31. Intervenors argue that Crowned Ridge's application is materially incomplete since the Avian Use Survey did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the raptor nest surveys did include that area. Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to SD GF & P. Staff's witness, Mr. Tom Kirschenmann from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate. The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann.
>
> 32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations. There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a

[21] Robish: zero hours, Christenson: 6:56 hours, Mogen: zero hours, Lynch: zero hours. (AR 17839).

[22] SDCL § 49-41B-11(11) requires that an application for a permit include environmental studies relative to the proposed facility. One of the many required environmental studies required by applicant is an Avian Use Study. Avian use surveys are vital and required because impacts of wind energy facilities on avian species can be direct (e.g. turbine strike mortality) or indirect (e.g. loss of degradation of habitat). (AR7022). SWCA Environmental Consultants prepared an Avian Use Survey Report for Applicant summarizing the avian use surveys that were completed for the project area from April 1, 2017 through November 30, 2017 (AR 7017).

> game production area. Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project. Applicant committed to file a Wildlife Conservation Strategy, which includes both direct and indirect effects as well as the wildlife mitigation measures set forth in the Application, prior to the start of construction. Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Mr. Kirschenmann testified that Applicant had appropriately coordinated with SD GF&P on the impact of the Project on wildlife.

(AR 20693-20694) (footnotes with citations to record evidence omitted). As evidenced by Findings of Fact 31 and 32, the Commission clearly recognized that Applicant did study the full extent of the Project Area, and that the survey methods utilized were reasonable and appropriate.

Additionally, in its final Order, the Commission imposed a number of conditions related to avian monitoring and protection:

> 10. Applicant shall promptly report to the Commission the presence of any critical habitat of threatened or endangered species in the Project Area that Applicant becomes aware of and that was not previously reported to the Commission.
>
> 29. Applicant agrees to undertake a minimum of two years of independently-conducted post-construction avian and bat mortality monitoring for the Project, and to provide a copy of the report and all further reports to the United States Fish and Wildlife Services, South Dakota Game, Fish, & Parks, and the Commission.
>
> 30. Applicant shall file a Bird and Bat Conservation Strategy (BBCS) prior to beginning construction of the Project. The BBCS shall be implemented during construction and operation of the Project.

(AR 20706, 20710, Condition Nos. 10, 29, 30). The Order's rationale and conditions clearly demonstrate the Commission addressed the Project's impact on avian species and in doing so cited substantial evidence that a reasonable mind might accept as being adequate as supporting the Commission's conclusion that the Project will not pose a threat of serious injury to the environment, including avian species. *See* SDCL § 1-26-1(9). Further, the Commission's findings, conclusions, and imposition of conditions related to avian species in light of the entire record were reasonable and not arbitrary. Thus, the Commission's findings and conclusions on the Project's

impact on avian species, including the imposition of numerous conditions on avian monitoring and protection, were within the Commission's discretion and are afforded great deference. *See Pesall*, 2015 S.D. 81, ¶ 8, 871 N.W.2d at 652.

Appellants cite no legal authority that an application must contain an avian use survey covering the *entire* project area. SDCL § 49-41B-11(11) does require an application for a permit to include environmental studies relative to the proposed facility, and ARSD 20:10:22:16 requires an Applicant provide information resulting from surveys to identify and quantify terrestrial ecosystems within the siting area. However, similarly to the issues regarding sound and shadow above, SDCL § 49-41B-22 does not specify how an Applicant must meet this burden. While an avian use survey is often used to assess avian species and populations within a project area, it is just one tool that an applicant can utilize to meet the filing content requirements of SDCL 49-41B-11(11) and ARSD 20:10:22:16. This court is unaware of, and Appellants do not cite, any other statute or administrative rule which mandates Applicant must file a *complete* avian use survey to meet its burden of proof.

Applicant errs in the assessment that the Commission overlooked the fact that the Avian Use Survey Report (Survey) the Applicant filed with its Application failed to include data from the Cattle Ridge area. In fact, the Survey included a map that was clearly marked and clearly identified the portion of the project area the Applicant studied to prepare the survey. (AR 7271). The scope of the Survey was discussed at length and on numerous occasions before the Commission. During the evidentiary hearing, Ms. Sappington specifically answered questions about the Survey and its scope and contents (AR 12317-12318). While Ms. Sappington agreed with Appellants' cross-examination questions that the Survey did not include data collected from the Cattle Ridge area, Ms. Sappington also indicated that applicant did conduct other studies within

the Cattle Ridge area and utilized the data collected to prepare Section 11.3 of the Application. (AR 12317-12318). Following the evidentiary hearing, Appellants addressed the lack of data collection in the Cattle Ridge area in Intervenors' post-hearing brief filed on July 2, 2019. (AR 2265). This matter was again discussed before the Commission at the July 9, 2019 Commission meeting, during which, the Commission heard oral arguments of each party, asked additional questions of the parties, and issued its oral decision. (AR 20565-2652???). Of the Permit, but found Section 11.3 of the Application identified the project's potential effects to wildlife for the entire project. (AR 20694). Clearly the Commission did not overlook Appellants' concerns about the scope of the Survey.

The record also clearly shows that the Commission made a reasonable determination that the Applicant submitted sufficient evidence to meet the environmental information requirements in SDCL 49-41B-11(11) and ARSD 20:10:22:16 and to meet the Applicant's ultimate burden of proof. This evidence is concisely explained in Findings of Fact V. B. 31 and 32 of the Commission's permit which state (). As evidence in Finding of Fact 31 and 32, the Applicant presented ample environmental and wildlife evidence to supplement any deficiencies in the avian use survey.

Even assuming *arguendo* that the Commission erred when it relied on the Survey, Appellants make no argument that they were prejudiced by the Commission's decision to grant the Permit. Additionally, the Commission included a number of conditions on the Permit, applicable to the entire project area, to further ensure that the facility does not adversely affect wildlife in the project area (AR 20710 and 20714, Conditions 29, 30, and 45). Given that there is no specific requirement that an Applicant submit an avian use survey of the entire project area to meet its burden of proof, the Commission's decision to issue a permit based on the totality of the

evidence presented was not an abuse of discretion. In conclusion, Appellants have also not shown any prejudicial effect from the Commission's action on avian protections, and, therefore, even if the Court were to find that the Commission abused its discretion, which it did not, the court should not overturn the Commission's order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. As such, the appeal on this issue is denied.

CONCLUSION

The decision of the South Dakota Public Utilities Commission is hereby affirmed. This court gives great weight to the findings made and inferences drawn by the agency on questions of fact in accordance with SDCL § 1-26-36.

Judicial notice of exhibits and maps from the Dakota Range proceedings is not proper, as the number of wind turbines in the Dakota Range facility is not a matter of common knowledge generally known within the trial court's jurisdiction, and the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. This court declines to take the judicial notice requested by Appellants.

The decision to grant the permit to Crowned Ridge was within the Commission's sound discretion, and extensive factual findings and conclusions of law were made that were supported by the administrative record. These factual findings were not clearly erroneous, and this court reviews those factual findings with great deference to the Commission. Applicant met the burden of submitting a complete application which demonstrated that the Crowned Ridge Project 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 footprint area, and further, that it will not substantially impair the health, safety, or welfare of the inhabitants in the siting area in accordance with SDCL § 49-41B-22.

Counsel for Appellees is directed to file an Order affirming the decision of the Public Utilities Commission.

BY THE COURT:

Carmen Means

Carmen A. Means
Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA) :SS COUNTY OF CODINGTON)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
AMBER KAY CHRISTENSON, and ALLEN ROBISH, Appellants, vs. CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	14CIV19-000290 ***NOTICE OF APPEAL and STAY OF EXECUTION of JUDGMENT and ORDER***

TO: MILES SCHUMACHER, ONE OF THE ATTORNEYS FOR APPELLEE CROWNED RIDGE WIND, LLC; and, PATRICIA VAN GERPEN, EXECUTIVE DIRECTOR, and, AMANDA REISS, SPECIAL ASSISTANT ATTORNEY GENERAL, FOR APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION.

PLEASE TAKE NOTICE that Appellants, Amber Christenson and Allen Robish, hereby appeal to the Supreme Court of South Dakota, the Order Affirming Decision of South Dakota Public Utilities Commission entered by Circuit Judge Carmen A. Means, signed on April 20, 2020, and for which Notice of Entry of Judgment was filed by/for Appellees on April 23, 2020, in the above-entitled action; and

NOTICE IS FURTHER GIVEN that Appellants, Christenson and Robish, to any extent necessary, hereby assert their right to a potential statutory stay, if may later be deemed applicable herein, from and as related to said lower Court's Order herein, pursuant to SDCL §15-26A-25 in conjunction with SDCL §15-6-62(b) or §15-6-62(d) and/or §15-6-62(f) pending final determination by the South Dakota Supreme Court in such appeal proceedings.

Dated this 22nd day of May, 2020.

/s/ R. Shawn Tornow

R. Shawn Tornow, for
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: (605) 271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Intervenors/Appellants

STATE OF SOUTH DAKOTA) :SS		IN CIRCUIT COURT
COUNTY OF CODINGTON)		THIRD JUDICIAL CIRCUIT
AMBER KAY CHRISTENSON, and ALLEN ROBISH, Appellants,	*	14CIV19-000290
vs.	*	*CERTIFICATE OF SERVICE*
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	*	

I, R. Shawn Tornow, do hereby certify that on this 22nd day of May, 2020, a true and correct copy of Appellants' Notice of Appeal and Stay, Docketing Statement and Order for Transcript for any Transcript(s) of Proceedings were served by e-mail through the Odyssey File and Serve program; or, if necessary (if the system may not be operating), by first class mail, postage prepaid, to the attention of the following person(s) at the address(es) indicated:

NAME:	ADDRESS:
Crowned Ridge Wind, LLC, Appellee	Miles F. Schumacher Lynn Jackson Shultz and Lebrun, PC 110 N. Minnesota Ave., Ste 400 Sioux Falls, SD 57104 Telephone: (605) 332-5999 E-mail: mschumacher@lynnjackson.com *One of the Attorney(s) for Appellee, CRW*
S.D. Public Utilities Commission, Appellee	Patricia Van Gerpen, Executive Director, and Amanda M. Reiss, Special Assistant Attorney General South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501 Telephone: (605) 773-3201 E-mail: amanda.reiss@state.sd.us *Attorney(s) for Appellee, South Dakota PUC*

/s/ R. Shawn Tornow
R. Shawn Tornow, for
Tornow Law Office, P.C.
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Telephone: (605) 271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Intervenors/Appellants

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

AMBER KAY CHRISTENSON, and ALLEN ROBISH, Appellants,	*	14CIV19-000290
vs.	*	***APPELLANTS' DOCKETING STATEMENT***
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	*	

SECTION A

TRIAL COURT

1. The circuit court from which the appeal is taken: Third Judicial Circuit
2. The county in which the action is venued at the time of appeal: Codington County
3. The name of the trial judge who entered the decision appealed: Carmen A. Means, Circuit Court Judge

PARTIES AND ATTORNEYS

4. Identify each party presently of record and the name, address, and phone number of the attorney for each party. (May be continued on an attached appendix.)

Amber Christenson, and Allen Robish, Intervenors/Appellants	R. Shawn Tornow, for Tornow Law Office, P.C. PO Box 90748 Sioux Falls, SD 57109-0748 Telephone: (605) 271-9006 E-mail: rst.tlo@midconetwork.com Attorney for Intervenors/Appellants
Crowned Ridge Wind, LLC, Appellee	Miles F. Schumacher Lynn Jackson Shultz and Lebrun, PC 110 N. Minnesota Ave., Ste 400 Sioux Falls, SD 57104 Telephone: (605) 332-5999 E-mail: mschumacher@lynnjackson.com One of the Attorney(s) for Appellee, CRW
S.D. Public Utilities Commission, Appellee	Amanda M. Reiss Special Assistant Attorney General

S.D. Public Utilities Commission
500 E. Capitol Ave.
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One of the Attorney(s) for the S.D. PUC

SECTION B
TIMELINESS OF APPEAL

(If Section B is completed by an appellee filing a notice of review pursuant to SDCL 15-26A-22, the following questions are to be answered as they may apply to the decision the appellee is seeking to have reviewed.)

1. The date the judgment of order appealed from was signed and filed by the trial court: April 20, 2020

2. The date the Circuit Court's order was served on Appellant(s): April 23, 2020

3. State whether either of the following motions was made:

   a. Motion for judgment n.o.v., SDCL 15-6-50(b): ___ Yes _X_ No

   b. Motion for new trial: SDCL 15-6-59: ___ Yes _X_ No

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

Appellant, Allen Robish, has been a taxpaying property owner and resided on his property at 47278 161st Street, Strandburg, South Dakota in Grant County since 1981. Appellant, Amber Christenson, has been a taxpaying property owner and resided on her property at 16217 466th Avenue, Strandburg, South Dakota in Codington County since 1994. Robish and Christenson, became Appellants herein by and through their (joint) intervention in the administrative hearing action below - along with Kristi Mogen and Patrick Lynch (with Mogen and Lynch *not* being part of this appeal). As Intervenors and Appellants, Robish and Christenson, raised a number of issues related to the failed and/or deficient aspects of Appellees permit application as well as the permit decision in and as a part of the administrative hearing proceedings below.

As a result, Appellants now appeal the decision of the Third Judicial Circuit, Judge Carmen Means, which affirmed the South Dakota Public Utilities Commission's (hereinafter, "the Commission" or "Commission's") Final Decision and Order Granting Permit to Construct Facility in *EL 19-003 [*that is, EL 19-003, *not*, EL 18-003 as incorrectly referenced by the circuit court/Appellees] dated July 26, 2019. (*Please see*, AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions, as attached hereto).

As part of the underlying administrative hearing record below, on January 30, 2019, Crowned Ridge Wind, LLC (hereinafter "Crowned Ridge") submitted its application to the Commission for a facility permit for a 300 megawatt (MW) wind energy facility to consist of up to 130 wind turbines in Codington and Grant counties ("the Project"). (AR 10-9060). On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply for Party Status. (AR 1026-27). Pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on March 20, 2019, in Waverly, S.D. (AR 1026-27). At such public hearing, representations by/for Applicant were made and relied upon which were, as a part of the hearing process, later proven to be both untruthful and significantly misleading. A number of concerned citizens and local taxpayers, including Appellants Christenson and Robish, intervened as parties prior to the Commission's deadline and the Commission granted party status to each such Intervenor. (*See*, AR 1070, 1322, 1463).

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses. (AR 1467-1024). Thereafter, over Appellants' objection, Sarah Sappington (Office Director/Project Manager/Archaeologist) was permitted by the Commission to "adopt" the direct testimony of Kimberly Wells (PhD in Fisheries and Wildlife Services, as a fully certified/expert Wetland Delineator/Wetland Biologist and also as Applicant's Environmental Services Manager. (AR 1925-44). Appellants' timely objected below to the improper, incomplete, unsupported and hearsay elements to/for any such testimony adduced from Ms. Sappington (no foundational knowledge or PhD expertise) as related to any such expert testimony that she wrongly, and inexplicably, was allowed to "adopt" and testify about at hearing. At least in part, as a result of such application-related and/or hearing-related allowances for Appellee Crowned Ridge, Intervenors/Appellants were wrongfully and prejudicially denied due process at hearing.

On April 25, 2019, Intervenors/Appellants filed a Motion to Deny and Dismiss the application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. (AR 2055-91, Transcript of Ad Hoc Commission Meeting). On May 10, 2019, the Commission issued its Order Denying Motion to Deny and Dismiss and an Order to Amend Application. (AR 2092-93). Also on May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing scheduling an evidentiary hearing for June 11-14, 2019, in Pierre, SD. (AR 2094-95). At the same time, on May 10, 2019, Intervenors filed the testimony of John Thompson and Allen Robish (AR 2096-2104), while Commission Staff filed the testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney (AR 2105-3505). Intervenors submitted a Second Motion to Deny and Dismiss and brief in support on May 17, 2019. (AR 3523-55). On May 24, 2019, Crowned Ridge submitted written rebuttal testimony, including testimony for Sarah Sappington and Jay Haley. (AR 3698-4818). Appellants' second motion was heard by the Commission on June 6, 2019. (AR 12245-52, Motion Hrg. Transcript). Appellants' second motion to dismiss was denied by the Commission.

Prior to July 1, 2019, on June 6, 11-12, 2019, the Commission held a lengthy evidentiary hearing, during which Appellee Crowned Ridge presented its application, testimonies and hearing exhibits. (AR 6944-11404 and AR 11928-12059, 12253-12504, 12521-12823). At hearing, Appellants elicited testimony and evidence regarding the incompleteness as well as the general unreliability of Appellee's permit application. Based on the administrative hearing and all considerations therein, the parties subsequently submitted post-hearing briefs on July 2, 2019. (AR 20257-20358, Intervenors/Appellants; 20445-491, Crowned Ridge; 20492-20510, Commission Staff).

Thereafter, on July 9, 2019, the Commission met to consider whether to issue a facility permit for the project based on the June administrative hearing record. (AR 20565-20652). After consideration, the Commission voted to issue a Facility Permit for the Project, subject to certain conditions (AR 20554-20652). As a result, on July 26, 2019, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions. The Commission's Facility Permit included 45 conditions, including sound and shadow flicker thresholds and avian monitoring and protection. Appellants timely and properly appealed the Commission's Final Decision to circuit court, below. As noted below, the circuit court, Judge Means, ultimately affirmed the administrative decision in this matter.

