IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

GARRY EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL,
AMY RALL AND LARETTA KRANZ
Petitioners-Appellants,

v.

CROWNED RIDGE WIND II, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION *Respondents-Appellees.*

Appeal No. 29610

Appeal from Circuit Court, Third Judicial Circuit, Codington County, South Dakota
The Honorable Dawn Elshere, Presiding

APPELLEE CROWNED RIDGE WIND II, LLC'S BRIEF

A.J. Swanson
Arvid J. Swanson, P.C.
27452 482nd Ave.
Canton, SD 57013
aj@ajswanson.com
Attorney for Appellants

Kristen Edwards
Amanda M. Reiss
Special Assistant Attorney General
South Dakota Public Utilities Commission
Pierre, SD 57507
Kristin.edwards@state.sd.us
Amanda.Reiss@state.sd.us
Attorneys for South Dakota Public Utilities Commission

Miles F. Schumacher
Lynn, Jackson, Shultz & Lebrun, P.C.
110 N. Minnesota Ave., Suite 400
Sioux Falls, SD 57104-6475
mschumacher@lynnjackson.com

Brian J. Murphy
NextEra Energy Resources, LLC
700 Universe Boulevard
Juno Beach, Florida 33408
Brian.J.Murphy@nee.com
Admitted Pro Hac Vice
Attorneys for Crowned Ridge Wind II, LLC Appellee

NOTICE OF APPEAL FILED APRIL 6, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

South Dakota Constitution

Federal Constitution

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal of the South Dakota Public Utilities Commission's ("Commission") April 6, 2020 Order ("Order"), issued in Docket No. EL19-027, granting a Facility Permit ("Facility Permit") to Crowned Ridge Wind II, LLC ("Crowned Ridge II") for an energy wind facility ("Project") and the Third Judicial Circuit Court's affirmation of the Order in its March 12, 2021 Memorandum Opinion ("Opinion").

STATEMENT OF THE ISSUES AND AUTHORITIES

Issue 1. WHETHER THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S GRANTING OF A FACILITY PERMIT WHEN THE COMMISSION DID NOT FIRST PROMULGATE RULES RELATED TO WHAT CONSTITUTES MINIMAL ADVERSE EFFECTS?

The Circuit Court properly ruled that the Commission was not legally required to promulgate regulations on what constitutes the minimal adverse effects for sound and shadow flicker produced from the Project.

In re Black Hills Power, 2016 S.D. 92, 889 N.W.2d 631
SDCL § 49-41B-22(3)
SDCL § 49-41B-35

Issue 2. WHETHER THE CIRCUIT COURT ERRED WHEN CONCLUDING THAT THAT SDCL § 43-13-2(8) IS OUTSIDE THE JURISDICTION OF THE COMMISSION?

The Circuit Court correctly concluded that a determination of property rights under SDCL § 43-13-2(8) is outside the jurisdiction of the Commission.

Northwestern Bell Tel. Co. v. Chicago & N.W. Transp., 245 N.W.2d 639 (S.D. 1976)
Sunnywood Common Sch. Dist. No. 46 v. County Bd. of Edu., 131 N.W.2d 105 (S.D. 1964)

Issue 3. WHETHER THE CIRCUIT COURT ERRED IN DETERMINING THAT INTERVENORS FAILED TO ESTABLISH THE COMMISSION'S GRANTING OF A FACILITY PERMIT WAS A TAKING OF PROPERTY?

The Circuit Court properly concluded that Intervenors failed to establish that the sound and shadow flicker produced by the Project constitutes a taking of their property.

Krsnak v. Brant Lake Sanitary Dist., 2018 S.D. 85, 921 N.W.2d 698
Muscarello v. Winnebago County Bd., 702 F.3d 909 (7th Cir. 2012)

Issue 4. WHETHER THE CIRCUIT COURT ERRED IN DETERMINING THAT INTERVENORS' CLAIM OF A *PER SE* NUISANCE IS NOT RIPE?

The Circuit Court properly ruled that Intervenors' claim for *per se* nuisance is not ripe.

