

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2)
 3 COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT
 4
 5 _____)
 6 Amber Kay Christenson, and)
 7 Allen Robish,)
 8 Appellants,) Appeal Hearing
 9 vs.) Civ. 19-290
 10 Crowned Ridge Wind, LLC, and)
 11 South dakota Public)
 12 Utilities Commission,)
 13 Appellees.
 14 _____

13 BEFORE: THE HONORABLE CARMEN MEANS
 14 Circuit Court Judge
 15 Watertown, South Dakota
 16 January 16, 2020

16 APPEARANCES:

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21 For the Defendant: Ms. Amanda Reiss
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 3RD CIRCUIT CLERK OF COURT
 By: *CH*

1 THE COURT: All right. This is the time and place
2 scheduled for attorneys to make oral argument in an appeal
3 entitled Amber Christenson, Allen Robish, Kristi Mogen, and
4 Patrick Lynch versus Crowned Ridge Wind, LLC and the South
5 Dakota Public Utilities Commission. Let's have counsel come
6 forward. All right. And so Mr. Gass, you represent the
7 appellants in this matter, is that correct.

8 MR. GASS: Correct, judge.

9 THE COURT: I just want to assure everybody I've read
10 all of your briefs so I'm familiar with the case, I don't want a
11 rehash of things that are in the brief if you can avoid that,
12 but I'm going to give you pretty much free reign as to the
13 issues you want to discuss. Mr. Gass, from my perspective the
14 things I'd like to hear from you about are, you asked me to take
15 judicial notice and as I see it I'm a reviewing court here as
16 opposed to a trial court level in this matter and so what
17 authority do you have for me to expand the record on appeal? Do
18 you have any statutory authority that would authorize me to do
19 that, and then I'd also like to hear from you the appellees are
20 claiming that you waived issue 2 and I'd like you to address
21 those matters specifically, but I'll go ahead and give you free
22 reign as to what you want to talk about.

23 MR. GASS: Sure. Thank you, your Honor, I will
24 address those two issues as I get into it. First I can address
25 the judicial notice issue right away. With regard to specific

1 statutory authority for a reviewing court, I have none, but I
2 don't think that will matter and I can probably walk back my
3 request for judicial notice specifically related to the exact
4 locations of the Dakota Range wind turbines, I think there's
5 certainly enough in the record in this case to establish that
6 there are other wind farms specifically Dakota Range and Crowned
7 Ridge II in the near geographic proximity of this particular
8 Crowned Ridge wind farm to establish what I need in terms of the
9 Court's knowledge of the geographic area related to those wind
10 farms. So I'm not asking the Court take judicial notice of
11 specific locations of the Dakota Range towers, just that there
12 are, and perhaps it's not even judicial notice request anymore,
13 but the record I certainly believe establishes that there are
14 other wind energy facilities in the same geographic proximity.

15 THE COURT: Very good.

16 MR. GASS: I'll get into the waiver issue as I go
17 through my arguments on my other issues. Judge, first and
18 foremost with regard to the standard of review in this court,
19 it's clear that administrative agencies' factual findings are
20 reviewed under a clearly erroneous standard. The finding may be
21 supported by substantial evidence but still set aside by
22 reviewing court if the Court determines it is clearly erroneous.
23 A reviewing court should set aside findings as clearly erroneous
24 when they are against the clear weight of the evidence or and
25 this is key I believe in this case when the Court is left with a