Prior to its decision, the lower court held a hearing by and through oral argument on January 16, 2020, and, following such hearing/argument, the Court below entered its Memorandum Decision on April 15, 2020, and, thereafter, filed its corresponding Order on April 20, 2020. Appellee then prepared and served its Notice of Entry herein on Appellants on April 23, 2020. The present appeal is timely filed herein as a matter of right.

5. Appeals of right may be taken only from final, appealable orders. See, SDCL 15-26A-3 and 15-26A-4.

a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims? X Yes __ No

b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)? N/A

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6. State each issue intended to be presented for review. (Parties will not be bound by these statements.)

1.) Whether the PUC decision below was clearly erroneous and unsupported by substantial evidence insofar as it wrongfully allowed consideration of an incomplete, inaccurate and/or misleading permit application by Appellee Crowned Ridge and such incomplete application was sought to be improperly bolstered by Appellee by and through post-hearing submissions of evidence/testimony by Applicant/Appellee.

2.) Reversible and prejudicial error was committed below when the PUC denied Appellants due process by improperly accepting and relying upon incomplete, unreliable and impermissible hearsay testimony from an Applicant witness (Sarah Sappington, Office Director/Project Manager/Archaeologist) and it was both prejudicial to Intervenors/Appellants and an abuse of discretion for the PUC to accept, over Intervenors/Appellants' objection, such unsupported and/or incomplete testimony by allowing the witness to somehow "adopt" the testimony of or "substitute for" the proposed testimony of a different Applicant witness (i.e., Kimberly Wells,

PhD in Fisheries and Wildlife Services, as a Certified Wetland Delineator and Certified Wildlife Biologist and also as Applicant's Environmental Services Manager).

3.) Reversible and prejudicial error was committed below when the PUC, over Intervenors/Appellants' objections, accepted and relied upon unsupported, unreliable and falsely claimed as licensed "professional engineer" testimony from an Applicant witness (Jay Haley) and, such error was erroneously compounded by the trial court below in its finding of such testimony amounting to "substantial evidence" when the reviewing court failed to consider Intervenors' preserved objection(s) to such unsupported and falsely-claimed opinion testimony to be addressed as an issue within any of Intervenor's 31-plus broadly-outlined issues on appeal from the administrative decision below.

4.) Whether the PUC as well as the trial court below committed reversible error in erroneously reviewing Applicant's permit, as heard and considered at hearing in June 2019, under the wrong legal standard(s) under SDCL § 49-41B-22, after July 1, 2019.

Dated: May 22, 2020.

/s/ R. Shawn Tornow

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Attorney for Intervenors/Appellants

*Trial Court's April 15, 2020, Memorandum Decision, as well as Appellees July 26, 2019, Final Decision and Order Granting Permit to Construct (Wind) Facility, EL 19-003, are appropriately attached hereto and incorporated herewith by this reference.

STATE OF SOUTH DAKOTA) : SS COUNTY OF CODINGTON)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **NOTICE OF ENTRY OF ORDER AFFIRMING DECISION OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

NOTICE IS HEREBY GIVEN that on April 20, 2020, the Honorable Carmen Means, Circuit Court Judge of the Third Judicial Circuit, signed an Order Affirming Decision of South Dakota Public Utilities Commission, which Order was entered and filed on April 20, 2020. Attached hereto and served herewith is a true and correct copy of said Order.

Dated this 23rd day of April 2020.

/s/ Amanda M. Reiss
Amanda M. Reiss (#4212)
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Amanda.reiss@state.sd.us
(605) 773-3201

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 23rd day of April, 2020, a true and correct copy of the foregoing *Notice of Entry of Order Affirming Decision of Public Utilities Commission, Order Affirming Decision of Public Utilities Commission, and Certificate of Service* was filed and served on all parties, through counsel for the parties via the Odyssey File & Serve system at their email addresses of record, upon the following:

Jared Gass
Gass Law, P.C.
PO Box 486
Brookings, SD 57006
Jared@gasslaw.com

Mr. Miles F. Schumacher
Lynn, Jackson, Shultz and Lebrun, PC
110 N. Minnesota Ave., Ste 400
Sioux Falls, SD 57104
mschumacher@lynnjackson.com

/s/ Amanda M. Reiss
AMANDA M. REISS

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

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, AND PATRICK LYNCH Appellants vs. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION Appellees.	Case No. 14CIV19-000290 **ORDER AFFIRMING DECISION OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

Appellants, Amber Kay Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch, having appealed from the South Dakota Public Utilities Commission's Final Decision and Order Granting Permit to Construct Facility in EL 18-003, and the parties having appeared by counsel of record, and the Court having considered the Briefs submitted by the parties and arguments of counsel, and the Court having issued its Memorandum Opinion on April 15, 2020, which is attached as Exhibit A and incorporated herein by this reference, it is hereby,

ORDERED, ADJUDGED and DECREED that the Decision and Order of the South Dakota Public Utilities Commission is affirmed.

Filed: 4/23/2020 4:45 PM CST Codington County, South Dakota 14CIV19-000290
Filed: 5/22/2020 11:35 AM CST Codington County, South Dakota 14CIV19-000290

Dated this _____ day of April, 2020.

BY THE COURT:

Signed: 4/20/2020 10:42:34 AM

Attest:
Hartley, Connie
Clerk/Deputy

Honorable Carmen A. Means
Circuit Court Judge
Third Judicial Circuit

ATTEST: Clerk of Courts

By:_____
Deputy

EXHIBIT A

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

AMBER KAY CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN, And PATRICK LYNCH,	)	
Appellants,	)	CIV 19-290
v.	)	**MEMORANDUM OPINION**
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UNTILITIES COMMISSION,	)	
Appellees.	)	

INTRODUCTION & STATEMENT OF FACTS

This matter comes before the circuit court on appeal by Appellants Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch (collectively "Appellants"), appealing the South Dakota Public Utilities Commission's ("the Commission's") Final Decision and Order Granting Permit to Construct Facility in EL 18-003 dated July 26, 2019. (AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions).

Crowned Ridge Wind, LLC ("Crowned Ridge" or "Applicant") submitted its application for a facility permit for a 300 megawatt (MW) wind energy facility to consist of up to 130 wind turbines in Codington and Grant counties on January 30, 2019 ("the Project"). (AR 10-960). Within its application, Crowned Ridge submitted written testimony from five witnesses[1] (two of whom filed jointly). (AR 965-1023). On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply

[1] The five witnesses included Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 961-2023).

for Party Status. (AR 1026-27). Pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on March 20, 2019, in Waverly, SD. (AR 1026-27). Five individuals intervened as parties before the April deadline and the Commission granted party status to each intervenor who filed before said deadline.[2] (AR 1070, 1322, 1463).

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses (two of whom testified jointly).[3] (AR 1467-1924). On April 10, 2019, Sarah Sappington adopted the direct testimony of Kimberly Wells. (AR 1925-44). On April 25, 2019, the intervenors filed a Motion to Deny and Dismiss the application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. (AR 2055-91, Transcript of Ad Hoc Commission Meeting). On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss and an Order to Amend Application. (AR 2092-93). Also on May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for June 11-14, 2019 to be conducted in Room 413, State Capitol Building, Pierre, SD. (AR 2094-95). Further on May 10, 2019, the intervenors filed the testimony of John Thompson and Allen Robish (AR 2096-2104);[4] while Commission Staff filed the direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney (AR 2105-3505). Intervenors submitted a Second Motion to Deny and Dismiss and brief in support on May 17, 2019. (AR 3523-55). On May 24, 2019, Crowned Ridge submitted written rebuttal testimony for Mark Thompson, Dr. Chris Ollson, Andrew Baker, Dr. Robert McCunney, Richard Lampeter, Sarah Sappington, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR 3698-4818). The second motion was heard by

[2] The Commission granted party status to Amber Christenson, Allen Robish, and Kristi Mogen on February 22, 2019. (AR 1070-71). On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR 1322). On April 5, 2019, the Commission granted party status to Patrick Lynch and established a procedural schedule. (AR 1463-64).

[3] The five witnesses included Chris Ollson, Jay Haley, Tyler Wilhelm, Sam Massey, and Mark Thompson.

[4] During the evidentiary hearing, the intervenors did not move for their testimony to be made part of the evidentiary record, and, therefore, it is not part of the record. (AR 20686).

the Commission on June 6, 2019. (AR 12245-52, Motion Hearing Transcript). The Commission denied the second motion.

On June 6, 11, and 12, the Commission held evidentiary hearings, during which Crowned Ridge entered into the record its application, testimonies, and hearing exhibits. (AR 6944-11404). Among the exhibits submitted were Exhibits A43-1 and 56 (isoline maps) that confirmed the Project was demonstrated to be in compliance with the modeled sound and shadow flicker thresholds ultimately adopted by the Commission in its Order (AR 17225-31; 17821-34; 20697-98; 20708-710; 20712). At the hearing, Crowned Ridge and Commission Staff presented witness testimony. (AR 11928-12059, 12253-12504, 12521-12823). Appellants did not call any witnesses. The Hearing Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing. On June 13, Tim and Linda Lindgren, represented by counsel, filed a Late Application for party status. (AR 20101-104) On June 25, 2019, the Commission heard the late-filed request for party status and voted 2-1 to deny the Lindgrens' request. (AR 20189-192, 20196-20209, 20222-23). The parties submitted post-hearing briefs on July 2, 2019. (AR 20257-20358, Intervenor-Appellants; 20445-491, Crowned Ridge; 20492-20510, Commission Staff).

On July 9, 2019, the Commission met to consider whether to issue a facility permit for the project. (AR 20565-20652). After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, the Commission voted unanimously to issue a Facility Permit for the Project, subject to certain conditions (AR 20554-20652). On July 26, 2019, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions (AR 20684-20714). The Facility Permit included 45 conditions, including sound and shadow flicker thresholds and avian monitoring and protection. *Id.* Appellants' issues on appeal were filed August 29, 2019, and an initial brief on November 8, 2019.

The Commission filed its response brief on December 19, 2019, and Appellee Crowned Ridge filed its brief on December 20, 2019. This court affirms the Commission's decision.

STANDARD OF REVIEW

SDCL § 49-41B-30 permits any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission to obtain judicial review of that decision by filing a notice of appeal in circuit court. "The review procedures shall be the same as that for contested cases under Chapter 1-26 [the Administrative Procedures Act.]"[5] *Id.* The review procedures are governed by SDCL § 1-26-36, which requires a reviewing court "to give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (agency findings of fact are reviewed under the clearly erroneous standard).

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 § 1-26-36(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). *See also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a

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

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). The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)) (emphasis added). 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)). The court affords great weight to the findings made and inferences drawn by an agency on questions of fact. *See* SDCL § 1-26-36, providing in relevant part:

> 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;
> (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.

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 at ¶ 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.[6] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Here, Appellants primarily assert that the Commission abused its discretion when making certain findings and conclusions related to sound, shadow flicker, and avian impact–and ultimately in granting Crowned Ridge's application for a facility permit.[7] The proper standard of review for findings of fact, however, is clearly erroneous. Appellants also challenge the agency's conclusion that the Crowned Ridge 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.[8] 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)).

APPLICABLE LAW AND ANALYSIS

A. Judicial Notice of the Dakota Range Proceedings

[6] 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.

[7] Appellants argue that certain findings and conclusions are an abuse of discretion on the part of the Commission. However, the ultimate decision (to grant the permit) would be reviewed under abuse of discretion, while the agency's findings of fact would be reviewed under the clearly erroneous standard. Despite these differences, the outcome is still the same: the appeal should be denied.

[8] 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).

Appellants request that the court take judicial notice of exhibits and maps in the Dakota Range Proceedings.[9] Appellants argue that although not a part of the record in this case, the exhibits and maps generated in the Dakota Range wind projects are relevant to the issues here and were a point of contention during the evidentiary hearings in the present case. SDCL § 19-19-201 governs judicial notice of adjudicative facts.[10] That statute provides:

> **(a) Scope.** This section governs judicial notice of an adjudicative fact only, not a legislative fact.
> **(b) Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
> (1) Is generally known within the trial court's territorial jurisdiction; or
> (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
> **(c) Taking notice.** The court:
> (1) May take judicial notice on its own; or
> (2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.
> **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
> **(e) Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
> **(f) Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

The general rule is that a fact judicially noticed must not be one subject to reasonable dispute. *See* SDCL § 19-19-201(b). It must be either generally known within the trial court's territorial jurisdiction, or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Id.*

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[9] Commission Docket Nos. EL18-003, *In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility*, and EL18-046, *In the Matter of the Application by Dakota Range III for a Permit of a Wind Energy Facility*. These dockets are separate, but related, and in the same geographic area (within 25 miles) of the proposed Crowned Ridge wind facility.

[10] "Adjudicative facts are those which relate to the immediate parties involved—the who, what, when, where, and why as between the parties." *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 9, 889 N.W.2d 416, 419 (quoting *In re Dorsey & Whitney Tr. Co.*, 2001 S.D. 35, ¶ 19, 623 N.W.2d 468, 474) (internal citations omitted).

Appellants cite to *Sioux City Boat Club v. Mulhall* to support the assertion that courts will take judicial notice of the location of a manmade object on a map. 117 N.W.2d 92 (S.D. 1962). However, in *Sioux City Boat Club*, the issue involved the court recognizing geographic boundaries pertinent to an inquiry as to whether it had jurisdiction. The issue in *Sioux City Boat Club* is not analogous or instructive on Appellants' request that this court take judicial notice of turbine locations set forth in exhibits and maps from the Dakota Range proceedings.

The number of wind turbines in the Dakota Range facility and the geographic location of the turbines is not a matter of common knowledge generally known within the trial court's jurisdiction. *See* SDCL § 19-19-201(b)(1). Additionally, the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. *See* SDCL § 19-19-201(b)(2). Further, Crowned Ridge was not a party to the Dakota Range proceedings and cannot verify the accuracy of the exhibits and maps.[11] Because there is no basis for a finding that the exhibits and maps from the Dakota Range proceedings are either generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned, this court declines to take judicial notice of the Dakota Range proceedings.

B. Appellants' Arguments Regarding Sound Studies

Appellants argue the Commission abused its discretion when it approved Crowned Ridge's application, alleging the Commission relied on incomplete and inaccurate information related to sound studies. However, on findings of fact the proper analysis is the clearly erroneous standard. Therefore, this court analyzes if the Commission's findings of fact were clearly erroneous based on the record as it pertains to sound studies. Here, the Commission's conclusion that the sound produced by the project would not substantially impair the health or welfare of the inhabitants was

[11] The exhibits and maps were submitted by Apex Clean Energy Holdings, LLC, a Dakota Range subsidiary wholly separate from and unrelated to Crowned Ridge.

supported by substantial evidence in the record, was reasonable and not arbitrary, therefore within their discretion.

SDCL § 49-41B-22 requires a permit applicant 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.[12]

The statute does not require *how* the applicant must establish the four elements: whether by maps, charts, random samplings, or otherwise. Here the Commission thoroughly considered the following information regarding sound (among other things):

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound

[12] However, this version of SDCL § 49-41B-22 has only been in effect since July 1, 2019. While the Commission issued its decision granting the facility permit for the project on July 26, 2019, all hearings were held prior to July 1, 2019. The prior version of SDCL § 49-41B-22, effective through June 30, 2019, reads as follows:
The applicant has the burden of proof to establish 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;
(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.

The 2019 update to the statute did not materially change the law, but instead clarified that wind energy facilities must comply with this statute.

> emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants' property boundaries for those residences in Codington County. Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects. Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and Applicant. Applicant agreed to a post-construction sound protocol to be used in the event the Commission orders post-construction sound monitoring.
>
> * * * *
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR 20697-20698, footnotes citing record evidence omitted).

In Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge complying with the sound thresholds of 45 dBA for sound within 25 feet of a non-participant's residence and 50 dBA for sound within 25 feet of a participant's residence. (AR 20708, Condition No. 26). *See Pesall v. Montana Dakota Utils., Co.*, 2015 S.D. 81, ¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring re-submittal of the application to consider additional information.). The Commission's analysis went above and beyond what was required by SDCL § 49-41B and ARSD 20:10:22. ARSD 20:10:22:13 provides in part:

> ... The environmental effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction...

Even considering this administrative rule, if it applies to wind energy facilities, at the time of the application for the Project when the sound modeling was completed (as well as at the time the permit was issued) there were no energy conversion facilities or wind energy facilities operating or under construction in the area.[13] Therefore, the sound modeling and the Commission's analysis went above and beyond the scope of review contemplated in the rule by factoring in the closest permitted wind turbines into the noise and shadow flicker analysis. The inclusion of the Dakota Range I and II wind turbines (which were approved by the Commission, but not yet constructed) was an additional conservative assumption in addition to several other conservative assumptions used by Crowned Ridge in its sound models.[14] The reason the Dakota Ridge III wind turbines were not added as yet another conservative assumption was the fact that Commission had not granted Dakota Range III a facility permit at the time Crowned Ridge filed its application. Crowned Ridge witness Jay Haley's rebuttal testimony states that "the tables in Exhibit 3 of the supplemental testimony show the cumulative results from *all turbines* in CRW, Crowned Ridge Wind II, and Dakota Range I and II." (emphasis added) (AR 4703, Rebuttal Testimony of Jay Haley, 2:11-13).