Boever v. South Dakota Bd. of Accountancy, 526 N.W.2d 747 (S.D. 1995)
Muscarello v. Ogle County Bd. of Commissioners, 610 F.3d 416 (7th Cir. 2010)

STATEMENT OF THE CASE

On July 9, 2019, Crowned Ridge II filed an Application for a Facility Permit to construct and operate the Project to be located in Grant County, Deuel County, and Codington County, South Dakota. (AR-1 71-1107) The Commission conducted a contested case to review the Application, which included the submission of prefiled testimony, discovery, the granting of party status to ten intervenors,[1] three days of evidentiary hearings, the submission of legal briefs, oral argument, and the issuance of the April 6, 2020 Order granting a Facility Permit to Crowned Ridge II. On April 29, 2020, Intervenors filed a Notice of Appeal of the Commission's Order with the Third Judicial Circuit Court in Codington County ("Circuit Court"). After briefing and oral argument, on March 21, 2021, Circuit Court Judge Elshere issued an Opinion affirming the Commission's granting of a Facility Permit to Crowned Ridge II. On April 6, 2021, Intervenors appealed the Circuit Court's Opinion to this Court.

STATEMENT OF THE FACTS

On July 9, 2019, Crowned Ridge II filed an Application and accompanying appendices with the Commission for a Facility Permit to construct and operate the Project, a 300.6 megawatt wind facility located in Codington, Grant, and Deuel Counties, South Dakota. (AR-1 71-1107) Also, on July 9, 2019, Crowned Ridge

[1] The Intervenors from the underlying proceeding who comprise the Appellants-Intervenors are Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz.

II submitted the prefiled Direct Testimony and exhibits of Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter. (AR-2 5-81)

On July 11, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and a Notice for Opportunity to Apply for Party Status. Pursuant to SDCL § § 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on August 26, 2019, at 5:30 p.m. CDT, at the Whitewood Room, Watertown Event Center, 1901 9th Ave. SW, Watertown, South Dakota. (AR-2 124-125)

On July 31, 2019, the Commission issued an order granting party status to Amber Christenson, Allen Robish, and Kristi Mogen. (AR-2 156-157) On August 26, 2019, the Commission also issued an order granting party status to Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Loretta Kranz. (AR-2 441) On August 26, 2019, the public input hearing was held. (AR-2 240-440)

On September 20, 2019, Crowned Ridge II submitted the pre-filed Supplemental Testimony and exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Dr. Christopher Ollson, Daryl Hart, Sarah Sappington, Michael MaRous, and Dr. Robert McCunney. (AR-2 972-2183; 2197-2214)

On October 1, 2019, the Commission issued an Order For and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for February 4-7, 2020 to

be conducted in the Matthew Training Center, Foss Building, 523 E. Capital Ave., Pierre, South Dakota. (AR-2 2192-2193)

On December 9, 2019, Staff submitted the pre-filed Direct Testimony and exhibits of David Hessler, Darren Kearney, Hilary Meyer Morey, David Lawrence, and Paige Olson. (AR-2 2319-2502; AR-3 512-770) On December 12, 2019, Intervenors submitted the pre-filed Direct Testimony of Garry Ehlebracht, Steven Greber, Amy Rall, and Laretta Kranz. (AR-3 772-785)

On January 8, 2020, Crowned Ridge II submitted the pre-filed Rebuttal Testimony and exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson. (AR-3 789-856) An evidentiary hearing was held on February 4-6, 2020, pursuant to the rules of civil procedure. (AR-7 432-1152) Seventeen witnesses were called to testify at the evidentiary hearing. On February 27, 2020 and March 2, 2020, post-hearing briefs were filed by Crowned Ridge II, Commission Staff, and Intervenors. (AR-7 4-45; 62-100;103-115; 117-148) On April 6, 2020, the Commission issued an Order granting a Facility Permit to Crowned Ridge II, subject to 49 conditions. (AR-7 403-431)

SUMMARY OF THE ARGUMENT

Intervenors assert that the Circuit Court erred in concluding that: (1) the Commission was not legally required to promulgate rules establishing the minimal effects a wind generating project can produce on sound and shadow flicker prior to issuing the Facility Permit to Crowned Ridge II; (2) a determination of property

rights under SDCL § 43-13-2(8) is outside the jurisdiction of the Commission; (3) Intervenors failed to establish that the sound and shadow flicker produced by the Crowned Ridge II wind project constitutes a taking of their property; and (4) Intervenors' claim that the Facility Permit constitutes a *per se* nuisance is not ripe. Intervenors' assertions, however, ignore the clear, certain, and unambiguous language of the statutes the South Dakota Legislature has entrusted to the Commission to administer, as well as the Commission's well-reasoned findings and conclusions set forth in its April 6, 2020 Order, all of which are based on substantial evidence in the record. Indeed, any reasonable reading of the Commission's Order clearly shows the Commission's findings, conclusions, and conditions are supported by substantial evidence, are reasonable and not arbitrary. Thus, Intervenors' assertions are without merit, and the Circuit Court's Opinion and Commission's Order should be affirmed in all respects.