1 firm and definite conviction that a mistake has been made. As
2 noted in appellants' brief a mistake has been made in granting
3 this PUC permit, I don't need to rehash all the arguments made
4 in appellants' brief but I will address some of the responsive
5 arguments made by the Commission as well as Crowned Right.
6 First, judge, the first issue that appellants bring to the
7 Court's attention is related to the sound studies submitted to
8 the PUC and whether the PUC abused its discretion and approved
9 the application using incomplete and inaccurate information
10 related to those sound studies, specifically the sound study
11 work of Jay Haley were scrutinized. In the judicial notice
12 portion of the Crowned Ridge brief, Crowned Ridge acknowledges
13 that the accuracy of Dakota Range exhibits and maps are subject
14 to question, Crowned Ridge is not in a position to verify the
15 accuracy of those exhibits and maps and there is no basis for a
16 finding that the exhibits and maps can be accurately and readily
17 determined from sources whose accuracy cannot be reasonably
18 questioned. Essentially Crowned Ridge has admitted that they
19 have no idea where the Dakota Range towers are, nor are they
20 able to verify the accuracy of the Dakota Range maps and turbine
21 locations. All of these arguments of course beg the question
22 how did Crowned Ridge verify the accuracy of maps and turbine
23 locations when it purported through its sound expert Jay Haley
24 to analyze the cumulative effect of all of the Dakota Range
25 turbines. How can Mr. Haley do an accurate sound study analysis

1 on 114 wind turbines in a 25 mile radius without knowing the
2 locations of those wind turbines? I believe you can't. That
3 was the first mistake that was made.

4 THE COURT: So Mr. Gass, is it your position then that
5 when a new wind turbine facility starts to begin construction it
6 has to wait until the previous one is fully constructed to give
7 accurate sound studies?

8 MR. GASS: I don't know that it needs to be fully
9 constructed, judge, but the position Crowned Ridge has taken is
10 they can't verify the locations, they don't know, certainly
11 there are maps submitted and I know wind towers can change
12 locations depending on how things pan out, but generally
13 speaking the overall footprint of a wind project is determined
14 and certainly it's our position that the overall footprint of
15 the Dakota Range project was determined prior to or during the
16 time that the PUC was hearing the Crowned Ridge case.

17 THE COURT: All right, go ahead.

18 MR. GASS: The Commission in their responsive brief
19 argues that the applicant Crowned Ridge isn't required by law or
20 rule to assess cumulative impacts. In my opinion that argument
21 loses the forest for the trees, it loses sight of the larger
22 issue, that being that Crowned Ridge is required to comply with
23 all applicable laws and rules pursuant to SDCL 49-41(b)-22, of
24 course that includes county sound thresholds. That's why it's
25 vital to assessment cumulative impacts, not because there's an

1 express code or administrative rule that requires it, but to
2 determine the effects of the citizens of the county, with
3 hundreds of wind turbines constantly spinning at the same time
4 in a small geographic area. I think it's important to examine
5 Mr. Haley's testimony very carefully. Both the commission and
6 Crowned Ridge rely on Haley's supplemental written testimony
7 found at page 1478 of the administrative record where he states
8 upon questioning that he did analyze all of the wind turbines
9 from Crowned Ridge II and Dakota Range. It's important to note
10 that this testimony was submitted after he updated the initial
11 sound study. The initial sound study that Mr. Haley submitted
12 was submitted to the PUC on January 30, 2019 and Mr. Haley's
13 executive summary found on page 397 of the administrative record
14 Mr. Haley acknowledges the computer models built for his sound
15 study combining the digital elevation information supplied by
16 Crowned Ridge Wind, LLC to generate models for the sight. He
17 got all of his analysis information from Crowned Ridge, he makes
18 no mention of any analysis information from Dakota Range or any
19 other wind farms in the geographic area. As I discussed earlier
20 Crowned Ridge in their responsive brief acknowledges that they
21 don't know, they don't acknowledge that they know where these
22 wind towers are in Dakota Range and so there's no way that they
23 could have provided that information to Mr. Haley. Also of
24 significance in Mr. Haley's report, this is found on page 403 of
25 the administrative record, he directly states in his initial