Appellants make a number of incorrect and incomplete factual assumptions and inferences. Appellants allege that only 17 Dakota Range turbines were included in the sound study based on a review of the Crowned Ridge isoline maps. But the maps are not intended to show all turbines included in the study—rather, they are used to graphically illustrate compliance with the sound thresholds for participants and non-participants. Crowned Ridge clearly indicated on the record

[13] The Dakota Range projects were not existing or under construction at this time. Because of this, even under the administrative rule Applicant was not required to include them in the modeling. Further, there is no legal requirement that the modeling of sound include every potential wind turbine that may or may not be constructed and operated.

[14] The Commission cited the following conservative assumptions included: "(1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted." (AR 20967). The omission also cited that "Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects." *Id.*

that all 97 of the Dakota Range I and II wind turbines were included in its sound studies (AR 1477, 2237). Further, the Commission's order recognized that Crowned Ridge included all the Dakota Range I and II turbines in its sound models (AR 20697). The fact that the map showed only the nearest 17 turbines appears to have led Appellants to the inaccurate conclusion that only 17 were included in the model. [Even so,] the Commission found that "Applicant modeled sound levels with consideration of the cumulative impacts from Dakota Range I and II and Crowned Ridge, II, LLC wind projects." (AR 20697, Finding of Fact 46).

Appellants also criticize witness Jay Haley's credentials and the use of the initials P.E. (indicating he is a professional engineer). At the evidentiary hearing, Appellants' trial attorney conducted a lengthy voir dire of Haley, after which Attorney Ganje objected to Haley's testimony on the grounds that the witness had held himself out to be a licensed professional engineer because of the initials behind his signature. Appellants' trial counsel also submitted a brief upon making an oral objection. Commission staff argued that credibility of a witness can be established by training, education, and experience, and licensing is not the end-all determination. (EH 352:15-20). Chairman Hanson stated that he agreed with Commission staff's argument. (EH 354:10-17). After taking argument from the parties, the Commission unanimously voted to overrule attorney Ganje's objection. (EH 355:7-9). The Commission's ruling on the admissibility of Haley's testimony is not an issue that was included within the Statement of Issues and is not subject to this appeal. *See* SDCL § 1-26-31.4.

The Commission's findings and conclusions that the sound produced by the project will not substantially impair the health or welfare of the inhabitants were reasonable, not arbitrary, and

supported by substantial evidence.[15] *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence sufficiently adequate to supporting the conclusion). Based on the information in the administrative record, the Project will comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26).[16] This court gives great deference to the Commission's findings pursuant to SDCL § 1-26-36. *Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952) (reversing the circuit court and directing it to affirm a Commission order that was based on substantial evidence, concluding that "... the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission.); *In re Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589, 593-96 (S.D. 1940) (reversing circuit court and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "the ultimate question is whether there was substantial evidence to support the order of the Commission.") Commission's thorough and reasonable consideration of sound was within its discretion.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to show that the Commission's actions had any prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its

[15] The testimony of witnesses McCunney and Ollson showed that if the Project complied with the sound and shadow flicker thresholds implemented by the counties and self-imposed by Crowned Ridge the Project would not have a detrimental impact on the health and welfare of inhabitants. (AR 1563-1924, 3728-3917, 4132-4369).

[16] The rebuttal testimony of witness Haley confirmed that the Project was in compliance with the county sound and shadow flicker thresholds, as well as a self-imposed sound threshold for the Project not to produce sound over 45 A-weighted decibels ("dBAs") sound within 50 feet of any nonparticipant's residence and over 50 dBA within 50 feet of any participant's residence. (AR 4701-4747).

discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). The record shows that the modeled sound level at 50 feet away from the residence of each of the Appellants is substantially below the 45 dBA non-participant threshold set forth in Condition 26.[17] The sound produced from the Project has been modeled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less than the sound of a library for Mogen and Robish. (AR 184). The sound is below the 45 dBA threshold imposed by the Commission. Appellants have failed to demonstrate any prejudicial effect, and their appeal on this issue should be denied.

C. Appellants' Arguments Regarding Shadow Flicker

Appellants argue that the Commission abused its discretion when it approved Crowned Ridge's application for a permit without sound and shadow flicker studies that encompassed all occupied residences within the siting area.[18] Applicant argues that Appellants failed to preserve this issue for appeal. It is well settled that if an Appellant does not object to the issue in the underlying proceeding, the issue is not preserved for appeal. *See, e.g., City of Watertown v. Dakota, Minnesota & E.R. Co.*, 1996 S.D. 82, ¶ 26, 551 N.W.2d 571, 577; *American Fed. Sav. & Loan Ass'n v. Kass*, 320 N.W.2d 800, 803 (S.D. 1982). This issue questions the veracity of Crowned Ridge hearing exhibits A67, A68, and A57, none of which Appellants objected to in the underlying proceeding. They also failed to preserve for appeal a challenge on the veracity of these exhibits. *See City of Watertown*, 1998 S.D. 82, ¶ 26, 551 N.W.2d at 577.

Applicant also argues that Appellants failed to include this issue in its Statement of Issues.[19] Applicant argues that it is well settled that if an appellant's Statement of Issues fails to set forth

[17] Robish: 29.3 dBA, Christenson: 38.6 dBA, Mogen: 28.8 dBA, Lynch: 37.3 dBA (AR 17839).
[18] As previously mentioned, however, the proper standard of review would be analyzing whether the factual findings and conclusions regarding shadow flicker were clearly erroneous.
[19] See Statement of Issues, filed by Appellants on August 29, 2019, listing 31 separate issues.

the reasons why the Commission's decision, ruling, or action should be reserved or modified, the argument is waived, citing *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 42, 915 N.W.2d 707, 719. However, that is not necessarily what *Lagler* says. The cited paragraph reads as follows:

> Once the circuit court's jurisdiction to review a particular decision, ruling, or action has been established—either through the filing of a notice of appeal or a notice of review—the question then becomes one of issue waiver. As indicated above, the appellant must file a statement of the issues to be presented on appeal, and the appellee may file such a statement as well. SDCL 1–26–31.4. In other words, once jurisdiction is established, the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified. *While the failure to specify a decision, ruling, or action in a notice of appeal or notice of review results in a lack of jurisdiction to review the same, the failure to file a statement of issues results in a waiver of argument.* And while either lack of jurisdiction or waiver of argument results in a denial of relief on appeal, they do so in fundamentally different ways (a lack of jurisdiction—which may be raised at any time—is a mandatory restraint on the court's power to act, but waiver is a restraint on a party's arguments that gives a court discretion to disregard them).

(emphasis added). This paragraph does not necessarily state that the failure to state the exact issue in the Statement of Issues constitutes a waiver, but rather, that the failure to file a Statement of Issues altogether results in a waiver of argument. Here, in Appellants' Statement of Issues, Issue 8 is "[w]hether the PUC acted arbitrarily and capriciously when it failed to consider testimony regarding trespass violations for shadow flicker and infrasound."

The court finds that Appellants Issue 8 is sufficient enough to allow the court to consider this issue on appeal. While Appellants certainly would have been better served had they objected to the admission of Exhibits A57, A67, or A68. (EH 366, 579:10-12), the court will consider argument on this issue.

Appellants' factual assumption that Crowned Ridge did not analyze the impact of shadow flicker on residents of Stockholm and Waverly is incorrect and not supported by the record. Appellants fail to recognize that the sounds isoline map in Exhibit A56 and the shadow flicker

map in Exhibit A43-1 clearly show that all residences in Stockholm and Waverly are well below the sound threshold for nonparticipating residents of 45 dBA and the 30-hour shadow flicker annual threshold for all residents.[20] (AR 17225-17231, 17821-17834). Exhibit A43-1 is a map detailing shadow flicker isolines for the entire project area (AR 17225-17231). This map demonstrates that each town is well below the shadow flicker limit in the Final Order.

Further, no requirement exists in South Dakota law for sound and shadow flicker studies that include each and every structure in the siting area. Again, nowhere in the statute or the administrative rules is it mandated how an applicant must establish the four elements in SDCL § 49-41B-22: whether by isoline maps, all-inclusive charts, random samplings, or otherwise. Further, while ARSD 20:10:22:33.02(5) requires an applicant to provide information regarding anticipated operational sound, the rules contain no such requirement for a shadow flicker analysis. With respect to the impact of the Project's shadow flicker on inhabitants, the Commission concluded:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CR1-C10-P) who is at 36:57 hours of shadow flicker. Applicant modeled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours. Applicant also used conservative assumptions, such as greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.

[20] For example, the sound isoline map filed as Exhibit A56 shows that all the residents of Stockholm and Waverly are below 35 dBA, which is well below the non-participant threshold of 45 dBA. (AR 17832-17833). Stockholm's results are also confirmed by the stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A57, which are in close proximity to Stockholm, and yet their sound is modeled at 35.4 dBA and 36.5 dBA respectively. (AR 17837). The same holds true for Waverly, which is represented by CR1-C4-NP, which is modeled at 38.5 dBA. (AR 17239). Similarly, for shadow flicker, the isoline map filed as Exhibit A43-1 shows that the residences of Stockholm will experience less than 10 hours of shadow flicker annually (AR 17236) which is again confirmed when reviewing stand alone non-participants (CR1-G36-NP and CR1-G37-NP) in the table of Exhibit A67, both of which will experience zero hours of shadow flicker. (AR 17895). The same holds true for shadow flicker in Waverly; the isoline map in Exhibit A43-1 shows that the residences of Waverly will experience less than 10 hours of shadow flicker annually (AR 17237) which again is confirmed when reviewing CR1-C4-NP in the table of Exhibit A67 which will experience zero hours of shadow flicker. (AR 17893).

(AR 20698) (footnotes citing record evidence omitted).

As with sound, the Commission cited the testimony of Drs. Ollson and McCunney showing no health or welfare impact from 30 hours of annual shadow flicker per year, and also imposed a compliance threshold that shadow flicker at a residence shall not exceed 30 hours of shadow flicker annually, unless waived. (AR 20698-20711). Therefore, similar to the Commission's rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including conservative shadow flicker modeling assumptions and testimony of a medical doctor specializing in the field of occupational health) as supporting the findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. See SDCL 1-26-1(9). Also, the Commission's findings, conclusions, and imposition of the shadow flicker thresholds in Condition No. 34 were within the range of permissible choices given the record, and therefore were reasonable and not arbitrary. The Commission's factual findings regarding the sound produced from the Project were not clearly erroneous and were supported by substantial evidence.

Even if this court were to find that the Commission abused its discretion in granting the permit, Appellants have failed to demonstrate prejudice. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("...[E]ven if the agency did abuse its discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). Appellants do not even argue that they are prejudiced. Any threat of prejudice is eradicated by the fact that the sound and shadow flicker conditions placed on the permit by the Commission account for actual, not modeled, sound and shadow flicker (AR 20708-20710, Condition 26). Additionally, each intervenor is well below

the 30-hour annual compliance threshold for shadow flicker.[21] As such, Appellants' arguments regarding shadow flicker are denied.

D. Appellants' Arguments Regarding Avian Use Studies

Finally, Appellants argue that the Commission could not have reasonably issued a decision in this matter because the avian use survey[22] submitted by Applicant "did not include data from the northeast portion of the project area, the historic Cattle Ridge portion of the project, and that the Commission overlooked this missing information." These arguments are not supported by the record or by legal authority. The Commission directly addressed this issue in its Order, when pursuant to SDCL § 49-41B-22, it concluded that the project will not pose a threat of serious injury to the environment. Specifically, the Commission rejected the claim that the avian impact study was not adequate, concluding in relevant part:

> 31. Intervenors argue that Crowned Ridge's application is materially incomplete since the Avian Use Survey did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the raptor nest surveys did include that area. Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to SD GF & P. Staff's witness, Mr. Tom Kirschenmann from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate. The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann.
>
> 32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations. There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a

[21] Robish: zero hours, Christenson: 6:56 hours, Mogen: zero hours, Lynch: zero hours. (AR 17839).

[22] SDCL § 49-41B-11(11) requires that an application for a permit include environmental studies relative to the proposed facility. One of the many required environmental studies required by applicant is an Avian Use Study. Avian use surveys are vital and required because impacts of wind energy facilities on avian species can be direct (e.g. turbine strike mortality) or indirect (e.g. loss of degradation of habitat). (AR7022). SWCA Environmental Consultants prepared an Avian Use Survey Report for Applicant summarizing the avian use surveys that were completed for the project area from April 1, 2017 through November 30, 2017 (AR 7017).

> game production area. Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project. Applicant committed to file a Wildlife Conservation Strategy, which includes both direct and indirect effects as well as the wildlife mitigation measures set forth in the Application, prior to the start of construction. Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Mr. Kirschenmann testified that Applicant had appropriately coordinated with SD GF&P on the impact of the Project on wildlife.

(AR 20693-20694) (footnotes with citations to record evidence omitted). As evidenced by Findings of Fact 31 and 32, the Commission clearly recognized that Applicant did study the full extent of the Project Area, and that the survey methods utilized were reasonable and appropriate.

Additionally, in its final Order, the Commission imposed a number of conditions related to avian monitoring and protection:

> 10. Applicant shall promptly report to the Commission the presence of any critical habitat of threatened or endangered species in the Project Area that Applicant becomes aware of and that was not previously reported to the Commission.
>
> 29. Applicant agrees to undertake a minimum of two years of independently-conducted post-construction avian and bat mortality monitoring for the Project, and to provide a copy of the report and all further reports to the United States Fish and Wildlife Services, South Dakota Game, Fish, & Parks, and the Commission.
>
> 30. Applicant shall file a Bird and Bat Conservation Strategy (BBCS) prior to beginning construction of the Project. The BBCS shall be implemented during construction and operation of the Project.

(AR 20706, 20710, Condition Nos. 10, 29, 30). The Order's rationale and conditions clearly demonstrate the Commission addressed the Project's impact on avian species and in doing so cited substantial evidence that a reasonable mind might accept as being adequate as supporting the Commission's conclusion that the Project will not pose a threat of serious injury to the environment, including avian species. *See* SDCL § 1-26-1(9). Further, the Commission's findings, conclusions, and imposition of conditions related to avian species in light of the entire record were reasonable and not arbitrary. Thus, the Commission's findings and conclusions on the Project's

impact on avian species, including the imposition of numerous conditions on avian monitoring and protection, were within the Commission's discretion and are afforded great deference. *See Pesall*, 2015 S.D. 81, ¶ 8, 871 N.W.2d at 652.

Appellants cite no legal authority that an application must contain an avian use survey covering the *entire* project area. SDCL § 49-41B-11(11) does require an application for a permit to include environmental studies relative to the proposed facility, and ARSD 20:10:22:16 requires an Applicant provide information resulting from surveys to identify and quantify terrestrial ecosystems within the siting area. However, similarly to the issues regarding sound and shadow above, SDCL § 49-41B-22 does not specify how an Applicant must meet this burden. While an avian use survey is often used to assess avian species and populations within a project area, it is just one tool that an applicant can utilize to meet the filing content requirements of SDCL 49-41B-11(11) and ARSD 20:10:22:16. This court is unaware of, and Appellants do not cite, any other statute or administrative rule which mandates Applicant must file a *complete* avian use survey to meet its burden of proof.

Applicant errs in the assessment that the Commission overlooked the fact that the Avian Use Survey Report (Survey) the Applicant filed with its Application failed to include data from the Cattle Ridge area. In fact, the Survey included a map that was clearly marked and clearly identified the portion of the project area the Applicant studied to prepare the survey. (AR 7271). The scope of the Survey was discussed at length and on numerous occasions before the Commission. During the evidentiary hearing, Ms. Sappington specifically answered questions about the Survey and its scope and contents (AR 12317-12318). While Ms. Sappington agreed with Appellants' cross-examination questions that the Survey did not include data collected from the Cattle Ridge area, Ms. Sappington also indicated that applicant did conduct other studies within

the Cattle Ridge area and utilized the data collected to prepare Section 11.3 of the Application. (AR 12317-12318). Following the evidentiary hearing, Appellants addressed the lack of data collection in the Cattle Ridge area in Intervenors' post-hearing brief filed on July 2, 2019. (AR 2265). This matter was again discussed before the Commission at the July 9, 2019 Commission meeting, during which, the Commission heard oral arguments of each party, asked additional questions of the parties, and issued its oral decision. (AR 20565-2652???). Of the Permit, but found Section 11.3 of the Application identified the project's potential effects to wildlife for the entire project. (AR 20694). Clearly the Commission did not overlook Appellants' concerns about the scope of the Survey.

The record also clearly shows that the Commission made a reasonable determination that the Applicant submitted sufficient evidence to meet the environmental information requirements in SDCL 49-41B-11(11) and ARSD 20:10:22:16 and to meet the Applicant's ultimate burden of proof. This evidence is concisely explained in Findings of Fact V. B. 31 and 32 of the Commission's permit which state (). As evidence in Finding of Fact 31 and 32, the Applicant presented ample environmental and wildlife evidence to supplement any deficiencies in the avian use survey.