STANDARD OF REVIEW

The Supreme Court affords great weight to the Commission's findings and the inferences drawn by the Commission on questions of fact. *See* SDCL § 1-26-36; *In Re Prevention of Significant Deterioration*, 2013 S.D. 10, ¶¶ 16, 48, 826 N.W.2d 649, 654, 662 ("We 'give great weight to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire record.'") (quoting *Williams v. South Dakota Dep't of Agric.*, 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400). Questions of law are reviewed *de novo*. *See Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing

Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co., 2015 S.D. 55, ¶ 11, 866 N.W.2d 545); *State v. Geise*, 2020 S.D. 161, ¶ 10, 656 N.W.2d 30, 36. The Supreme Court will afford a well-reasoned and fully informed Commission decision with "due regard", unless there is a clear error of judgment or conclusion not supported in fact. *In re Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 29, 744 N.W.2d 594, 603.

In addition, the Supreme Court does not weigh the evidence or substitute its judgment for that of the Commission, but, rather, its function is to determine whether there was substantial evidence in support of the Commission's conclusion or finding. *See In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952); *In re Application of Dakota Transp., Inc.,* 291 N.W. 589, 593, 595-596 (S.D. 1940). Under SDCL § 1-26-1(9), substantial evidence is defined as "relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support the conclusion." The Court only reverses the Commission's factual determinations when it is "left with a definite and firm conviction that a mistake has been committed." *In re Application of Midwest Motor Express*, 431 N.W.2d 160, 162-163 (S.D. 1988). In addition, for the 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. 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. *Id*. at ¶ 20, 871 N.W.2d at 856.

ARGUMENT

I. The Commission was not legally required to promulgate rules establishing the minimal effects for the sound and shadow flicker prior to the issuance of a Facility Permit for the Project.

Intervenors assert that, pursuant to SDCL § 49-41B-35, the Commission was legally required to promulgate uniform rules on the amount of sound and shadow flicker for South Dakota wind projects prior to granting a Facility Permit to Crowned Ridge II. Intervenors Br. at 10-16. Failing to promulgate such rules, according to Intervenors, results in an arbitrary and capricious adoption of sound and shadow flicker thresholds in the Crowned Ridge II Facility Permit, because the Commission adopted lower thresholds in the Prevailing Wind proceeding. *Id*. Intervenors' assertions are without merit in that they misread SDCL § 49-41B-35, SDCL § 49-41B-1, and, the most applicable statute to the Commission review of the Project, SDCL § 49-41B-22.

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

> To implement the provisions of this chapter regarding facilities, the commission shall promulgate rules pursuant to chapter 1-26. Rules **may be adopted** by the commission:
>
> > (1) To establish the information requirements and procedures that every utility must follow when filing plans with the commission regarding its proposed and existing facilities;
> >
> > (2) To establish procedures for utilities to follow when filing an application for a permit to construct a facility, and the information required to be included in the application; and
> >
> > (3) To require bonds, guarantees, insurance, or other requirements to provide funding for the decommissioning and removal of a wind energy facility.

(emphasis added).

SDCL § 49-41B-35 plainly provides the Commission with the discretion to implement rules related to informational filing requirements, procedures for the consideration of proposed facilities, and bonds or other financial instruments for the funding of decommissioning, without any reference to a legal requirement to promulgate uniform rules for sound or shadow flicker thresholds. Thus, there is no reading of the clear, certain, and unambiguous language in SDCL § 49-41B-35 that can be interpreted as a directive from the South Dakota Legislature to the Commission requiring it to promulgate uniform sound and shadow flicker rules. Instead, pursuant to SDCL § 49-41B-22(3),[2] the Legislature vested the Commission with the discretion to impose sound and shadow flicker thresholds

[2] SDCL § 49-41B-22(3) reads: "The applicant has the burden of proof to establish by a preponderance of the evidence that: . . . The facility will not substantially impair the health, safety or welfare of the inhabitants."

based on the record in the underlying proceeding, provided the applicant carried its burden of showing the adopted thresholds would not substantially impair the health and welfare of the inhabitants.