1 sound study that he analyzed the cumulative effects of Crowned
2 Ridge II but he makes no mention of Dakota Range. Certainly if
3 he would have analyzed the Dakota Range towers in his initial
4 report he would have made mention of that. I believe that fact
5 is clear. The phrase Dakota Range quote unquote is simply not
6 found in his initial sound study report therefore it's
7 reasonable to conclude that Dakota Range and the cumulative
8 effects of the Dakota Range project were not analyzed in the
9 initial report. Now we get to the updated sound study and this
10 relates to his written testimony, at page 1476 of the
11 administrative record Mr. Haley is asked about any updates to
12 the sound study since it was filed on January 30, 2019.
13 Mr. Haley's response is that he updated -- excuse me, updates
14 were made to participating land owner information and that sound
15 study tables were updated to reflect the land update, land owner
16 information. Mr. Haley makes no mention about being the sound
17 study be related to Dakota Range turbines and any cumulative
18 effect they might have. He makes no mention of Dakota Range
19 what so ever when asked what updates he made to the sound study.
20 Now two pages later at 1478 which is the quote that the
21 Commission and Crowned Ridge both rely heavily on where
22 Mr. Haley testifies that he did analyze the cumulative effects
23 of both Crowned Ridge II and Dakota Range. This is where I get
24 a little confused because it wasn't clearly part of the initial
25 sound study and when asked what updates he made he didn't

1 mention Dakota Range, so the question is when did he analyze
2 that information and how -- and what information did he use to
3 analyze the Dakota Range turbines? Going further in his
4 response to that question as to the cumulative effects he
5 testifies that his prior conclusions which I take to believe his
6 prior conclusions from the initial sound study were not changed
7 as a result of impacts from the cumulative effects of Dakota
8 Range. This of course leads us to believe that he analyzed
9 Dakota Range after the initial sound study was submitted which
10 is what he testified -- excuse me he didn't testify as to the
11 time when he analyzed Dakota Range, but that statement there
12 that his initial conclusions were unchanged leads me to believe
13 that he supposedly analyzed the effects of Dakota Range after
14 the initial sound study was submitted. Now, this is problematic
15 because Haley acknowledges on direct testimony and this is at
16 page 12,588 of the administrative record that sound from the
17 Dakota Range wind towers impacts appellant Allen Robish's
18 property in spite of his property being 20 to 25 miles away from
19 Dakota Range. Haley says no impact related to cumulative
20 effects in his written testimony but when he's questioned by the
21 PUC in direct testimony he says that there are sound impacts
22 from towers 20 to 25 miles away yet these same effects are not
23 existent in his updated sound study, he says there was no
24 change. This is incredibly conflicting testimony that should
25 not be overlooked. All of this, judge, related to Mr. Haley's

1 testimony leads me to believe that a mistake has been made, that
2 the full cumulative effects of the Dakota Range project within
3 the close proximity of the Crowned Ridge project and those
4 inhabitants of the County living in that area were not fully
5 realized. The only evidence that Crowned Ridge presented to the
6 Commission related to sound studies was from Mr. Haley, the
7 Commission relied solely on Mr. Haley's testimony. As mentioned
8 in appellant's brief Mr. Haley is not a professional engineer
9 all though he purports to be one. He's not bound by any code of
10 professional conduct, his license I believe expired in 2016,
11 that's in the record, if I'm wrong on the year I apologize, but
12 it's in the record that he was not a licensed engineer at the
13 time he was testifying and submitted this report to the PUC.
14 Mr. Haley even includes a liability waiver on his sound study
15 maps and makes no warranties with respect to the use of the
16 information on those drawings. Judge, based on the forgoing I'm
17 convinced that the Commission made its decision to grant this
18 permit based on faulty sound studies that gave an inaccurate
19 picture of the cumulative effects of the Dakota Range turbines
20 on the inhabitants within the Crowned Ridge footprint. Now,
21 Crowned Ridge argues that even if the Court determines that the
22 PUC made a mistake the appellant can't show prejudice. Crowned
23 Ridge cites sound levels at appellant's homes being below the 45
24 DBA required nonparticipant threshold. Of course all this could
25 change, the sound levels could change if the cumulative effects