Even assuming *arguendo* that the Commission erred when it relied on the Survey, Appellants make no argument that they were prejudiced by the Commission's decision to grant the Permit. Additionally, the Commission included a number of conditions on the Permit, applicable to the entire project area, to further ensure that the facility does not adversely affect wildlife in the project area (AR 20710 and 20714, Conditions 29, 30, and 45). Given that there is no specific requirement that an Applicant submit an avian use survey of the entire project area to meet its burden of proof, the Commission's decision to issue a permit based on the totality of the

evidence presented was not an abuse of discretion. In conclusion, Appellants have also not shown any prejudicial effect from the Commission's action on avian protections, and, therefore, even if the Court were to find that the Commission abused its discretion, which it did not, the court should not overturn the Commission's order. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. As such, the appeal on this issue is denied.

CONCLUSION

The decision of the South Dakota Public Utilities Commission is hereby affirmed. This court gives great weight to the findings made and inferences drawn by the agency on questions of fact in accordance with SDCL § 1-26-36.

Judicial notice of exhibits and maps from the Dakota Range proceedings is not proper, as the number of wind turbines in the Dakota Range facility is not a matter of common knowledge generally known within the trial court's jurisdiction, and the exhibits and maps in the Dakota Range proceedings are subject to reasonable dispute. This court declines to take the judicial notice requested by Appellants.

The decision to grant the permit to Crowned Ridge was within the Commission's sound discretion, and extensive factual findings and conclusions of law were made that were supported by the administrative record. These factual findings were not clearly erroneous, and this court reviews those factual findings with great deference to the Commission. Applicant met the burden of submitting a complete application which demonstrated that the Crowned Ridge Project 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 footprint area, and further, that it will not substantially impair the health, safety, or welfare of the inhabitants in the siting area in accordance with SDCL § 49-41B-22.

Counsel for Appellees is directed to file an Order affirming the decision of the Public Utilities Commission.

BY THE COURT:

Carmen Means

Carmen A. Means
Circuit Court Judge
Third Judicial Circuit

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY CROWNED RIDGE WIND, LLC FOR A PERMIT OF A WIND ENERGY FACILITY IN GRANT AND CODINGTON COUNTIES	)	FINAL DECISION AND ORDER GRANTING PERMIT TO CONSTRUCT FACILITY; NOTICE OF ENTRY
	)	EL19-003

APPEARANCES

Commissioners Gary Hanson, Chris Nelson, and Kristie Fiegen.

Miles Schumacher, Lynn, Jackson, Shultz and Lebrun, PC, 110 N. Minnesota Ave., Suite 400, Sioux Falls, South Dakota 57104, and Brian Murphy, NextEra Energy Resources, LLC, 700 Universe Blvd., Juno Beach, FL 33408, appeared on behalf of Applicant, Crowned Ridge Wind, LLC.

Kristen Edwards, Amanda Reiss, and Mikal Hanson, 500 E. Capitol Ave., Pierre, South Dakota 57501, appeared on behalf of the South Dakota Public Utilities Commission Staff (Staff).

David Ganje, Ganje Law Offices, 17220 N. Boswell Blvd., Suite 130L, Sun City, AZ 85373, appeared on behalf of intervenors Allen Robish, Amber Christenson, Kristi Mogen, Patrick Lynch, and Melissa Lynch (Intervenors).

PROCEDURAL HISTORY

On January 30, 2019, the South Dakota Public Utilities Commission (Commission) received an Application for a Facility Permit for a wind energy facility (Application) from Crowned Ridge Wind, LLC (Crowned Ridge or Applicant) to construct a wind energy conversion facility to be located in Grant County and Codington County, South Dakota (Project).[1] Also on January 30, 2019, Crowned Ridge filed the prefiled Direct Testimony and Exhibits of Jay Haley, Kimberly Wells, Mark Thompson, Tyler Wilhelm, and Sam Massey.

On January 31, 2019, the Commission electronically transmitted notice of the filing and the intervention deadline of April 1, 2019, to interested individuals and entities on the Commission's PUC Weekly Filings electronic listserv.

On January 31, 2019, Crowned Ridge filed copies of the Application with the Grant and Codington County auditors.

On February 6, 2019, the Commission issued a Notice of Application; Order for and Notice of Public Input Hearing; Notice of Opportunity to Apply for Party Status (Order). The Order scheduled a public input hearing for March 20, 2019, at 5:30 p.m., CDT, at the Waverly-South Shore School Gymnasium, 319 Mary Place, Waverly, South Dakota.

[1] See Ex. A1 (Application).

On February 7, 2019, Crowned Ridge filed a Supplemental Figure 3a.

On February 22, 2019, the Commission issued an Order Assessing a Filing Fee; Order Authorizing Executive Director to enter into Necessary Consulting Contracts; Order Granting Party Status (Amber Christenson, Allen Robish, Kristi Mogen).

On February 27, 2019, Crowned Ridge filed updated appendices for Appendix H and Appendix I.

On February 28, 2019, Crowned Ridge filed additional Updated Supplements to Appendix H and Appendix I.

On March 12, 2019, Crowned Ridge filed a Supplement to Appendix B.

On March 20, 2019, a public input hearing was held as noticed at the Waverly-South Shore School Gymnasium, 319 Mary Place, Waverly, South Dakota.

On March 21, 2019, the Commission issued an Order Granting Party Status (Melissa Lynch).

On March 25, 2019, Patrick Lynch filed an Application for Party Status.

On March 26, 2019, Staff filed a Motion for Procedural Schedule.

On March 27, 2019, Crowned Ridge filed its Response to the Motion for Procedural Schedule.

On March 28, 2019, Intervenors filed a Response to Crowned Ridge's Response to the Motion for Procedural Schedule.

On March 28, 2019, Affidavits of Publication were filed by Staff confirming that the Notice of Public Hearing was published in the *Watertown Public Opinion* on February 20 and March 13, 2019, in the *South Shore Gazette* on February 21 and March 14, 2019, and in the *Grant County Review* on February 20 and March 13, 2019.

On April 2, 2019, Affidavits of Publication were filed by Crowned Ridge confirming that the Notice of Public Hearing was published in the *Watertown Public Opinion* on February 13 and 20, 2019, in the *South Shore Gazette* on February 14 and 21, 2019, and in the *Grant County Review* on February 13 and 20, 2019.

On April 2, 2019, Crowned Ridge filed a Proof of Mailing to affected landowners pursuant to SDCL 49-41B-5.2.

On April 5, 2019, the Commission issued an Order Granting Party Status (Patrick Lynch); Order Establishing Procedural Schedule.

On April 9, 2019, Crowned Ridge filed the prefiled Supplemental Testimony and Exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Sam Massey, and Dr. Christopher Ollson.

On April 10, 2019, Crowned Ridge filed the prefiled Direct Testimony and Exhibits of Sarah

Sappington adopting the Direct Testimony of Kimberly Wells.

On April 25, 2019, Intervenors filed a Motion to Deny and Dismiss.

On April 30, 2019, the Commission issued an Order for and Notice of Motion Hearing on Less Than 10 Days' Notice.

On April 30, 2019, Staff and Crowned Ridge each filed a Response to Motion to Deny and Dismiss.

On May 6, 2019, Intervenors filed a Reply Brief in Support of Motion to Deny and Dismiss.

On May 10, 2019, the Commission issued an Order Denying Motion to Deny and Dismiss; Order to Amend Application.

On May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing.

On May 10, 2019, Intervenors filed the testimony of John Thompson and Allen Robish.[2]

On May 15, 2019, Applicant filed an Amendment to the Application.

On May 17, 2019, Intervenors filed a Second Motion to Deny and Dismiss.

On May 22, 2019, the Commission issued an Order for and Notice of Motion Hearing.

On May 23, 2019, Crowned Ridge filed a Response to Intervenors' Second Motion to Deny and Dismiss.

On May 23, 2019, Staff filed a Request for Exception to Procedural Schedule.

On May 23, 2019, Crowned Ridge filed Revised Maps.

On May 24, 2019, Crowned Ridge filed the prefiled Rebuttal Testimony and Exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Sam Massey, Andrew Baker, Dr. Robert McCunney, Richard Lampeter, Sarah Sappington, and Dr. Christopher Ollson.

On May 28, 2019, Crowned Ridge filed the prefiled Rebuttal Exhibits 1 and 2 of Tyler Wilhelm and Sam Massey.

On May 28, 2019, Intervenors filed a Reply Brief in Support of Motion to Deny and Dismiss and a Motion to Take Judicial Notice.

On May 30, 2019, the Commission issued an Order for and Notice of Motion for Exception to Procedural Schedule on Less Than 10 Days' Notice.

On May 30, 2019, Staff filed the prefiled Direct Testimony and Exhibits of David Hessler, Darren Kearney, Tom Kirschenmann, and Paige Olson.

[2] During the evidentiary hearing, Intervenors did not move for its testimony to be made part of the evidentiary record, and, therefore, it is not part of the evidentiary record.

On May 31, June 3, and June 5, 2019, Intervenors filed its prefiled Exhibits.

On June 6, 2019, the evidentiary hearing commenced to hear the testimony of Staff witness, David Hessler.

On June 7, 2019, Crowned Ridge filed a Final Land Status Map.

On June 10, 2019, Crowned Ridge filed a Replacement Final Land Status Map.

On June 11, 2019, prior to the start of the evidentiary hearing, the Commission heard the Second Motion to Deny and Dismiss. The Commission voted unanimously to deny the Second Motion to Deny and Dismiss.

On June 11, 2019, the evidentiary hearing was resumed, as scheduled, and concluded on June 12, 2019.

On June 12, 2019, the Commission issued an Order Granting Request for Exception to Procedural Schedule; Order Denying Motion to Take Judicial Notice; Order Denying Motion to Strike.

On June 13, 2019, the Commission received a late-filed Application for Party Status from Timothy and Linda Lindgren.

On June 18, 2019, the Commission issued an Order Setting Post-Hearing Briefing Schedule and Decision Date.

On June 18, 2019, Staff filed its Response to Late Application for Party Status.

On June 19, 2019, Intervenors filed an email regarding the Late Application for Party Status.

On June 25, 2019, at its regularly scheduled meeting, the Commission heard the late-filed Application for Party Status and denied it.

On June 26, 2019, the Commission issued an Order Denying Late-Filed Application for Party Status.

On July 2, 2019, post-hearing briefs were filed by Crowned Ridge, Staff, and Intervenors.

On July 9, 2019, at its regularly scheduled meeting, the parties made oral arguments. After questions of the parties by the Commissioners and public discussion among the Commissioners, the Commission voted unanimously to grant a permit to construct the Project to Crowned Ridge, subject to the approved Permit Conditions.

Having considered the evidence of record, applicable law, and the briefs and arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order Granting Permit to Construct Facility:

FINDINGS OF FACT

I. PROCEDURAL FINDINGS.

1. The Procedural History set forth above is hereby incorporated by reference in its entirety in these Procedural Findings. The procedural findings set forth in the Procedural History are a substantially complete and accurate description of the material documents filed in this docket and the proceedings conducted and decisions rendered by the Commission in this matter.

II. PARTIES.

2. Applicant, Crowned Ridge Wind, LLC, is a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC (NextEra).[3] NextEra, through its affiliates, is the world's largest generator of renewable energy from the wind and sun, generating over 19,000 MWs in 29 states and Canada.[4]

3. Amber Christenson, Allen Robish, Kristi Mogen, Melissa Lynch, and Patrick Lynch were granted party status (Intervenors).

4. Staff fully participated as a party in this matter, in accordance with SDCL 49-41B-17.

III. PROJECT DESCRIPTION.

5. The Project is an up to 300 MW wind facility to be located in Codington County and Grant County, South Dakota.[5] It will be owned and operated by Applicant.[6] The Project is situated within an approximately 53,186-acre Project Area and will include the following: (i) up to 130 GE 2.3 MW wind turbine generators; (ii) access roads to turbines and associated facilities; (iii) underground 34.5-kilovolt (kV) electrical collector lines connecting the turbines to the collection substation; (iv) underground fiber-optic cable for turbine communications co-located with the collector lines; (v) the low-side of a 34.5 to 345-kV collection substation; (vi) one permanent meteorological (met) tower; (vii) an operations and maintenance (O&M) facility; and (viii) temporary construction areas, including laydown and batch plant areas.[7] The estimated construction cost associated with the wind facility is approximately $400 million.[8] Fluctuations in Project costs could be as much as 20% percent, dependent on final micrositing and MISO interconnection costs.[9] The Project will utilize the Crowned Ridge 34-mile 230 kV generation tie line and a new reactive power compensation substation[10] to transmit the generation from the Project's collector substation to the Project's point of interconnection located at the Big Stone South 230 kV Substation, which is owned by Otter Tail Power Company.[11] Applicant has no plans for future expansion of the Project.[12]

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[3] Ex. A1 at 1 (Application).
[4] Ex. A5 at 1 (Wilhelm and Massey Direct Testimony).
[5] Ex. A1 at 1 (Application); Ex A1-A (Figures); Ex. A42-1 (Sappington Rebuttal Testimony); and Ex. A54 (Final Land Status Map).
[6] Ex. A1 at 14 (Application) and Ex. A29 (Amendment to Application on Ownership).
[7] Ex. A1 at 1, 17-25 (Application); Ex. A1-A (Figures 4a, 4b, and 5); Ex. A54 (Final Land Status Map); and Ex. A59 (Final Land Status and Hessler 7 Turbine Moves).
[8] Ex. A1 at 17 (Application).
[9] *Id.*
[10] The transmission gen-tie and reactive compensation substation were approved in Docket No. EL17-050.
[11] Ex. A1 at 1 (Application).
[12] *Id.* at 112.

6. All turbines will be constructed within the Project Area consistent with the configuration presented in Exhibit A44-2 (Updated Project Layout Map) and subject to all commitments, conditions, and requirements of the Commission's Final Order and Permit Conditions.

7. Applicant has agreed, if feasible, to use alternative turbine locations instead of the following primary turbine locations: CR-16, CR-19, CR-23, CR-49, CR-60, CR-67, and CR-68.[13] Applicant testified that based on the final land status map, there would be a shift in turbines CR-50 and CR-Alt22.[14] Crowned Ridge further testified that final land status required the dropping of CR-17 and CR-40, to be replaced with CR-Alt42 and CR-Alt45.[15] Crowned Ridge also testified that turbines CR-56, CR-57, CR-79, CR-Alt20, and CR-Alt19 will be removed due to Crowned Ridge not having leases for those properties.[16]

8. Crowned Ridge presented evidence of consumer demand and need for the Project.[17] Applicant has executed a PPA with Northern States Power Company (NSP) to sell NSP the full output of the Project.[18] On July 6, 2017, the Minnesota Public Utilities Commission approved NSP's Petition for Approval of the Acquisition of Wind Generation from the Company's 2016-2030 Integrated Resource Plan, including the PPA with Applicant. On December 6, 2018, North Dakota Public Service Commission issued an order granting an advance determination of prudence for the PPA between NSP and Applicant.[19] The commercial operation date for the Project is projected to be in or before the first quarter of 2020.[20]

9. With regard to micrositing, Crowned Ridge identified the need for turbine and associated facility flexibility.[21] With respect to turbine flexibility, Crowned Ridge and Staff agreed to the turbine flexibility and "material change" provisions set forth in Permit Condition 22. With respect to the access roads, the collector and communications systems, meteorological towers, Aircraft Detection Lighting System (ADLS) facilities, the O&M facility, the Project Substation, and temporary facilities, Crowned Ridge and Staff agreed to Permit Condition 23.

10. Applicant has entered into lease and easement agreements with private landowners within the Project Area for the placement of Project infrastructure.[22] Applicant anticipates that the life of the Project will be approximately 25 years, which is consistent with the Project's contracted term.[23] At the end of the Project's contracted life there may be opportunities to extend the life of the Project by repowering the Project by retrofitting the turbines and power system with upgrades based on new technology, which may allow the wind farm to produce efficiently and successfully for many more years.[24]

11. In the event the Project's contracted life is not extended, the record demonstrates that Applicant has appropriate and reasonable plans for decommissioning.[25] The Project will be

[13] Permit Conditions ¶ 27.
[14] Ex. A59 (Final Land Status and Hessler 7 Turbine Moves); Ex. A55 (Proposed Turbine Drops and Moves). Evid. Hrg. Tr. at 229-230 (Wilhelm).
[15] Ex. A59 (Final Land Status and Hessler 7 Turbine Moves). Ex. A 55 (Proposed Turbine Drops and Moves). Evid. Hrg. Tr. at 231 (Wilhelm).
[16] Evid. Hrg. Tr. at 229- 230 (Wilhelm).
[17] *See, e.g.,* Ex. A1 at Ch. 4.0 (Application).
[18] Ex. A1 at 1, 15 (Application).
[19] *Id.* at 1.
[20] *Id.* at 1, 94.
[21] Ex. A5 (Wilhelm and Massey Direct Testimony); Ex. A44 (Wilhelm and Massey Rebuttal Testimony).
[22] Ex. A1 at 113 (Application) and Ex. A54 (Final Land Status Map).
[23] Ex. A1 at 113 (Application).
[24] *Id.*
[25] *Id.* at Appendix L and Ex. A4 at 9-11 (Thompson Direct Testimony).

decommissioned in accordance with applicable state and county regulations.[26] Applicant has agreed to establish an escrow account for the purpose of financing the decommissioning of the Project.[27]

12. The record demonstrates that Crowned Ridge submitted substantial evidence on the potential cumulative impacts of the Project, and that the Project will not have a significant impact.[28]

IV. APPLICABLE STATUTES AND REGULATIONS FOR AN ENERGY FACILITY PERMIT.

13. The following South Dakota statutes are applicable: SDCL 49-41B-1, 49-41B-2, 49-41B-2.1, 49-41B-4, 49-41B-5.2, 49-41B-12 through 49-41B-19, 49-41B-22, 49-41B-25, 49-41B-26, 49-41B-35, 49-41B-36, and applicable provisions of SDCL Chapters 1-26 and 15-6.