Equally misguided is Intervenors' reference to SDCL § 49-41B-1 along with *Smith v. Canton Sch. Dist. 41-1*, 599 N.W.2d 637 (S.D. 1999), neither of which support the premise that the South Dakota Legislature directed the Commission to adopt "statewide" uniform or specific rules related to "minimal adverse effects". Intervenor Br. at 11-12, 14. As the legislative preamble to Chapter 49, SDCL § 49-41B-1 titled "Legislative findings – Necessity to require a permit for facility" clearly and unambiguously articulates, the legislative purpose of Chapter 49 is to ensure that a proposed facility that falls under the Commission's jurisdiction can only be constructed or operated after the facility first obtains a permit from the Commission.[3] Hence, SDCL § 49-41B-1 cannot be read as the South Dakota Legislature directing the Commission to implement

[3] SDCL § 49-41B-1 reads:

> The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a facility may not be constructed or operated in this state without first obtaining a permit from the commission.

rules, including rules on the sound and shadow flicker thresholds for wind generating projects. Similarly, the Court's decision in *Smith* contains no holding that the Commission must adopt statewide sound and shadow flicker thresholds; instead, the legal error in *Smith* was based on the Canton School Board's rewriting and ignoring of court imposed factors when it denied petitioner's request for a minor school boundary change. Unlike *Smith*, there are no court or legislatively imposed factors controlling the sound and shadow flicker thresholds that can be produced by a wind generating project, and, therefore, Intervenors' citation to *Smith* as authority is unavailing.

In contrast to Intervenors' misguided reading of SDCL § 49-41B-1 and *Smith*, the Commission, pursuant to SDCL § 49-41B-22(3), carefully considered the evidentiary record in the underlying proceeding to determine the sound and shadow flicker thresholds for Crowned Ridge II, a record that includes hundreds pages of studies, reports, and expert testimony from sound and shadow flicker modelers, a Ph.D., and a medical doctor who directly address the applicable statutory question of whether the Project will substantially impair human health or welfare. Based on the substantial evidence in the record, the Commission concluded:

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

> emission levels; (3) the receptors were assumed to be downwind of the wind turbines; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants property boundaries for those residences in Codington County. Applicant modelled sound levels with consideration of the cumulative sound impacts from Deuel Harvest and Crowned Ridge Wind I wind projects. Further, Applicant agreed to Permit Condition No. 27 in order to further reduce certain non-participant sound levels, consistent with the proposal advocated by Staff witness Mr. David Hessler. Pursuant to Permit Condition No. 26, Applicant agreed to a post construction sound protocol to be used in the event the Commission orders post construction sound monitoring.
>
> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow and flicker for the Project to no more than 30 hours for all participants and nonparticipants inclusive of cumulative impacts from Deuel Harvest and Crowned Ridge Wind I, with the understanding that wind turbine CRII-Alt-3 will need to be curtailed to ensure the shadow and flicker is no more than 30 hours at receptor CR1-C10-P. Applicant also used conservative assumptions, such as the greenhouse-mode, no credit for blockage due to tree and assumed the wind turbines were operating 100% of the time to model shadow and flicker, which, in turn, produces conservative results.
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge Wind II witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge Wind II witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR-7 414-415) footnotes citing record evidence omitted).

The above passages, and the record evidence cited within the passages, demonstrate that the Commission's determination that the sound and shadow

flicker thresholds satisfied SDCL § 49-41B-22(3)'s requirement that the Project will not substantially impair the health and welfare of the inhabitants was well-reasoned and supported by substantial evidence. *Application of Svoboda*, 54 N.W.2d at 327 ("The court's authority extends only to a determination whether the Commission acted with its power and whether it's determination is supported by substantial evidence."), citing *Application of Dakota Transp., Inc.*, 291 N.W. at 593, 595-596. In addition, in Attachment A to the Order, the Commission also conditioned the granting of the Facility Permit on Crowned Ridge II complying with the sound thresholds of 45 dBA for sound within 25 feet of a nonparticipant's residence and 50 dBA for sound within 25 feet of a participant's residence and a shadow flicker threshold of no more than 30 hours annually unless consented to by the owner of the residence. (AR-7 424-425, 428 Condition Nos. 26 and 35) *See Presell v. Mont. Dakota Utils., Co.*, 2015 S.D. 81¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring the resubmittal of the application to consider additional information).