1 of the Dakota Range turbines were fully realized. Crowned Ridge
2 in their responsive brief was nice enough to give us some
3 context, the effect at Christenson and Lynch properties is like
4 a whisper they say, the effect at the Mogan and Robish
5 properties is that of a library, a constant hum, a library. I
6 would like to give the Court some additional context. Judge, as
7 you probably know these turbines do not stop. The noise they
8 produce is a constant unwelcome noise whether it's a whisper or
9 jet air liner. What Crowned Ridge fails to grasp or more likely
10 ignores is that the constant noise is a major issue. It's easy
11 to say it's just a whisper, you can put up with a whisper, but a
12 constant whisper, judge, that's different. An unwelcome whisper
13 on a rare occasion may not be prejudice, but the constant woosh
14 woosh woosh of the blades imposed on nonparticipants is
15 prejudice enough. The findings of the Commission should be set
16 aside based on the faulty sound studies and the prejudice is
17 clear. It doesn't -- this is a constant, judge, these wind
18 towers do not stop unless there's no wind and as we know that's
19 a rare occasion in this part of the country. Switching gears,
20 judge, to issue number 2 and this is the issue that both the PUC
21 and Crowned Ridge claim was waived. First, judge, I argue that
22 the issue was preserved, the issues of appeal that I submitted
23 were broad and deliberately so, specifically I believe this
24 issue is preserved in paragraphs 5 and 9 of the issues of appeal
25 filed by appellants. It's the PUC has to determine, judge,

1 whether the Crowned Ridge project would not substantially impair
2 the health, safety, or welfare of the inhabitants of the
3 citizens of the county and the towns within the project
4 footprint and so I believe it's our position that this issue has
5 been preserved through the issues of appeal in paragraphs 5 and
6 9. Would you like me to stop at that issue or would you like me
7 to keep going?

8 THE COURT: You can go ahead.

9 MR. GASS: Thank you. Judge, there's no
10 administrative rule or South Dakota law that allows for an and
11 exception to leave residences out of a sound study or shadow
12 flicker study whether that residence is located in the
13 municipality or the county. The Commission points out in their
14 responsive brief that there is no requirement in South Dakota
15 law that sound and shadow flicker studies need to be completed
16 on each and every structure. That may be, but in the next
17 paragraph the Commission accurately points out that South Dakota
18 law requires the applicant to comply with all laws and rules, of
19 course this includes county zoning rules which require sound and
20 shadow flicker thresholds to be measured at participating and
21 nonparticipating residence. If Crowned Ridge measured sound and
22 shadow flicker at all occupied residence in project footprint --
23 excuse me if they do not, if they do not measure sound and
24 shadow flicker at all occupied residence in the footprint how
25 can they insure to the PUC that they will comply with all

1 applicable laws and rules including county zoning rules related
2 to sound and shadow flicker. Of course this always comes down
3 to time and money. Crowned Ridge of course has the resources
4 and expertise to analyze the homes in Waverly and Stockholm, but
5 they chose not to and unfortunately the Commission looked the
6 other way. Not to be overlooked, judge, is the percentage of
7 occupants in the footprint that are participating versus
8 nonparticipating. It is certainly in Crowned Ridge's best
9 interest and also I believe in the Commission's best interest in
10 the matter of public opinion to have more participating land
11 owners than nonparticipating. By skipping over the towns of
12 Waverly and Stockholm Crowned Ridge artificially inflated the
13 percentage of participating land owners in the project
14 footprint. This is another mistake that was made, judge, the
15 findings should be set aside for failure to analyze the occupied
16 structures in the towns of Waverly and Stockholm. The third
17 issue, judge, is whether the PUC abused its discretion when it
18 approved the application without a complete avian use study. It
19 is undisputed that an avian use survey that was submitted did
20 not include the Cattle Ridge portion of the project which
21 encompasses approximately 15,000 acres of the 53,000 acre
22 Crowned Ridge footprint. The PUC unfortunately concluded that
23 what Crowned Ridge submitted was good enough and again it comes
24 down to time and money. Crowned Ridge purchased the Cattle
25 Ridge portion of the project too late to conclude an avian use