14. The following South Dakota administrative rules are applicable: ARSD Chapters 20:10:01 and 20:10:22.

15. Pursuant to SDCL 49-41B-22, Applicant has the burden of proof to establish that:

a) The proposed facility will comply with all applicable laws and rules;

b) 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;

c) The facility will not substantially impair the health, safety or welfare of the inhabitants; and

d) 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.

16. SDCL 49-41B-25 provides that the Commission must make a finding that the construction of the facility meets all of the requirements of Chapter 49-41B.

17. There is sufficient evidence on the record for the Commission to assess the proposed Project using the criteria set forth above.

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[26] Ex. A1 at 113 (Application).
[27] Ex. A44 at 5 (Wilhelm and Massey Rebuttal Testimony); Permit Conditions ¶ 32.
[28] Ex. A7 at 5-7 (Applicant's Responses to Staff First Set of Data Requests); Ex. A26 at 2-3 (Applicant's Responses to Staff's Third Set of Data Requests); Ex. A43 at 2 (Haley Rebuttal); Ex. A56 (Appendix D and ISO-Lines Map Book); Ex. A57 (Appendix C-3 Sound Results Table Rev 6); Ex. A67 (Appendix C-1 Shadow Flicker Results Table Rev 5); and Ex. A68 Appendix C-2 Shadow Flicker Results Table Rev 5).

V. SATISFACTION OF REQUIREMENTS FOR THE ISSUANCE OF AN ENERGY FACILITY PERMIT.

A. The proposed facility will comply with all applicable laws and rules.

18. The evidence submitted by Crowned Ridge demonstrates that the Project will comply with applicable laws and rules.[29] 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.[30]

19. The record demonstrates that construction of the Project, subject to the Permit Conditions, meets all applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.[31]

B. 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.

1. Environment.

20. The evidence demonstrates that the Project does not pose a threat of serious injury to the environment in the Project Area.[32] The evidence also shows that Crowned Ridge will implement reasonable avoidance and mitigation measures, as well as commitments, to further limit potential environmental impacts.[33]

21. With respect to geological resources, the evidence shows that construction of the Project will not pose a threat of serious injury to these resources.[34] The risk of seismic activity in the vicinity of the Project Area is "low" according to data from the South Dakota Dept of Natural Resources.[35] The evidence further shows that the impact to geological resources from the Project will be minimal.[36]

22. The evidence demonstrates that the Project does not pose a threat of serious injury to soil resources, including prime farmland.[37] The Project during construction will only impact 2,134.4-acres of the 53,186.2-acre Project Area, and only 86.0 acres on a permanent basis.[38] Table 11.1.2 of the Application sets forth additional detail on the temporary and permanent impacts from the Project, broken down by land cover type.[39] During and after construction a number of mitigation measures, including best management practices (BMP), a Storm Water Pollution Prevention Plan (SWPPP), and a Spill Prevention, Control, and Countermeasures Plan (SPCCP), will be implemented to minimize the impacts to soil resources.[40] Applicant has

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[29] Ex. A1 at 75-78, 118-119 (Application) and Ex. A5 at 8-11 (Wilhelm and Massey Direct Testimony).
[30] Permit Conditions ¶ 1; Evid. Hrg. Tr. at 243 (Wilhelm); Evid. Hrg. Tr. at 295 (Massey).
[31] Ex. A1 through Ex. A61.
[32] Ex. A1 at 29-87, 89-93 (Application); Ex. A25 at 3-11 (Sappington Direct Testimony); Ex. A42 at 3-10, 12-21, 23-24 (Sappington Rebuttal Testimony); Ex. A42-1 (Updated Maps); and Ex. A54 (Final Land Status Map).
[33] Ex. A1 at 24-25, 29-87, 89-93 (Application); Ex. A4 at 4-5 (Thompson Direct Testimony); Ex. A25 at 3-11 (Sappington Direct Testimony); and Ex. A42 at 3-10, 12-21, 23-24 (Sappington Rebuttal Testimony).
[34] Ex. A1 at 32-35 (Application) and Ex. A42-1, Figures 9a, 9b, and 10 (Updated Maps). *See* Ex. A1 at § 9.0 (Application).
[35] Ex. A1 at 34 (Application).
[36] Ex. A1 at 34-35 (Application).
[37] Ex. A1 at 28-29, 35-39 (Application) and Ex. A42-1, Figure 11 (Updated Maps).
[38] Ex. A1 at 37 and 50 (Application) and Ex. A42 at 5, 13-14, 23-24 (Sappington Rebuttal Testimony).
[39] Ex. A1 at 50 (Application); Ex. A25 at 5-7 (Sappington Direct Testimony); Ex. A42 at 6-7 (Sappington Rebuttal Testimony).
[40] Ex. A1 at 24, 38-39 (Application).

committed that during construction, it will protect topsoil and minimize soil erosion. Soil areas disturbed during construction will be decompacted and returned to preconstruction contours to the extent practicable and in accordance with landowner agreements.[41]

23. The evidence also demonstrates that the Project does not pose a threat of serious injury to hydrological resources.[42] The evidence shows there will only be limited and temporary impacts to: (i) groundwater resources; (ii) existing surface water resources; and (iii) current and planned water uses.[43] To minimize impacts, Applicant has committed to implement BMPs, a SWPPP, and SPCCP to mitigate impacts to hydrology resources.[44] The evidence also shows there will be no impact to impaired waters and flood storage areas.[45] Applicant has indicated the amount of water it will likely use during construction, and has committed to obtain any necessary permits for water sources used during construction and operations.[46]

24. The evidence demonstrates that the Project does not pose a threat of serious injury to terrestrial ecosystems.[47] Specifically, there are no anticipated impacts to federally or state-listed plants.[48] The Project will not involve any major tree-clearing.[49] Also, Crowned Ridge has designed the Project so that turbines will not be sited in wetlands.[50] To minimize temporary impacts to vegetation due to construction, Applicant has also committed to implement BMP, a SWPPP, and SPCCP. Applicant will avoid impacts to United States Fish and Wildlife Services (USFWS) grasslands and grassland-wetland combination easements, as well as avoid impacts to native grassland to the extent practicable.[51] BMPs will include re-vegetation practices and erosion control devices.[52] Applicant has also agreed to compensate landowners for crop damage.[53] Applicant will develop and implement a plan to control noxious weeds.[54] Further, Applicant indicated that the minor shifts in the siting of collector lines, access roads, two turbines, and the use of alternative turbine sites does not change the overall impact of the Project on the terrestrial environment.[55]

25. The evidence demonstrates that the Project does not pose a threat of serious injury to wildlife however, the potential impact to prairie grouse leks is unknown.[56] Applicant has conducted extensive studies and consulted relevant studies to understand the potential impact to wildlife.[57] Applicant will implement an avoidance, minimization, and mitigation approach to lessen the impact the Project has on wildlife.[58]

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[41] *Id.* at 38.
[42] *Id.* at 40-46; Ex. A42-1, Figure 12.
[43] Ex. A1 at 40-46 (Application).
[44] *Id.*
[45] *Id.* at 45.
[46] Ex. A1 at 23, 41, 42 (Application) and Ex. A45 at 5-10 and 5-11 (Applicant's Responses to Intervenors' Fifth Set of Data Requests).
[47] Ex. A1 at 46-69 (Application); Ex. A1-C (Dakota Skipper and Poweshiek Skipperrling Survey); Ex. A1-D (2017-2018 Raptor Nest Survey Report); Ex. A1-E (Avian Use Survey Report); Ex. A1-F (Bat Habitat Assessment Report); and Ex. A1-G (Bat Acoustic Survey Report).
[48] Ex. A1 at 50 (Application).
[49] *Id.* at 51.
[50] Ex. A1 at 52 (Application) and Ex. A42 at 8 (Sappington Rebuttal Testimony).
[51] Ex. A1 at 12, 43 (Application).
[52] *Id.* at 51.
[53] Ex. A1 at 50 (Application) and Ex. A23 at 3-7 (Wilhelm and Massey Supplemental Testimony); Permit Conditions ¶ 20.
[54] Permit Conditions ¶ 16.
[55] Ex. A42 at 11 (Sappington Rebuttal Testimony); Ex. A42-1 (Updated Maps); Ex. A59 (Final Land Status and Hessler 7 Turbine Moves); Evid. Hrg. Tr. at 173, 308 (Sappington).
[56] Ex. A1 at 53-69 (Application).
[57] Ex. A1 at 53-66 (Application); Ex. A1-C (Dakota Skipper and Poweshiek Skipperrling Survey); Ex. A1-D (2017-2018 Raptor Nest Survey Report); Ex. A1-E (Avian Use Survey Report); Ex. A1-F (Bat Habitat Assessment Report); and Ex. A1-G (Bat Acoustic Survey Report); Ex. A42 at 9-10 (Sappington Rebuttal Testimony).
[58] Ex. A1 at 69 (Application); Ex. A25 at 3 and 12-13 (Wells Direct Testimony adopted by Sappington); Evid. Hr. Tr. at 172-173.

26. Prairie grouse leks are the locations at which male prairie grouse make displays to attract females to mate.[59] Prairie grouse are known to historically use the same areas for leks year after year.[60] Crowned Ridge acknowledges that "sharp-tailed grouse and greater prairie-chicken could be affected by Project development if Project infrastructure disturbs or displaces grouse from leks or areas of preferred habitat (grasslands)."[61]

27. Crowned Ridge observed several active greater prairie-chicken leks during a spring survey in 2007-2008 and four active leks were recorded during a spring 2016 survey in, or near, an earlier iteration of the Project Area, including two greater prairie-chicken leks and two unknown leks.[62] The SD GF&P recommended Crowned Ridge place a one-mile buffer around leks when siting and placing infrastructure and that a two-mile buffer should be placed around known leks for construction occurring during the lekking period (March 1 to June 30).[63] Applicant agreed to follow the SD GF&P's construction buffer recommendation of 2-miles during the lekking period, however Crowned Ridge elected to use a reduced buffer from Project infrastructure and sited wind turbines as close as 0.3 miles from known lek locations.[64]

28. Both the SD GF&P and Crowned Ridge wildlife experts testified that the effect of wind turbines on leks is still not well known.[65] SD GF&P recommended 2 years of post-construction grouse lek monitoring of confirmed leks less than 1 mile from proposed turbines in order to gain additional information on the effect of operating wind turbines on leks and to aide with future discussions around cumulative effects of wind energy development on prairie grouse.[66]

29. The Commission finds that Crowned Ridge decided to site wind turbines less than 1 mile from known leks and not implement the SD GF&P's recommendation for siting project infrastructure at least 1 mile from known leks. Further, the Commission finds that the effects of wind turbines on prairie grouse leks is still not sufficiently understood. Therefore, to add to the scientific knowledge on the impact operating wind turbines may have on prairie grouse leks, if any, the Commission adopts Staff's proposed condition.[67]

30. The Commission's review of correspondence and comment letters from the South Dakota Game, Fish & Parks (SD GF&P) and USFWS wildlife experts found that neither of the agencies recommended general mammal studies be done, therefore general mammal studies are not needed in the Project Area.[68] The wildlife experts did recommend a survey to be conducted for bats, which are a mammal, and Crowned Ridge conducted the recommend survey.[69]

31. Intervenors argue that Crowned Ridge's Application is materially incomplete since the Avian Use Survey[70] did not include the portion of the Crowned Ridge Project Area that was formerly known as Cattle Ridge. Crowned Ridge's expert witness, Ms. Sarah Sappington, testified that while the avian use survey did not include the Cattle Ridge portion of the Project Area, the

[59] Evid. Hrg. Tr. at 193 (Sappington).
[60] *Id.*; Evid. Hrg. Tr. at 504, 505 (Kirschenmann).
[61] Ex. S2 at 430 (Kearney Direct Testimony).
[62] Ex. A1 at 61 (Application).
[63] Ex. S2 at 440 (Kearney Direct Testimony).
[64] *Id.*; Ex. A1-A, Figure 6 at 25 (Application).
[65] Ex. S6; Evid. Hrg. Tr. at 198 (Sappington); Evid. Hrg. Tr. at 508 (Kirschenmann).
[66] Ex. S3 at 20 (Kirschenmann Direct Testimony).
[67] Permit Conditions ¶ 45.
[68] Ex. A1-B; Ex. A12.
[69] Ex. A1-G.
[70] Ex. A1-E.

raptor nest surveys did include that area.[71] Ms. Sappington further testified that Crowned Ridge did study the full extent of the Project Area as detailed in the Application and that shapefiles of the full extent of the Project Area were sent to the SD GF&P.[72] Staff's witness, Mr. Tom Kirschenmann, from the SD GF&P, testified that the survey methods used by Crowned Ridge followed the USFWS guidelines, and were reasonable and appropriate.[73] The Commission finds that the lack of an avian use survey in the Cattle Ridge portion of the Project Area is not fatal to the Application since Section 11.3 of the Application[74] identified the Project's potential effects to wildlife for the entire Project Area, as testified to by Ms. Sappington, and that proper survey methods were used by Crowned Ridge, as testified to by Mr. Kirschenmann.

32. Crowned Ridge will also mitigate temporary impacts to habitat consistent with Mr. Kirschenmann's recommendations.[75] There will be no turbines on game production areas, with the closest two turbines .24 mile and .35 mile away from a game production area.[76] Further, Applicant is required to conduct two years of independently-conducted post-construction avian and bat mortality monitoring for the Project.[77] Applicant committed to file a Wildlife Conservation Strategy, which includes both direct and indirect effects as well as the wildlife mitigations measures set forth in the Application, prior to the start of construction.[78] Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction.[79] Also, Mr. Kirschenmann testified that Applicant had appropriately coordinated with SD GF&P on the impact of the Project on wildlife.[80]

33. The evidence demonstrates that the Project does not pose a threat of serious injury to aquatic ecosystems.[81] Similarly, the evidence demonstrates that the Project does not pose a threat of serious injury to land use and will comply with local controls.[82] Applicant has coordinated with landowners to locate infrastructure in a manner that minimizes the impact to their land uses.[83] 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.[84] Applicant also committed to implement a number of BMPs to mitigate the impact of the Project on air and water quality.[85]

34. Applicant will install and use lighting required by the Federal Aviation Administration (FAA).[86] Applicant has also committed to use an FAA-approved Aircraft Detection Lighting System to minimize visual impact of the Project.[87]

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[71] Evid. Hrg. Tr.at 178.
[72] Evid. Hrg. Tr.at 180.
[73] Ex. S3 at 6.
[74] Ex. A1.
[75] Ex. A42 at 4 (Sappington Rebuttal Testimony); S3 (Kirschenmann Direct Testimony).
[76] Ex. A42 at 10 (Sappington Rebuttal Testimony.
[77] Permit Conditions ¶ 29.
[78] Ex. A42 at 6 (Sappington Rebuttal Testimony) and Evid. Hrg. Tr. at 212-213 (June 11, 2019).
[79] Permit Conditions ¶ 30.
[80] Ex. S3 at 3-5 (Kirschenmann Direct Testimony).
[81] Ex. A1 at 70-73 (Application).
[82] Ex. A1 at 73-88 (Application); Ex. A1-A (Figures); Ex. A5 at 8-11 (Wilhelm and Massey Direct Testimony); Ex. A2 (Haley Direct Testimony); Ex. A1-H (Sound Modelling Report), Ex. A1-J (Shadow Flicker Report); Ex. A1-L (Decommissioning Plan); Ex. A22 (Haley Supplemental Testimony); Ex. A43 (Haley Rebuttal Testimony); Ex. A43-1 (Shadow Flicker ISO-Lines); Ex. A43-2 (Sound Pressure ISO-Lines); Ex. A56 (Appendix D Sound ISO-Lines Map Book); Ex. A57 (Appendix C3 Sound Results Table Rev 6); Ex. A67 (Appendix C-1 Shadow Flicker Results) and Ex. A68 Appendix C-2 Shadow Flicker Results).
[83] Ex. A5 at 11-12 (Wilhelm and Massey Direct Testimony).
[84] Ex. A1 at 89-91, 92-93 (Application).
[85] Ex. A1 at 90-93 (Application) and Ex. A42 at 12-13, 18-20 (Sappington Rebuttal Testimony).
[86] Ex. A1 at 87 (Application). *See also,* Permit Conditions ¶33.
[87] *Id.*

35. Applicant has undertaken extensive study, surveys, and consultation with applicable tribes to identify and avoid sites of cultural, archaeological, and historical importance.[88] For example, Applicant's Records Search per the South Dakota State Historic Preservation Office (SD SHPO) guidance identified 133 previously documented archaeological sites, 6 previously documented historic bridges, 83 previously documented standing historic structures, and 5 previously documented cemeteries that have been recorded inside and within 1 mile of the Project Area.[89] As a mitigation measure, Applicant will avoid direct physical impacts to National Register of Historic Places listed sites.[90]