Much of Intervenors' misplaced claim that Commission was required to adopt uniform sound and shadow flicker threshold rules rest on their factual disagreement with the Commission Order's findings on the sound and shadow flicker thresholds. However, any reasonable reading of the above quoted passages of the Order demonstrates the Commission's findings and

ultimate conclusion that, pursuant to SDCL § 49-41B-22(3), the sound and shadow flicker produced from the Project will not substantially impair the health or welfare of the inhabitants were based on substantial evidence, and were reasonable and not arbitrary. Furthermore, clearly a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge II (including its conservative sound modelling assumptions and the unchallenged testimony of a Harvard-trained medical doctor specializing in the field occupational health) as supporting the findings and conclusion that the sound and shadow flicker to be produced by the Project will not substantially impair the health or welfare of the inhabitants. *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a reasonable mind might accept the evidence as being sufficiently adequate to support the conclusion). Additionally, the Commission's findings, conclusions, and imposition of the sound and shadow flicker thresholds in Condition Nos. 26 and 35 are within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesell*, 2015 S.D. 81 ¶ 8, 871 N.W.2d at 652.

Consequently, the Commission's thorough and reasonable consideration of sound and shadow flicker was within its discretion, which, in turn, requires that the Commission's factual findings and inferences be afforded great weight pursuant to SDCL § 1-26-36, and not second guessed

by the Court, as Intervenors request. *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *Application of Svoboda*, 54 N.W.2d at 328 (reversing circuit court, and directing it to affirm a Commission order that was based on substantial evidence, concluding that ". . . the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission."); *Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 35, 744 N.W.2d at 604 (Commission's application of SDCL § 49-41B-22 upheld: "Our review of the record shows the PUC entered a well-reasoned and informed decision when it concluded that Big Stone II would not pose a threat of serious injury to the environment."); *In Re Northwestern Pub. Serv. Co.*, 297 N.W.2d 462, 467 (S.D. 1980) ("It is not for this court to weigh the evidence."); *Application of Dakota*, 291 N.W. at 593, 595-596 (reversing circuit court, and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "[t]he ultimate question is whether there was substantial evidence to support the order of the Commission."). Accordingly, as the Commission's rationale on sound and shadow flicker was well-reasoned, and was based on ample and substantial evidence, the Circuit Court's affirmation of the Commission's Order should be upheld.

Intervenors also failed to show the Commission's actions had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (even if the decision was an abuse of discretion, a court will not overturn an agency's decision unless the abuse produced some prejudicial effect). The record shows that the modelled sound level at 25 feet away from the residence of each of the Intervenors is substantially below the 45 dBA nonparticipant threshold established in Condition No. 26: Ehlebracht 42.2 dBA; Greber 41.8 dBA; Rall 40.5 dBA; and Kranz 41.2 dBA. (AR-7 69-70). For additional context, the record shows that the sound produced from the Project for the Intervenors is approximately that of a soft whisper at a distance of 3 feet. (AR-1 229) Similarly, for shadow flicker, Intervenors are well below the Commission-imposed shadow flicker threshold of 30 hours annually established in Condition No. 35: Ehlebracht 3 hours and 14 minutes annually; Greber 14 hours and 22 minutes annually; Rall 13 hours and 27 minutes annually; and Kranz 3 hours and 44 minutes annually. (AR-7 69-70) Hence, there is no showing of prejudicial effect, because the Project's sound and shadow flicker for the Intervenors are below the Commission-imposed thresholds that substantial evidence shows will not substantially impair the health and welfare of the inhabitants.

In addition to Intervenors' misplaced reading of statute and the evidentiary record, Intervenors' citations to *City of Aberdeen v. Meidinger*, 233 N.W.2d 331 (1975) and the concurrence in *Lyons v. Lederle Laboratories*, 440 N.W.2d 769, 773 (S.D. 1989) as authority for its vaguely presented equal protection clause

claim are unavailing.[4] As a threshold issue, it is undisputable that Intervenors did not identify equal protection as an issue in the underlying proceeding nor did they identify it in their Notice of Appeal or Statement of Issues. Therefore, this argument has been waived. *See Lagler v. Menard, Inc.*, 2018 S.D. 53 ¶ 42, 915 N.W.2d 707, 719 (". . . the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified"); *In Re LAC Minerals USA*, 2017 S.D. 44, ¶ 13, 900 N.W.2d 283, 288 (holding that the issue was waived because it was not presented during underlying administrative proceeding).