1 study for that area. I forget the gentleman's name that
2 testified at the PUC, but he testified I believe it was a Game,
3 Fish and Parks gentleman testified that Crowned Ridge would not
4 have time to complete an appropriate avian use study for the
5 Cattle Ridge portion of the project. Instead of delaying the
6 application for a proper environmental study which the
7 Commission should have done, it approved the application knowing
8 avian use study was not done for approximately 38 percent of the
9 project area. That's a large area. As I said an area of
10 approximately 15,000 acres. The Commission and Crowned Ridge
11 rely on conditions imposed related to avian monitoring and
12 protection to get past this issue, they skirt the study
13 requirements and say the Commission imposed conditions to
14 monitor this after the fact. Certainly that was within the
15 Commission's discretion to impose, conditions to save avian
16 species, but how can findings and conclusions be entered related
17 to the project's impact on avian species if an avian use study
18 hasn't been completed for approximately 38 percent of the
19 project footprint? Appellants are not asking the Court to
20 substitute its judgment for that of the commission, appellants
21 are simply asking the Court to recognize the Commission's error
22 in pushing the application through without being informed as to
23 the impact on avian species throughout the project footprint.
24 It was pointed out I think it was in Crowned Ridge's responsive
25 brief that raptor nesting studies were done for the whole area

1 but according to the avian use study that was completed for the
2 southern portion of the project, there are 23 other nonraptor
3 avian species in the area that were studied. The Commission
4 simply has no knowledge of those 23 species and potentially
5 others how they may be impacted by the Crowned Ridge project in
6 the 15,000 acres left out of the avian use study. There's
7 simply just no information. This too, judge, was a mistake.
8 The findings should also be set aside for lack of a thorough
9 environmental study related to avian species for a large portion
10 of the project footprint. Judge, mistakes have been made in the
11 granting of this PUC permit to Crowned Ridge, as such the
12 appellants are asking the Court to set aside the Commission's
13 findings as clearly erroneous. Thank you.

14 THE COURT: All right. Attorney for the Commission
15 may speak.

16 MS. REISS: Thank you, your Honor, this is Amanda
17 Reiss on behalf of the Public Utilities Commission. I'd like to
18 just briefly respond to the appellants' arguments before I step
19 into a brief statement. Appellants note that Crowned Ridge did
20 not include the location of Dakota Range turbines within its
21 sound studies, specifically that there was a question as to
22 where these turbines could be built. I would just note that
23 Dakota Range has not been constructed at this point, there's
24 always the possibility of turbines to shift and the two projects
25 have different ownership, so there was not the ability to have

1 the specific location of each turbine in order to conduct that
2 sound study. However, I would note that there is no statutory
3 requirement for the cumulative impact studies to be submitted in
4 regards to wind facilities. As noted in PUC's brief, these are
5 specifically excluded from that definition of an energy
6 conversion facility and the requirement for cumulative impact
7 studies only applies to energy conversion facilities.
8 Additionally it only applies to constructive facilities because
9 again if the facility has not been constructed, there are so
10 many unknowns that make it difficult to determine with certainty
11 what the impact would be. Beyond this the Commission
12 established conditions within the order granting the permit to
13 protect against any possibility that the sound or shadow flicker
14 would exceed the levels indicated. The Commission established
15 maximum sound and shadow flicker levels that apply whether
16 Dakota Range I and II are constructed or not, so in addition the
17 Commission also established a model for participants or
18 nonparticipants in the area to bring concerns if they believe
19 the shadow flicker or sound has exceeded those relevant or those
20 specific limits. And so there are protections in place to
21 protect against any exceeding of the permit conditions and so I
22 believe the Commission was understanding that while there may
23 have been questions as to where Dakota Range turbines might be
24 built and the sound impacts, there are significant protections
25 in place to protect against any prejudice. And as precedent