36. Applicant also consulted with the tribal members from the Sisseton Wahpeton Oyate, Yankton Sioux, and Spirit Lake Nation tribes (who were selected by the affected tribes to represent those all applicable tribes) to identify significant tribal resources, and Applicant included them as part of the survey field team.[91] Applicant further consulted with the SD SPHO on the type and content of surveys.[92] Applicant agrees to avoid direct impacts to cultural resources not previously identified and evaluated or notify the Commission and the SD SHPO if avoidance cannot be achieved so to coordinate minimization and/or treatment measures.[93] Applicant will also develop a plan to address any unanticipated discovery of cultural resources, consistent with SDCL 34-27-25, 34-27-26, and 34-27-28.[94] Applicant will file with the Commission a Level III Archaeological survey for, among other facilities, access roads, crane paths, and collection lines prior to commercial operation.[95] Further, Applicant will implement specific avoidance, minimization, and mitigation measures for Traditional Cultural Properties.[96] Based on the record in this proceeding and the Permit Conditions, Applicant has demonstrated that it will minimize or avoid impacts to cultural resources.[97]

2. *Social and Economic.*

37. Applicant has been developing the Project for 10 years through an iterative process to identify the Project Area.[98] During this time, Applicant worked closely with federal and state agencies, landowners, and tribal and local governments to properly design and site the infrastructure for the Project.[99] After accounting for land status and Project changes as identified in Finding of Fact 7, Applicant has all land rights needed to construct and operate the Project.[100]

38. Applicant has demonstrated that the Project does not pose a threat of serious injury to the community.[101] The Project will only permanently impact approximately 86 acres of farmland.[102] The Project is expected to have a negligible effect, if any, on the assessed values of private property and, therefore, on property taxes.[103] Applicant has committed to coordinate with first responders and provide them with the Applicant's safety plan.[104] Further, Applicant has

[88] Ex. A1 at 104-110 (Application); Ex. A25 13-16 (Sappington Direct Testimony); and Ex. A42 at 2-3 (Sappington Rebuttal Testimony).
[89] Ex. A1 at 105 (Application); Ex. A16 at 2-30 and Attachment 1 to 2-30 Confidential (Applicant's Responses to Staff Second Set of Data Requests).
[90] Ex. A1 at 108 (Application).
[91] Ex. A25 at 15 (Sappington Direct Testimony).
[92] Ex. A25 at 15-16 (Sappington Direct Testimony); Ex. A1-B (Agency Coordination); Ex. S4 at 3-7 (Olson Direct Testimony).
[93] Permit Conditions ¶ 11.
[94] Permit Conditions ¶ 12.
[95] Permit Conditions ¶ 13.
[96] Permit Conditions ¶ 37.
[97] Permit Conditions ¶ 48.
[98] Ex. A1 at 2, 26-28, 88 (Application).
[99] Ex. A1 at 2, 26-28, 88; Ex. A5 at 6-15.
[100] Exs. A52, A53, A54, A64, and A65; Evid. Hear. Tr. at 228-231 and 260 (Wilhelm Testimony).
[101] Ex. A1at 95-110, 117 (Application); Ex. A1-K (Property Value Effects Studies); and Ex. A1-M (Telecommunication Study).
[102] Ex. A1 at 102 (Application).
[103] Ex. A1 at 100 (Application) and Ex. A1-K (Property Value Effects Studies); Ex. S8.
[104] Ex. A1 at 101 (Application); Permit Conditions ¶¶ 8, 28, 43.

demonstrated that the construction and operation of the Project will result in benefits to South Dakota and local economies through payment of property taxes and lease payments.[105] Also, there will be approximately 250 temporary workers used during the construction or the Project, and 12 permanent workers in South Dakota to conduct operation and maintenance activities, including 10 wind technicians, 1 lead wind technician, and 1 site manager.[106]

39. The record also demonstrates that the Project is not expected to adversely impact communication systems, such as microwave, AM, FM, cellular, TV, and aviation towers.[107] Also, Applicant has agreed to take action to minimize interference the Project causes to radio, television, and other licensed communication transmitting or receiving equipment.[108]

40. The record demonstrates that Applicant will avoid and/or minimize impacts to transportation.[109] Applicant has committed to coordinate with the South Dakota Department of Transportation (SDDOT), Codington County and Grant County, and Project Area townships to manage construction traffic, and to ensure that equipment and components are delivered safely to the Project. Applicant will also obtain SDDOT Highway Access and Utility Permits prior to construction, and contractors will be required to obtain applicable over height or overweight haul permits. County road permits required for right-of-way occupancy, utility crossings, road approaches, and overweight loads will be obtained by Applicant from Codington County and Grant County prior to beginning construction activities for which the permit is required.[110] Applicant is required to obtain applicable road use agreements and implement specific road protection practices.[111]

41. Crowned Ridge has demonstrated that the Project will not adversely impact property values. Applicant's witness, Mr. Andrew Baker, a licensed appraiser in South Dakota, with experience evaluating the impact of wind turbines on property values, conducted a Market Analysis to analyze the potential impact of the Project on the value of the surrounding properties and found no market data indicating property values will be adversely impacted due to proximity to the Project.[112] This conclusion is also consistent with the Commission's recent findings regarding property values in the Prevailing Wind Park, Dakota Range I and II, Crocker, and Deuel Harvest wind farm proceedings.[113]

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[105] Ex. A1 at 15, 98 (Application).
[106] Ex. A1 at 111 (Application); Ex. A4 at 8 (Thompson Direct Testimony); Ex. A5 at 12 (Wilhelm and Massey Direct Testimony); and Ex. A28 (Allocation of Tax Revenues).
[107] Ex. A1 at 103-104 (Application) and A1-M (Telecommunication Study).
[108] Permit Conditions ¶ 24.
[109] Ex. A1 at 103 (Application).
[110] Permit Conditions ¶¶ 7, 8, 9.
[111] *Id.*
[112] Ex. A1 at 99-100 (Application); Ex. A1-K (Property Value Effects Studies); Exs. A39; A39-1; A39-2; A39-3 (Baker Rebuttal Testimony); Ex. S8.
[113] *See In the Matter of the Application by Prevailing Wind Park, LLC for a Permit of a Wind Energy Facility in Bon Homme County, Charles Mix County and Hutchinson County, South Dakota, for the Prevailing Wind Park Project*, Docket EL18-026, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (Nov. 28, 2018); *In the Matter of the Application by Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility in Grant County and Codington County, South Dakota, for the Dakota Range Wind Project*, Docket EL18-003, Final Decision and Order Granting Permit to Construct Wind Energy Facility; Notice of Entry (July 23, 2018); *In the Matter of the Application by Crocker Wind Farm, LLC for a Permit of a Wind Energy Facility and a 345 kV Transmission Line in Clark County, South Dakota, for Crocker Wind Farm*, Docket EL17-055, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (June 12, 2018); *In the Matter of the Application of Deuel Harvest Wind Energy, LLC*, Docket No. EL18-053, Final Decision and Order (May 30, 2019).*see also* Ex. S8 (Surrebuttal Testimony of David Lawrence in Docket EL18-003).

42. The FAA has not yet issued a Determination of No Hazard for five of the Project's proposed turbine sites.[114] Applicant has committed to not build any wind turbines that do not have an FAA Determination of No Hazard.[115]

43. In prior contested siting dockets, the Commission has considered the following socioeconomic issues in evaluating whether a project would pose a threat of serious injury to the social and economic condition: temporary and permanent jobs; tax revenue; and impacts on commercial, agricultural, and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities, schools, transportation facilities, and other community and government facilities.[116]

44. The record demonstrates that the Project will not pose a threat of serious injury to the social and economic condition of inhabitants or expected inhabitants in the siting area.[117]

C. <u>The facility will not substantially impair the health, safety or welfare of the inhabitants</u>.

45. The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence.[118] These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted.[119] The Project will also not result in sound above 50 dBA at any non-participants property boundaries for those residences in Codington County.[120] Applicant modelled sound levels with consideration of the cumulative sound impacts from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects.[121] Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and

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[114] Ex. S7 at 31 (Applicant's Additional Data Request Responses to Staff) (Public); Ex. A62; Evid. Hrg. Tr. at 253.
[115] Evid. Hrg. Tr. at 243; Evid. Hrg. Tr. at 253.
[116] *See, e.g., In the Matter of the Application of Dakota Access, LLC for an Energy Facility Permit to Construct the Dakota Access Pipeline*, Docket HP14-002, Final Decision and Order; Notice of Entry (Dec. 14, 2015); *In the Matter of the Application by TransCanada Keystone Pipeline, LP for a Permit Under the South Dakota Energy Conversion and Transmission Facilities Act to Construct the Keystone XL Project*, Docket HP09-001, Amended Final Decision and Order; Notice of Entry (June 29, 2010) (discussing socioeconomic effects, including tax revenue, jobs, and impacts on agricultural, commercial, and industrial sectors and public facilities); *In the Matter of the Application of Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility in Grant County and Codington County, South Dakota, for the Dakota Range Wind Project*, Final Decision and Order Granting Permit to Construct Wind Energy Facility; Notice of Entry (July 23, 2018); *In the Matter of the Application of Montana-Dakota Utilities Co. and Otter Tail Power Company for a Permit to Construct the Big Stone South to Ellendale 345 kV Transmission Line*, Docket EL13-028, Final Decision and Order; Notice of Entry (Aug. 22, 2014) (discussing impacts to agriculture, property values, and local roads under this criterion). *See In the Matter of the Application by Prevailing Wind Park, LLC for a Permit of a Wind Energy Facility in Bon Homme County, Charles Mix County and Hutchinson County, South Dakota, for the Prevailing Wind Park Project*, Docket EL18-026, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (Nov. 28, 2018); *In the Matter of the Application by Crocker Wind Farm, LLC for a Permit of a Wind Energy Facility and a 345 kV Transmission Line in Clark County, South Dakota, for Crocker Wind Farm*, Docket EL17-055, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (June 12, 2018); *In the Matter of the Application of Deuel Harvest Wind Energy, LLC*, Docket No. EL18-053, Final Decision and Order (May 30, 2019).
[117] *See, e.g.*, Ex. A1 at § 18 (Application).
[118] Ex. A56 (Appendix D Sound ISO-Lines Map Book); Ex. A57 (Appendix C-3 Sound Results Table Rev 6).
[119] Ex. A22 at 3 (Haley Supplemental Testimony); Evid. Hrg. Tr. at 358 (Haley).
[120] Evid. Hrg. Tr. at 358 (Haley).
[121] Ex. A26 at 3-3 (Applicant's Responses to Staff Third Set of Data Requests); Ex. A56 (Appendix D Sound ISO-Lines Map Book); Ex. A57 (Appendix C-3 Sound Results Table Rev 6); Evid. Hrg. Tr. at 361 (Haley).

Applicant.[122] Applicant agreed to a post construction sound protocol to be used in the event the Commission orders post construction sound monitoring.[123]

46. Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CR1-C10-P) who is at 36:57 hours of shadow flicker.[124] Applicant modelled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours.[125] Applicant also used conservative assumptions, such as the greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.[126]

47. Receptor CR1-C10-P is a participating landowner in Codington County.[127]

48. Receptor CR1-C10-P will experience 36 hours and 57 minutes of shadow flicker per year.[128]

49. Nothing in the record indicates that Receptor CR1-C10-P has signed a waiver.

50. Applicant will work with the one participant that will experience 36 hours of shadow flicker to either waive the 6:57 hour overage or implement mitigation, such as curtailing the turbine for the 6:57 hours of shadow flicker.[129]

51. There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant.[130] Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.[131]

52. There is no evidence in the record that the Project will substantially impair safety. Applicant will meet or exceed required setbacks established for safety,[132] and, also, implement safety practices during construction, operation, and maintenance, including grounding wind turbines in accordance with National Electrical Safety Code standards.[133] Applicant will monitor the operation of the Project twenty-four hours a day, seven days a week through the Supervisory Control and Data Acquisition system.[134] Also, Applicant will implement a SWPPP and SPCCP, part of which will ensure that state and local disaster services are coordinated with in the event of the accidental release of contaminants.[135] Applicant will illuminant the wind turbines as required

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[122] Ex. A58 (Final Land Status and Hessler 7 on Intervenors); Ex. A60 (Hessler 7 on Hessler Identified Non-Participants); Permit Conditions ¶ ¶ 26, 27.
[123] Permit Conditions ¶ 26.
[124] Ex. A67 (Appendix C-1 Shadow Flicker Results); Ex. A68 Appendix C-2 Shadow Flicker Results).
[125] Ex. A26 at 3-3 (Applicant's Responses to Staff Third Set of Data Requests); Ex. A43 at 2 (Haley Rebuttal Testimony).
[126] Ex. A2 at 7 (Haley Direct Testimony); Evid. Hrg. Tr. at 359-360 (Haley).
[127] *Id.*
[128] *Id.*
[129] Ex. A44 at 2-3 (Wilhelm and Massey Rebuttal Testimony); Evid. Hrg. Tr. at 361 (Haley); Permit Conditions ¶ ¶ 34, 41.
[130] Ex. A24 (Ollson Supplemental Testimony); Ex. A24-1 and through Ex. A24-17; Ex. A38 (Ollson Rebuttal Testimony); Ex. A38-1 through Ex. A38-7; Ex. A40 (McCunney Rebuttal Testimony); Ex. A 40-2 through Ex. A40-9; Evid. Hrg. Tr. at 433-435 (McCunney); Evid. Hrg. Tr. at 452-458 (Ollson).
[131] *Id.*
[132] Ex. A1 at 12, 27, 75-78 (Application); Ex. A5 at 9-11 (Wilhelm and Massey Direct Testimony).
[133] Ex. A1 at 20, 114-115 (Application); Ex. A4 at 3, 7 (Thompson Direct Testimony).
[134] Ex. A1 at 23 (Application); Ex. A4 at 5, 7-8 (Thompson Direct Testimony).
[135] Ex. A1 at 41, 90-91, 100, 102 (Application).

by the FAA.[136] Applicant is required to use two methods to detect icing conditions on turbine blades to shut down turbines when they are accumulating ice.[137]

53. Applicant, prior to construction, is required to notify public safety agencies on the location of construction work.[138]

54. Applicant is required to provide each participating and non-participating landowner detailed safety information, including safety precautions, 14 days prior to the commencement of construction.[139]

55. Therefore, the record shows that Crowned Ridge has met its burden to demonstrate that the Project will not substantially impair the health, safety or welfare of the inhabitants of the siting area; indeed, there is no evidence in the record that the Project would substantially impair human health.

D. 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.

56. The Commission must give due consideration to the views of governing bodies of affected local units of government pursuant to SDCL 49-41B-22(4).

57. The record demonstrates that the Project will not unduly interfere with the orderly development of the region. The Project complies with all applicable local land use requirements as demonstrated by the granting of conditional use permits for the Project by Grant County and Codington County.[140]

58. Applicant has also committed to decommissioning the Project at the end of its 25 year useful life, provided the life of the Project is not extended by retrofitting the turbines and power systems.[141] In support of decommissioning, Applicant will establish an escrow agreement consistent with the Commission's past rulings.[142] The escrow agreement covers decommissioning of the entire project, and, therefore, the Commission finds the escrow agreement required in this proceeding will provide sufficient financial protection for the decommissioning of the Project, and, accordingly, there is no need for Grant County and Codington County to require duplicative financial security related to decommissioning.

59. Staff witness Darren Kearney attached to his testimony 37 proposed conditions that the Intervenors indicated they desired to advance in this proceeding.[143] While Mr. Kearney provided Staff's initial reaction to the 37 conditions, he, also, testified that Staff had not seen supporting information from the Intervenors on the 37 conditions.[144] During the proceeding, the Intervenors submitted no evidence in support of the 37 conditions. In contrast, the Applicant

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[136] *Id.* at 12.
[137] Permit Conditions ¶35.
[138] Permit Conditions ¶43.
[139] Permit Conditions ¶4.
[140] Ex. A1 at 88 (Application); Ex. A1-J (County Conditional Use Permits); Ex. A5 at 8-11 (Wilhelm and Massey Direct Testimony); Ex. A44 at 3-4 (Wilhelm and Massey Rebuttal Testimony).
[141] Ex. A1 at 113 (Application); Ex. A1-L (Decommission Plan).
[142] *In the Matter of the Application of Deuel Harvest Wind Energy, LLC*, Docket No. EL18-053, Final Decision and Order (Condition No. 36) (May 30, 2019). The Commission, however, will allow the Crowned Ridge escrow agreement to be filed 30 days (instead of the 60 days in past cases) prior to the commencement of commercial operations in order to allow Crowned Ridge with additional time to work with Grant County and Codington County so that they do not require duplicative escrow agreement(s).
[143] Ex. S2 at 12 (Exhibit DK-9) (Kearney Direct Testimony).
[144] *Id.*

provided evidence that the conditions should not be adopted.[145] Therefore, the 37 conditions proposed by the Intervenors will not be adopted.

VI. GENERAL.

60. Applicants have furnished all information required by the applicable statutes and Commission regulations.

61. Applicants have satisfied their burden of proving all of the requirements imposed by SDCL 49-41B-22 for issuance of the permit to construct by the preponderance of the evidence.

62. An application may be denied, returned, or amended, at the discretion of the Commission, for failure to file an application generally in the form and content required by SDCL Chapter 49-41B and ARSD Chapter 20:10:22.[146] The Commission finds that Applicant filed its application generally in the form and content required by SDCL Chapter 49-41B and ARSD Chapter 20:10:22. The Commission notes that the supplementation of an application with additional information is common.[147]

63. An application may be denied, returned, or amended, at the discretion of the Commission, if there are any deliberate misstatements of material facts in the application or in accompanying statements or studies.[148] The Commission finds that the application and its accompanying statements and studies did not contain any deliberate misstatements of material facts.

64. The Commission finds that the Permit Conditions attached hereto and incorporated herein by reference are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22.

65. 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.

66. The Commission finds that the Project, if constructed in accordance with the Permit Conditions of this decision, will not pose an unacceptable threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area.

67. The Commission finds that the Project, if constructed in accordance with the Permit Conditions of this decision, will not substantially impair the health, safety or welfare of the inhabitants in the siting area.

68. The Commission finds that the Project, if constructed in accordance with the Permit Conditions of this decision, will not unduly interfere with the orderly development of the region

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[145] Ex. A1-K (Property Value Effects Study); Ex. A37 at 4-11 (Thompson Rebuttal Testimony); Ex. A38 at 8-12 (Olson Rebuttal Testimony); Ex. A39 at 2-6 (Baker Rebuttal Testimony); Ex. A40 at 3-11 (McCunney Rebuttal Testimony); Ex. A42 at 12-24 (Sappington Rebuttal Testimony); Ex. A43 at 6-7 (Haley Rebuttal Testimony); and Ex. A44 at 9-19 (Wilhelm and Massey Direct Testimony).
[146] SDCL 49-41B-13(2).
[147] Ex. S2 at 8 (Kearney).
[148] SDCL 49-41B-13(1).

with due consideration having been given the views of governing bodies of affected local units of government.

69. The Commission finds the Intervenors have not presented evidence sufficient to deny the permit under the applicable statutes and Commission regulations.

70. The Commission finds that a permit to construct the Project should be granted subject to the attached Permit Conditions.

71. To the extent that any Conclusion of Law set forth below is more appropriately a finding of fact, that Conclusion of Law is incorporated herein by reference as a Finding of Fact as if set forth in full herein.

72. To the extent that any of the Findings of Fact in this decision are determined to be Conclusions of Law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a Conclusion of Law as if set forth in full herein.

Based on the foregoing Findings of Fact and the record in this proceeding, the Commission hereby makes the following:

CONCLUSIONS OF LAW

From the foregoing Findings of Fact and the record in this proceeding, the Commission now makes the following Conclusions of Law:

1. The Commission has jurisdiction to consider the Application under SDCL Chapter 49-41B.

2. The wind energy conversion facility proposed by Applicant is a wind energy facility as defined under SDCL 49-41B-2(13).

3. The Application submitted by Applicant, as amended and supplemented through the proceedings in this matter, meets the criteria required by SDCL 49-41B-25, and construction of the Project meets the requirements of SDCL 49-41B and ARSD Chapter 20:10:22.

4. The Commission concludes that it possesses the authority under SDCL 49-41B-25 to impose conditions on the construction, operation and maintenance of the Project, that the Conditions set forth in the attached Permit Conditions are supported by the record, are reasonable, and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and that the Permit Conditions are hereby adopted.

5. The Commission concludes that it needs no other information to assess the impact of the proposed facility or to determine if Crowned Ridge has met its burden of proof.

6. The Commission satisfied the hearing and notice requirement in SDCL Chapter 49-41B.

7. Applicant satisfied the applicable notice requirements in SDCL Chapter 49-41B.

8. All other applicable procedural requirements in SDCL Chapter 49-41B have been satisfied.

9. Applicant has demonstrated that the proposed facility will comply with all applicable laws and rules.

10. When considered with all Permit Conditions, Applicant has demonstrated that 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.

11. When considered with all Permit Conditions, Applicant has demonstrated that the facility will not substantially impair the health, safety or welfare of the inhabitants.

12. When considered with all Permit Conditions, Applicant has demonstrated that 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.

13. Crowned Ridge must comply with the requirements in the Grant County and Codington County ordinances.

14. No party has provided sufficient evidence to impose any of the 37 proposed Intervenor conditions.

15. The standard of proof is by the preponderance of evidence. Applicant has met its burden of proof imposed by SDCL 49-41B-22 for issuance of the permit to construct by the preponderance of the evidence and is entitled to a permit to construct as provided in SDCL 49-41B-25.

16. Based on the preponderance of the evidence presented to the Commission, the Commission concludes that all of the requirements of SDCL 49-41B-22 have been satisfied.

17. The Commission thus concludes that the Application should be granted, and a facility permit should be issued for the Project for the reasons stated in these Findings of Fact and Conclusions of Law. The Commission grants the permit to construct requested in the Application, as amended, subject to the Permit Conditions.

ORDER

From the foregoing Findings of Fact and Conclusions of Law, it is therefore:

ORDERED, that a permit to construct the Crowned Ridge Wind Project is granted to Crowned Ridge Wind, LLC for the construction and operation of the Project. It is further

ORDERED, that Applicant shall comply with all of the attached Permit Conditions, which are incorporated by reference into this Order the same as if they had been set forth in their entirety herein. It is further

ORDERED, that Intervenors' Second Motion to Dismiss is hereby denied.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that this Final Decision and Order Granting Permit to Construct Facility was duly issued and entered on the 26th day of July 2019.

Dated at Pierre, South Dakota, this 26th day of July 2019.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically or by mail.

By: Karen E. Cremer

Date: 07/26/19

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Gary Hanson

GARY HANSON, Chairman

Chris Nelson

CHRIS NELSON, Commissioner

Kristie Fiegen

KRISTIE FIEGEN, Commissioner

PERMIT CONDITIONS

1. Applicant will obtain all governmental permits which reasonably may be required by any township, county, state agency, or federal agency, or any other governmental unit for construction and operation activity of the Project prior to engaging in the particular activity covered by that permit. Copies of any permits obtained by Applicant shall be filed with the Commission.

2. Applicant shall construct, operate, and maintain the Project in a manner consistent with (1) descriptions in the Application, (2) Application supplements and corrections, (3) commitments made by Applicant in response to data requests, (4) the Final Decision and Order Granting Permit to Construct Facility, and attached Permit Conditions, (5) all applicable industry standards, (6) all applicable permits issued by a federal, state, or local agency with jurisdiction over the Project, and (7) evidence presented by Applicant at the evidentiary hearing.

3. Applicant agrees that the Commission's complaint process as set forth in ARSD Chapter 20:10:01 shall be available to landowners and other persons sustaining or threatened with damage as the result of Applicant's failure to abide by the conditions of the Permit or otherwise having standing to seek enforcement of the conditions of the Permit. Participating landowners are free to use the complaint process free from retribution or consequence regardless of any private easement term to the contrary.

4. At least 14 days prior to commencement of construction, Applicant shall provide each participating and non-participating landowner in the Project Area, using the addresses designated to receive the property tax bill sent by the county treasurer, with the following information:

   a) A copy of the Final Decision and Order Granting Permit to Construct Facilities with attached Permit Conditions;

   b) Detailed safety information describing:

      i. Reasonable safety precautions for existing activities on or near the Project;

      ii. Known activities or uses that are presently prohibited near the Project; and

      iii. Other known potential dangers or limitations near the Project;

   c) Construction/maintenance damage compensation plans and procedures (only to participating landowners);

   d) The Commission's address, website, and phone number;

   e) Contact person for Applicant, including name, e-mail address, and phone number.

5. In order to ensure compliance with the terms and conditions of this Permit pursuant to SDCL 49-41B-33, it is necessary for the enforcement of this Order that all employees, contractors, and agents of Applicant involved in this Project be made aware of the terms and conditions of this Permit.

6. Except as otherwise provided in the Permit Conditions, Applicant shall comply with all mitigation measures set forth in the Application and Applicant's commitments in its responses to data requests, and Applicant exhibits and testimony at the evidentiary hearing. Material modifications to the mitigation measures shall be subject to prior approval of the Commission.

7. Applicant will negotiate road use agreements with Codington and Grant Counties and all affected townships, if required. Applicant will comply with such road use agreements. When using haul roads specified in applicable road use agreements, Applicant shall take appropriate action to mitigate wind-blown particles created throughout the construction process, including implementation of dust control measures such as road watering, covering of open haul trucks when transporting material subject to being windblown, and the removal of any soils or mud deposits by construction equipment when necessary.

8. In accordance with applicable road use agreements or applicable law, Applicant shall comply with the following conditions regarding road protection:

   a) Applicant shall acquire all necessary permits authorizing the crossing of federal, state, county, and township roads.

   b) Applicant shall coordinate road closures with federal, state, and local governments and emergency responders.

   c) Applicant shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the public.

   d) After construction, Applicant shall repair and restore deteriorated roads resulting from construction traffic or compensate governmental entities for their repair and restoration of deteriorated roads, such that the roads are returned to their preconstruction condition.

   e) Within 180 days of completing construction and reclamation of the Project, Applicant shall submit documentation to the Commission identifying that the roads were repaired in accordance with this Condition 8 and to the satisfaction of affected townships and county. If the townships or county will not provide such documentation, then Applicant shall provide a report to the Commission on the outstanding road repair issues and how those issues have been or will be resolved.

   f) Privately owned areas used as temporary roads or crane paths during construction will be restored to their preconstruction condition, except as otherwise requested or agreed to by the landowner.

   g) Should Applicant need to widen any existing roadways during construction of the Project, Applicant shall return the roadways back to original width after completion of the Project, unless otherwise agreed upon with the federal, state, county, or township entities, or the landowner.

9. Applicant shall provide signage that identifies road closures and disturbances resulting from the Project in accordance with the most recent editions of the Manual on Uniform Traffic Control Devices as published by the Federal Highway Administration.

10. Applicant shall promptly report to the Commission the presence of any critical habitat of threatened or endangered species in the Project Area that Applicant becomes aware of and that was not previously reported to the Commission.

11. Applicant agrees to avoid direct impacts to cultural resources that are unevaluated, eligible for, or listed in the National Register of Historic Places (NRHP). When a NRHP unevaluated, eligible, or listed resource cannot be avoided, Applicant shall notify the South Dakota State Historic Preservation Office (SHPO) and the Commission of the reasons that complete avoidance cannot be achieved in order to coordinate minimization and/or treatment measures.

12. Prior to the commencement of construction, Applicant agrees to develop an unanticipated discovery plan for cultural resources and comply with SDCL 34-27-25, 34-27-26, and 34-27-28 for the discovery of human remains.

13. Applicant shall file a Level III Archaeological survey of the remaining facilities (i.e. access roads, crane paths, collection lines, O&M facilities, concrete batch plant, and laydown areas) with the Commission and provide a copy of the survey to SHPO prior to commercial operation. The survey report may contain confidential information and all confidential portions of the survey report shall be filed as confidential and not for public disclosure. If any potential adverse impacts to NRHP unevaluated, listed, or eligible cultural resources are identified in the survey, Applicant shall file with the Commission a report describing the SHPO-approved planned measures to ameliorate those impacts.

14. Applicant shall provide the Stormwater Pollution Prevention Plan (SWPPP) to the Commission when Applicant has a final design for the Project. The SWPPP will outline the water and soil conservation practices that will be used during construction to prevent or minimize erosion and sedimentation and be in a form consistent with the South Dakota Department of Environment and Natural Resources guidelines. The SWPPP will be completed before submittal of an application for a National Pollutant Discharge Elimination System (NPDES) general permit for construction activities. All contractors to be engaged in ground disturbing activities will be given a copy of the SWPPP and the requirements will be reviewed with them prior to the start of construction.

15. Applicant shall repair and restore areas disturbed by the construction or maintenance of the Project. Except as otherwise agreed to by the landowner, restoration shall include the replacement of the original pre-construction topsoil or equivalent quality topsoil to its original elevation, contour, and compaction and re-establishment of original vegetation as close thereto as reasonably practical. In order to facilitate compliance with this Permit Condition, Applicant shall:

    a) Strip the topsoil to the actual depth of the topsoil, or as otherwise agreed to by the landowner in writing (e-mail is sufficient), in all areas disturbed by the Project; however, with respect to access roads, Applicant may remove less than the actual depth of the topsoil to ensure roads remain low-profile and the contours align with the surrounding area;

    b) Store the topsoil separate from the subsoil in order to prevent mixing of the soil types;

    c) All excess soils generated during the excavation of the turbine foundations shall remain on the same landowner's land, unless the landowner requests, and the landowner agrees otherwise; and

d) When revegetating non-cultivated grasslands, Applicant shall use a seed mix that is recommended by the Natural Resource Conservation Service (NRCS), or other land management agency, unless otherwise agreed upon with the landowner in writing.

16. Applicant shall work closely with landowners or land management agencies, such as the NRCS, to determine a plan to control noxious weeds and Applicant shall implement the plan.

17. Applicant shall stage construction materials in a manner that minimizes the adverse impact to landowners and land users as agreed upon between Applicant and landowner or Applicant and the appropriate federal, state, and/or local government agency. All excess (non-permanent) construction materials and debris shall be removed upon completion of the Project, unless the landowner agrees otherwise.

18. In order to mitigate interference with agricultural operations during and after construction, Applicant shall locate all structures, to the extent feasible and prudent, to minimize adverse impacts and interferences with agricultural operations, shelterbelts, and other land uses or activities. Applicant shall take appropriate precautions to protect livestock and crops during construction. Applicant shall repair all fences and gates removed or damaged during construction or maintenance unless otherwise agreed upon with the landowner or designee. Applicant shall be responsible for the repair of private roads damaged when moving equipment or when obtaining access to the right-of-way.

19. Applicant shall bury the underground collector system at a minimum depth of 48 inches, or deeper if necessary, to ensure the current land use is not impacted.

20. Applicant shall repair or replace all property removed or damaged during all phases of construction, including but not limited to, all fences, gates, and utility, water supply, irrigation, or drainage systems. Applicant shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses. All repair, replacement and/or compensation described above shall be in accordance with the terms and conditions of written agreements between Applicant and affected landowners where such agreements exist.

21. Applicant shall, in the manner described in its written agreement with a landowner, indemnify and hold the landowner harmless for loss, damage, claim, or actions resulting from Applicant's use of the easement, including any damage resulting from any release, except to the extent such loss, damage claim, or action results from the negligence or willful misconduct of the landowner or his employees, agents, contractors, invitees, or other representatives.

22. Applicant may make turbine adjustments of 250 feet or less from the turbine locations identified at the time a Facility Permit is issued without prior Commission approval, so long as the specified noise and shadow flicker thresholds are not exceeded, cultural resource impacts and documented habitats for listed species are avoided, and wetland impacts are avoided or are in compliance with applicable U.S. Army Corps of Engineers (USACE) regulations. Prior to implementing the turbine adjustment, Applicant will file in the docket an affidavit demonstrating compliance with the limitations set forth above. Any turbine adjustment that does not comply with the aforesaid limitations, or turbine model change, would be considered a "material change," and Applicant shall file a request for approval of the "material change" prior to making the adjustment pursuant to the following approval process:

Applicant will file with the Commission and serve on the official Service List a request for approval of the material change that includes:

- An affidavit describing the proposed turbine adjustment, the reason for the adjustment, the reason the adjustment does not comply with one or more turbine flexibility limitations set forth above, and information regarding compliance with all other applicable requirements; and
- A map showing both the approved location and the proposed adjustment (in different colors).
- Once received, the information would be reviewed by Commission staff, and Commission staff will have 10 calendar days within which to request further Commission review.
- If no further review is requested, Applicant may proceed with the adjustment.
- If further review is requested, the Commission will issue a decision regarding Applicant's request at its next available regularly scheduled Commission meeting, subject to notice requirements, after the request for further review is made by Commission staff.

23. Applicant may adjust access roads, the collector and communications systems, meteorological towers, Aircraft Detection Lighting System facilities, the operations and maintenance facility, the Project Substation, and temporary facilities, so long as they are located on land leased for the Project, cultural resources are avoided or mitigated in consultation with the SHPO; documented habitats for listed species are avoided; wetland impacts are avoided or are in compliance with applicable USACE regulations; and all other applicable regulations and requirements are met.

24. If the Project causes interference with radio, television, or any other licensed communication transmitting or receiving equipment, Applicant shall take all appropriate action to minimize any such interference and shall make a good faith effort to restore or provide reception levels equivalent to reception levels in the immediate areas just prior to construction of the Project. This mitigation requirement shall not apply to any dwellings or other structures built after completion of the Project.

25. Applicant will provide Global Positioning System (GPS) coordinates of structure locations to affected landowners at any time during the life of the Project. Coordinates will be provided in writing to landowners within 30 days of a request.

26. The Project, exclusive of all unrelated background noise, shall not generate a sound pressure level (10-minute equivalent continuous sound level, Leq) of more than 45 dBA as measured within 25 feet of any non-participating residence unless the owner of the residence has signed a waiver, or more than 50 dBA (10-minute equivalent continuous sound level, Leq) within 25 feet of any participating residence unless the owner of the residence has signed a waiver. The Project Owner shall, upon Commission formal request, conduct field surveys and provide monitoring data verifying compliance with specified noise level limits. If the measured wind turbine noise level exceeds a limit set forth above, then the Project Owner shall take whatever steps are necessary in accordance with prudent operating standards to rectify the situation.