1 states, even if an error is made in the administrative record or
2 in the administrative level, the Court will only overturn that
3 if there's prejudice that has occurred from that. In this case
4 there's no such prejudice. Appellants go on to argue about the
5 lack of sound receptors at each residence within the applicable
6 cities and as indicated in PUC's brief, there was evidence
7 presented to the Commission that showed what the expected sound
8 levels would be within the cities, all though no receptor
9 specific information was provided at each of the residences
10 within those areas, the isomaps clearly show what the expected
11 sound levels would be and they are within the levels required by
12 the County and by the PUC permit. Again, the Commission ordered
13 specific testing protocol if there's a question as to whether or
14 not the sound requirements are met once the project is
15 constructed. So if there's a question, again, after the project
16 is constructed the Commission has made sure to insure that no
17 prejudice can come because Crowned Ridge is required to meet
18 those standards, there's testing protocols in place, the
19 Commission can address any concerns once the project is
20 constructed. And as far as the county zoning requirements, the
21 County has the processes in place to insure that any question on
22 interpretation of their zoning requirements can be addressed at
23 the county level. The Commission has a very limited scope of
24 authority and asking the Commission to determine the meaning of
25 a county ordinance when the County is able to make that

1 determination really shifts the burden away from where it needs
2 to be. At this point the County -- or no evidence has been
3 presented before the Commission that the County determined that
4 a receptor needed to be located at each of those residences and
5 so right now we look at what's on the record and the Commission
6 -- or the evidence presented at the Commission shows that they
7 are in compliance with the County's sound requirements and that
8 they are in compliance or that they would be when constructed,
9 that they would be in compliance with the requirements placed by
10 the Commission. I guess to the third matter, in regards to the
11 historic Cattle Ridge area and whether or not it was included in
12 the avian use survey. As indicated in the PUC's brief, there's
13 no specific requirement that a specific avian use survey be
14 conducted on the entire project area, the applicant is required
15 to present environmental information and the applicant did
16 present that information. Witness Sappington testified that
17 studies were conducted in the historic Cattle Ridge area and
18 that those studies were considered and presented before the
19 commission in section 11.3 of the application. The Commission
20 was full aware of what was included and what was not and
21 determined under their discretion that the studies were
22 sufficient to show that the applicant had met its burden. There
23 was no evidence presented that indicated that a specific avian
24 use survey in that historic Cattle Ridge area would have any
25 result other than what was presented to the Commission. So I

1 think the appellee briefs concisely cover the specific details
2 as well as the authority that show why the Commission's order
3 should be affirmed, but just a couple items, the past precedent
4 is extremely settled on the standard required for an appellant
5 court to set aside or reverse an agency decision based on abuse
6 of discretion. There must be a fundamental error of judgment
7 outside the range of permissible choices, so an unreasonable
8 judgment. And as evident from the record this standard has
9 simply not been met by the appellants. As indicated in the PUC
10 brief and in the massive administrative record and in the
11 Commission's order a significant amount of convincing evidence
12 was presented which supports the Commission's final decision
13 that the appellant or that the applicant Crowned Ridge met their
14 burden of proof and that a permit was appropriate. Secondly and
15 most significantly, even if the Court were to find an abuse of
16 discretion occurred, the precedent did I not is clear that the
17 Commission's decision may not be overturned unless the Court
18 concludes the abuse had a prejudicial effect and in this case no
19 prejudicial effect has been shown. There's been no indication
20 that any result other than what occurred or that the Commission
21 would make any decision other than the decision they had made if
22 they had the information that the appellants are arguing was
23 missing. The Commission's decision in this case is clearly
24 reasonable based on the evidence presented and we respectfully
25 ask the Court to affirm the Commission's decision.

1 THE COURT: All right. Mr. Schumacher, I'd hear from
2 you.

3 MR. SCHUMACHER: Thank you, your Honor, Miles
4 Schumacher, Lynn, Jackson, Shultz and Lebrun on behalf of
5 Crowned Ridge Wind, LLC, I also have with me today co-counsel
6 Brian Murphy who is available if needed. Your Honor, the
7 standard of review is critical to keep in mind here, the
8 standard is not perfection and counsel for appellant is
9 attempting to use the word mistake to inappropriately try to
10 change the standard of review here. The standard of review is
11 not that the decision can be overturned if there was less than
12 perfection in the process, it's if the overall decision of the
13 commission was a mistake because the burdens weren't met. Your
14 Honor, there is substantial credible evidence in the record as
15 demonstrated in the briefs that Crowned Ridge has met its
16 statutory and regulatory burdens on all three issues. There
17 simply is no contradictory evidence in the record or offered by
18 intervenors here and importantly that standard of proof or
19 standard of review requires a showing of prejudice. There's not
20 even an allegation, your Honor, that the applicable sound
21 thresholds are not going to be met. As we apply that to the
22 specific arguments that are made here, your Honor, the whole
23 Dakota Range argument and the reference to the language in the
24 brief of Crowned Ridge is taken out of context. Those arguments
25 are made in the context of the standard set forth in SDCL

1 19-19-201(b) as to what is required before judicial notice can
2 be taken and one of the elements as stated in our brief is that
3 the subject of what is being sought for judicial notice whether
4 it can be accurately and readily determined from sources whose
5 accuracy cannot be reasonably questioned. That's the context in
6 which Crowned Ridge points out that hey, this isn't our project,
7 we can't tell you, the record can't tell you whether or not
8 those turbine locations are final. It does not contradict the
9 substantial evidence presented in the record and referred to by
10 the Commission in its findings that the studies did take into
11 account what available information was there as to the locations
12 of Crowned Ridge and applied them to the final sound studies.
13 And importantly, your Honor, when counsel talks about well even
14 the whisper and the library sound is a problem for my clients,
15 well there's no showing that the Dakota Range turbines he
16 asserts weren't taken into account when in fact they were, but
17 there's no assertion that they contribute a measurable sound
18 level to those. The testimony of Mr. Haley with regard to those
19 is that his modeling shows some remnant sound. That's the
20 language that was used before the Commission. That does not
21 translate to a detectable or discernable sound level that
22 affects in any way the legal sound thresholds to which Crowned
23 Ridge must adhere. Finally, your Honor, the reference to
24 Mr. Haley's credentials is not in the statement of issues in
25 this case, it's not appropriate for consideration on this

1 appeal, that was thoroughly vetted in front of the Commission
2 and the Commission determined that his sound studies were
3 admissible and available for use for the Commission and there
4 just is no contradictory evidence in the record to the fact that
5 the modeling demonstrates that the sound thresholds required by
6 the counties and the PUC would be met. With regard to the
7 second issue of residences being omitted from the study, he
8 argues well there's nothing in the rules or regulations or
9 statute that allows omission. Well that's because there's
10 nothing that requires those studies in the first place. There's
11 no reason, your Honor, to go house by house in a small community
12 like Stockholm or Waverly because the residences are so close
13 together that when you model for one residence or for the area
14 there's not going to be a significant difference from one
15 neighbor to the other on what those levels will be. As counsel
16 for the PUC staff pointed out, the modeling shows through the
17 isomaps that the levels that those communities are well below
18 the threshold so once again the credible substantial evidence is
19 before the Commission, appropriate for them to make the decision
20 they did, and absolutely nothing to demonstrate prejudice to
21 these intervenors because all of the evidence before the
22 commission demonstrated that the applicable sound and shadow
23 flicker thresholds would be met. Finally with regard to the
24 avian study, your Honor, once again the record is clear that the
25 burden is met, again as counsel for the Commission stated, there

1 is no regulatory or statutory requirement that it be
2 specifically an avian study that meets the applicants burden in
3 this regard. The record is clear that the Commission felt the
4 burden was met through expert testimony and the concurrence of
5 the witness from the South Dakota Game, Fish and Parks
6 Department, and with regard to this issue, your Honor, there's
7 not even an attempt at establishing the requirement of
8 demonstrating prejudice to any of the intervenors. So for those
9 reasons, your Honor, we feel that the decision of the South
10 Dakota Public Utilities Commission should be upheld.