If a field survey and monitoring data is requested by the Commission, the Project Owner shall submit the test protocol to the Commission prior to conducting the survey and sound monitoring for approval. The test protocol shall include and be implemented as follows:

a) The post-construction monitoring survey shall be conducted following applicable American National Standard Institute (ANSI) methods.

b) Sound levels shall be measured continuously for 14 days in an effort to capture a sufficient quantity of valid readings meeting the wind conditions delineated below in subpart (e). A sufficient quantity shall be defined as 0.5% of the total number of samples, or a minimum of 10 for a 14-day measurement period. As a precaution against the possibility that a sufficient number of valid readings are not automatically recorded during the chosen 14-day sampling period, 10 on/off tests shall be carried out during the survey period when the Project is operating at full power production irrespective of the ground level wind speed. For the on/off tests, all units in the Project shall be shut down for a 10-minute period synchronized with the monitor's clocks (starting, for example, at the top of the hour or 10 minutes after, 20 minutes after, etc.). The background level measured during the shutdown interval can then be subtracted from the average of the levels measured immediately before and after it to determine the Project-only sound level. The results from these tests may be used to make up for any shortfall in collecting 10 samples measured when the ground level wind speed is less than or equal to 5 m/s.

c) Measurements shall be conducted at a select number of non-participating and participating residences with the highest expected noise levels and/or at specific residences identified in the Commission's formal request. Typically, 4 to 6 measurement locations total should be selected.

d) Measurements shall be conducted using sound level meters meeting ANSI Type 1 specifications. An anemometer shall be placed within 20 feet of each microphone, and at a height of approximately 2 meters above the ground.

e) The measurement data shall be analyzed as follows:

i. At a minimum, the closest five wind turbines will be operating for evaluation periods and when at least the closest wind turbine is operating at a condition at full (within one decibel of maximum sound power levels) acoustic emissions.

ii. Discard those samples measured when the 10-minute average ground wind speed is greater than 5 m/s.

iii. Discard those samples measured during periods with precipitation.

iv. If measured (total) sound levels exceed the sound level limits, determine Project-only sound levels by removing transient background noise (i.e. occasional traffic, activities of residents, farming activities, and wind gusts) based upon audio recordings, excessive wind gusts, personal observations, and/or comparison of sound level metrics.

v. If measured (total) sound levels exceed the sound level limits, determine Project-only sound levels by removing, continuous background noise. This approach requires wind turbine shut-downs, where the background noise is measured directly. Background noise levels will be subtracted from total noise levels measured during these wind conditions to calculate turbine-only noise levels.

vi. As necessary, review of the frequency spectra of potential turbine-only samples to identify and remove outliers (spectral shape clearly differing from those samples measured under very low (less than 2 m/s) ground wind conditions, which are the samples most representative of turbine-only noise).

f) Compare the resulting turbine-only noise levels to the 45 and 50 dBA limits. Compliance shall be demonstrated if all samples are less than the limits.

27. Applicant agrees to use alternative turbine locations instead of the following primary turbine locations CR-16, CR19, CR-23, CR-49, CR-60, CR-67, and CR-68. If during construction at an alternative turbine, Applicant determines that the location is not suitable for a turbine due to geotechnical, cultural, environmental issues or other constructability issues, Applicant shall file an affidavit with the Commission setting forth why the alternative turbine cannot be used and identifying which primary turbine will be used. If there is a dispute over the use of a primary turbine, Applicant and Commission staff shall meet and attempt to resolve the dispute within 10 business days of the filing of the affidavit. If the dispute cannot be resolved within 10 business days, Applicant shall file a request for a material change with the Commission.

28. Applicant shall seek input from local emergency response personnel to properly and effectively coordinate an emergency response plan consistent with local resources and response abilities. Upon completion of construction, a Project operation emergency response plan shall be provided to Commission staff to make available to the general public on the Commission's website.

29. Applicant agrees to undertake a minimum of two years of independently-conducted post-construction avian and bat mortality monitoring for the Project, and to provide a copy of the report and all further reports to the United States Fish and Wildlife Services, South Dakota Game, Fish and Parks, and the Commission.

30. Applicant shall file a Bird and Bat Conservation Strategy (BBCS) prior to beginning construction of the Project. The BBCS shall be implemented during construction and operation of the Project.

31. If the Project is decommissioned, Applicant will follow Section 21 of the Application and the decommissioning plan laid out in Appendix L of the Application. The Commission shall be notified prior to any decommissioning action.

32. At least 30 days prior to commencement of commercial operation, Applicant shall file an escrow agreement with the Commission for Commission approval that provides a decommissioning escrow account. The escrow agreement shall incorporate the following requirements:

a) The escrow account is funded by the turbine owner annually at a rate of $5,000 per turbine per year for the first 30 years, commencing no later than the commercial operation date.

b) Beginning in year ten following commercial operation of the Project and each fifth year thereafter, the turbine owner shall submit to the Commission an estimated decommissioning date, if established, and estimated decommissioning costs and salvage values. Based on the verification of the information in the filing the Commission may determine that funds in escrow are sufficient to cover the costs

of decommissioning and that reduced, or no additional deposits are required. The Commission also may determine that additional funding is required and may require additional funding equal to the estimated amount needed for decommissioning.

c) All revenues earned by the account shall remain in the account.

d) An account statement shall be provided annually to the Commission and become a public record in this docket.

e) The escrow account obligations will be those of Crowned Ridge and the escrow agreement shall include terms providing that the agreement binds Crowned Ridge's successors, transferees, and assigns. A sale of Project assets shall include the associated Permit that requires Commission approval per SDCL §49-41B-29.

f) The escrow account agent shall be a South Dakota chartered state bank or a nationally chartered bank with an office located in South Dakota.

g) The escrow agreement shall be subject to the laws of South Dakota and any disputes regarding the agreement shall be venued in South Dakota.

h) To minimize the risk that the escrow account would be subject to foreclosure, lien, judgment, or bankruptcy, the escrow agreement will be structured to reflect the follow factors:

i. That Crowned Ridge agreed to the creation of the escrow account;

ii. Crowned Ridge exercises no (or the least amount possible of) control over the escrow;

iii. The initial source of the escrow account;

iv. The nature of the funds put into the escrow account;

v. The recipient of its remainder (if any);

vi. The target of all its benefit; and

vii. The purpose and its creation.

i) Account funds are to be paid to the Project owner at the time of decommissioning, to be paid out as decommissioning costs are incurred and paid.

j) If the Project owner fails to execute the decommissioning requirement found in this section of the Permit Conditions, the account is payable to the landowner who owns the land on which associated Project facilities are located as the landowner incurs and pays decommissioning costs.

33. Applicant shall utilize an Aircraft Detection Lighting System approved by the Federal Aviation Administration.

34. Shadow flicker at residences shall not exceed 30 hours per year unless the owner of the residence has signed a waiver. Prior to construction, Applicant shall obtain and file with the Commission and the Codington County Zoning Officer a waiver for any occupied structure which will experience more than thirty hours of shadow flicker per year. If no waiver is obtained, Applicant shall file a mitigation plan with the Commission prior to construction and obtain Commission approval of the mitigation plan.

35. Applicant will use two methods to detect icing conditions on turbine blades: (1) sensors that will detect when blades become imbalanced or create vibration due to ice accumulation; and (2) meteorological data from on-site permanent meteorological towers, on-site anemometers, and other relevant meteorological sources that will be used to determine if ice accumulation is occurring. These control systems will either automatically shut down the turbine(s) in icing conditions (per the sensors) or Applicant will manually shut down turbine(s) if icing conditions are identified (using meteorological data). Turbines will not return to normal operation until the control systems no longer detect an imbalance or when weather conditions either remove icing on the blades or indicate icing is no longer a concern. Applicant will pay for any documented damage caused by ice thrown from a turbine.

36. Turbines shall be set back at least 1.1 times the tip height, with a minimum set back distance of 500 feet, from any surrounding property line. However, if the owner of the wind turbine tower has a written agreement with an adjacent land owner allowing the placement of the tower closer to the property line, the tower may be placed closer to the property line shared with that adjacent land owner.

37. Applicant shall implement the avoidance, minimization, and mitigation measures identified as follows for Traditional Cultural Properties (TCPs):

a) Implement standard avoidance or resource protection practices (e.g., barrier fencing, contractor training) for TCPs, where feasible, in collaboration with the Sisseton-Wahpeton Oyate, Yankton Sioux, Rosebud Sioux and Spirit Lake Tribal Historic Preservation Officers (THPOs) and Applicant;

b) Make reasonable efforts to identify participating landowners who may be willing to work with the tribes on site preservation, accessibility, and protection of TCPs on their property;

c) Conduct site revisits prior to construction;

d) Help facilitate post-construction site revisits for tribes with the landowners; and

e) Identify and implement education/interpretation opportunities regarding tribal resource preservation and/or Native American perspectives which may include sensitivity training when needed.

38. For purposes of this Project and the commitments herein, "residences," "business(es)," "structures," "schools," "churches," "cemeteries," and "public buildings" shall include only those that are in existence and in use as of the date of the Commission's order issuing a permit.

39. The terms and conditions of the Permit shall be made a uniform condition of construction and operation, subject only to an affirmative written request for an exemption addressed to the Commission. A request for an exemption shall clearly state which particular condition should not be applied to the property in question and the reason for the requested exemption. The Commission shall evaluate such requests on a case-by-case basis, which evaluation shall be completed within 60 days unless exigent circumstances require action sooner.

40. Applicant shall provide a copy of the Commission's Final Decision and Order Granting Permit to Construct Facility; Notice of Entry and attached Permit Conditions in this docket to the affected county, townships, and municipalities in the Project Area.

41. At least 30 days prior to the commencement of construction work in the field for the Project, Applicant will provide to Commission staff the following information:

a) the most current preconstruction design, layout, and plans, including the turbine model selected;

b) a sound level analysis showing compliance with the applicable sound level requirements;

c) a shadow flicker analysis showing the anticipated shadow flicker levels will not exceed applicable requirements per year at any residence, absent a waiver agreement executed by the residence owner(s);

d) should Applicant decide at a later point to use a different turbine model, it shall provide the information required in parts a-c above. Applicant shall also demonstrate that in selecting locations for the other turbines, it considered how to reduce impacts on non-participating landowners; and

e) additional Project preconstruction information as Commission staff requests.

42. At least 30 days prior to commencement of construction, Applicant shall submit the identity and qualifications of a public liaison officer to the Commission for approval to facilitate the exchange of information between Applicant, including its contractors, landowners, local communities, and residents, and to facilitate prompt resolution of complaints and problems that may develop for landowners, local communities, and residents as a result of the Project. Applicant shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Applicant without the approval of the Commission. The public liaison officer shall be afforded immediate access to Applicant's on-site Project manager, its executive Project manager, and to the contractors' on-site managers and shall be available at all times to Commission staff via mobile phone to respond to complaints and concerns communicated to the Commission staff by concerned landowners and others. Within 10 working days of when Applicant's public liaison officer has been appointed and approved, Applicant shall provide contact information for him/her to all landowners in the Project Area and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Applicant and the public liaison officer, take action to

remove the public liaison officer. The public liaison's services shall terminate 90 days after the Project commences commercial operations, unless the appointment is extended by order of the Commission.

43. Prior to the construction of the Project, Applicant will notify public safety agencies by providing a schedule and the location of work to be performed within their jurisdiction. The agencies contacted will include the South Dakota Department of Public Safety, the sheriffs of Codington County and Grant County, and the Codington County and Grant County Offices of Emergency Management.

44. Within 90 days after the Project's commercial operation date, Applicant shall submit a report to the Commission that provides the following information:

a) as-built location of structures and facilities, including drawings clearly showing compliance with the setbacks required by state and local governments set forth in Table 13.1.2 of the Application;

b) ArcGIS shapefiles of the final turbine and facility layout;

c) the status of remedial activities for road damage, landowner property damage, crop damage, environmental damage, or any other damage resulting from Project construction activities; and,

d) a summary of known landowner complaints and Applicant's plan for resolving those complaints.

45. Applicant will undertake a minimum of two years of independently-conducted post-construction grouse lek monitoring of known leks that are located less than 1 mile from a wind turbine. Known leks are SDGFP confirmed lek locations and leks documented during any wildlife surveys conducted by Applicant for Project development. Applicant shall file with the Commission its proposed independent third-party's credentials and survey methodology for approval by the Commission 60 days prior to the commencement of Project operation. The study shall be conducted on the ground. Applicant shall consult with SDGFP and USFWS on the proposed survey methodology for the post-construction lek monitoring. Results of the post-construction lek monitoring shall be reported to the SDGFP and USFWS after the first year of monitoring and a final report should be compiled and submitted to the SDGFP and USFWS at the end of the second year of monitoring. Within 90 days of the issuance of this Final Order, Applicant and Staff shall work together to develop a mitigation plan that will be incorporated into Applicant's Wildlife Conservation Strategy in case impacts to prairie grouse leks are found.

STATE OF SOUTH DAKOTA) :SS	IN CIRCUIT COURT
COUNTY OF CODINGTON)	THIRD JUDICIAL CIRCUIT
AMBER KAY CHRISTENSON, and ALLEN ROBISH, Appellants,	14CIV19-000290
vs.	*ORDER FOR TRANSCRIPT(S) OF PROCEEDINGS*
CROWNED RIDGE WIND, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	

Appellants, Amber Christenson and Allen Robish, by and through their attorney of record herein, R. Shawn Tornow of Tornow Law Office, P.C., hereby order from Dawn Russell, Official Circuit Court Reporter for the Third Judicial Circuit Court, or any other court reporter who may have transcribed any related matter(s) herein, a complete certified transcript and any necessary copies of all proceedings related to the circuit court proceedings (including, oral argument proceedings either in-person or via Court Smart) on or about January 16, 2020, and/or any other related proceedings below as presided over by Judge Carmen Means, or any other remaining administrative agency untranscribed proceedings below, if any may currently remain not-yet-transcribed, in/for the above-entitled matter.

Dated this 22nd day of May, 2020.

/s/ R. Shawn Tornow
R. Shawn Tornow, for
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: (605) 271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Intervenors/Appellants

ENDORSEMENT OF REPORTER

I, _____, Court Reporter, hereby acknowledge receipt of a true and correct copy of an Order for Transcript of any remaining (untranscribed) proceedings in the above-entitled action on this _____ day of _____, 2020. I estimate that the transcript will be completed within the 45-day period under South Dakota's rules of civil appellate procedure on, _____.

_____
_____, Court Reporter

CODINGTON COUNTY CLERK OF COURTS
THIRD JUDICIAL CIRCUIT

14 1st Avenue S.E.
Watertown, SD 57201-3611
(605) 882-5095
Fax: (605) 882-5384

May 26, 2020

SUPREME COURT OF SOUTH DAKOTA
OFFICE OF THE CLERK
500 EAST CAPITOL AVENUE
PIERRE, SD 57501-5070

RE: CASE NUMBER – 14CIV19-290

AMBER KAYE CHRISTENSON, ALLEN ROBISH, KRISTI MOGEN,
AND PATRICK LYNCH

VS

CROWNED RIDGE WIND, LLC AND SD PUBLIC UTILITIES COMMISSION

Please find enclosed, certified copies of:

1. Notice of Appeal and Stay of Execution of Judgment and Order with Certificate of Service;
2. Appellant's Docketing Statement;
3. Order Affirming Decision of SD Public Utilities Commission;
4. Notice of Entry of Order Affirming Decision of SD Public Utilities Commission;
5. Memorandum Opinion;
6. Check for the Appeal.

I will be requesting an eRecord in the near future.

If you have any questions or need anything else, please contact me.

Thank you!

Barbara Zeller

Barbara Zeller
Deputy Clerk
Codington County

FILED
MAY 26 2020
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

Supreme Court of South Dakota

OFFICE OF THE CLERK
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3511

Shirley A. Jameson-Fergel
Clerk

Laura J. Graves
Chief Deputy

Amy Hudson
Deputy Clerk

Sarah L. Gallagher
Deputy Clerk

May 28, 2020

Ms. Connie Hartley
Codington County Clerk of Courts
14 1st Ave SE
Watertown SD 57201

Re: #29334, Amber Kaye Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch v. Crowned Ridge Wind, LLC, and South Dakota Public Utilities Commission
(CIV 19-290)

Dear Ms. Hartley:

We acknowledge receipt of certified copies of notice of appeal and docketing statement, proof of service thereof, memorandum decision, order and notices of entry thereto, in the above-referenced matter.

Enclosed find receipt number 13844 for the $100.00 filing fees.

Sincerely,

Shirley A. Jameson-Fergel

SAJ:ms

FILED
JUN 01 2020
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

SUPREME COURT CASE NO.	$ CHECKS	$ CASH	TRIAL COURT CASE NO.	DATE	RECEIVED FROM	DESCRIPTION	RECEIVED BY
24334	100 00		CIV 19-290	5/18/20	Codington Cnty Clerk of Courts	filing fee	

13844

INVALID WITHOUT SIGNATURE

STATE OF SOUTH DAKOTA
OFFICE OF CLERK OF SUPREME COURT
CAPITOL BUILDING
500 EAST CAPITOL
PIERRE, S.D. 57501

CLERK OF SUPREME COURT

DEPUTY CLERK

RETAIN THIS RECEIPT FOR YOUR RECORDS