11 THE COURT: Thank you. Mr. Gass, I'll give you 5
12 minutes to respond to the arguments made today.

13 MR. GASS: Thank you, your Honor. With regard to the
14 sound studies and the Dakota Range turbines, my understanding is
15 that the Dakota Range turbines were permitted by the PUC in
16 approximately March of 2018, certainly when this permit was
17 being litigated at the PUC the Dakota Range project was
18 permitted and certainly there would have been some accurate
19 information as to the location of the wind towers in the Dakota
20 Range project. Judge, it's easy to argue that there are so many
21 unknowns related to other wind projects in the area that we just
22 throw our hands up, there's so many unknowns we don't know where
23 these towers are, we can't analyze the sound appropriately.
24 That's an easy argument to make and I think it's hurtful to the
25 people in the community that live in the county where these

1 towers are constructed. The biggest issue I have with the sound
2 studies is there's no mention of Dakota Range in the initial
3 sound study, when he was asked, Mr. Haley was asked about
4 updates made to the sound study, he does not mention Dakota
5 Range. The only time Dakota Range is mentioned is when he's
6 asked did you analyze the effects of Crowned Ridge II and Dakota
7 Range and he says yes I did, but they didn't have any effect on
8 my previous study. But later in direct testimony he testifies
9 that there is effect, specifically at the Robish property there
10 is an effect, Commissioner Nelson specifically asked him,
11 because it changed a little bit at the Robish property, where
12 did that change come from? Oh, that's from the Dakota Range
13 project, there's some sound remnants there, but it affected the
14 DBA level at the Robish property and Commissioner Nelson
15 specifically asked Mr. Haley about that and then kind of dropped
16 it, they didn't explore that any further which is troubling
17 because he testified that there was no change in the sound
18 studies when he analyzed Dakota Range related to the Crowned
19 Ridge sound emissions. Judge, in looking at administrative rule
20 20-10-2213, that's the environmental requirement, that sets
21 forth that there needs to be -- existing environmental
22 conditions need to be established and certainly there are many
23 environmental studies that could be used, it's troubling that
24 they used an avian use survey for the southern portion to
25 establish environmental effects but neglected 15,000 acres just

1 because they didn't have time to do it. Had the PUC hearings
2 been months or years later they would have done it, they would
3 have time, but it comes down to time and money and they
4 shouldn't get passed for not including an avian use survey in
5 the Cattle Ridge portion. That's all I have, judge. Thank you.

6 THE COURT: All right, I thank counsel for their
7 arguments here, this is obviously a voluminous record at the PUC
8 level and I'd like to take some more time to review that record
9 before issuing my decision in this matter, so I will issue a
10 written decision after reviewing those documents. We'll be in
11 recess for today.

12 MR. SCHUMACHER: Thank you, your Honor.

13 (Proceeding concluded.)
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1 IN CIRCUIT COURT)

2 :SS CERTIFICATE

3 COUNTY OF CODINGTON)

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5 This is to certify that I, Dawn Russell, Court Reporter in
6 the above-named County and State, took the foregoing
7 proceedings, and the foregoing page 1-25, inclusive, are a true
8 and correct transcript of my stenotype notes.

9 Dated at Watertown, South Dakota, this 10th day of July,
10 2020.

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12 /s/ Dawn Russell

13 Dawn Russell, Court Reporter

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