However, even if the equal protection claim is properly before the Court, Intervenors have failed to carry their burden to show that there is any constitutional impairment on the face of the applicable statute, SDCL § 49-41B-22(3), or the Commission's administration of the statute. *Steinkruger v. Miller*, 2000 S.D. 83 ¶ 8, 612 N.W.2d 591, 595 ("Statutes are presumed constitutional: challengers bear the burden to prove beyond a reasonable doubt that a statute violates a constitutional provision."). In fact, Intervenors' equal protection claim is not even supported by their cited authority – *Aberdeen* and *Lyons* – because

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

these cases are too far afield from the Commission's application of SDCL § 49-41B-22(3). *Aberdeen* involved the question of whether the South Dakota and the U.S. Constitutions were implicated when two separate South Dakota statutes imposed unequal punishments for the same criminal offense based on an arbitrary classification of persons without a rationale relationship between the classification and a legitimate legislative purpose. Unlike *Aberdeen*, in the instant case, there is one statute, SDCL § 49-41B-22(3), administered by the Commission, that on its face makes no classifications, but, instead, requires the Commission to make a finding on whether the applicant has by a preponderance of the evidence carried its burden that the Project will not substantially impair the health and welfare of the inhabitants. Similarly, *Lyons* is not instructive, because it did not involve a regulatory agency administering a statute, but, rather, the Court struck down a statute imposing a classification regarding the minimum age of a plaintiff for filing a malpractice claim. The Court concluded the malpractice statute violated both the South Dakota and Federal equal protection clauses, because the arbitrary age classification on when a person could bring a medical malpractice lawsuit was not rationally related to the legislative goal of alleviating the medical malpractice crisis.

Additionally, a straightforward application of the two-pronged test adopted by this Court to SDCL § 49-41B-22(3) shows the Commission did not violate equal protection requirements. The two-pronged test to determine whether the equal protection clause has been violated is whether: (1) the statute establishes an

arbitrary classification among various people, and, if so, (2) there is a rational relationship between the classification and a legitimate legislative purpose. *Cheyenne River Sioux Tribe Tel. Auth. v. PUC*, 595 N.W.2d 604, 614 (S.D. 1999). As already discussed, on its face, SDCL § 49-41B-22(3) does not establish a classification, but, rather, the statute expressly directs the Commission to evaluate the evidence presented by the applicant in the context of health and welfare, which is precisely what the Commission did in the underlying proceeding. As shown, *infra*, the Commission carefully and reasonably concluded that evidence of Crowned Ridge II, including substantial evidence from a Ph.D. and a Harvard-trained medical doctor specializing in the field occupational health, showed that the Project will not substantially impair the health and welfare of the inhabitants. The fact that in an earlier case, Prevailing Wind, the Commission set lower and different sound and shadow flicker thresholds based on the evidence in that case is not controlling on the Commission for all subsequent cases, as the clear language of SDCL § 49-41B-22(3) instructs the Commission to base its decision on the evidence provided by the applicant in the case before it. Therefore, consistent with SDCL § 49-41B-22(3), the inhabitants in Prevailing Wind and Crowned Ridge II are treated equally in that the Commission found the sound and shadow flicker produced, based on the evidence in their respective cases, met the statutory imperative that the project not substantially impair the health and welfare of the inhabitants. Furthermore, even if *arguendo* the Commission created a classification of various persons in its Crowned Ridge II Order, which it did not,

as shown, *infra*, the Commission articulated a rational relationship between the establishment of sound and shadow flicker thresholds for the Crowned Ridge II inhabitants and the legitimate legislative purpose of ensuring that Crowned Ridge II, by a ponderance of the evidence, showed the Project would not substantially impair the health and welfare of the inhabitants. Thus, in the event the Court addresses Intervenors' waived equal protection argument, the application of the Court's two-pronged test to the Commission's decision shows it did not implicate equal protection clauses of the South Dakota and Federal Constitutions. *Cheyenne River*, 595 N.W.2d at 612-614 (Commission's action did not constitute a denial of equal protection clause under the South Dakota and Federal Constitutions when Commission had a rational basis for its application of the statute); *United Hospital v. Thompson*, 383 F.3d 728, 732 (8th Cir. 2004) (federal courts use the rational basis or purpose test to evaluate an agency's action in the context of an equal protection clause challenge). Accordingly, for the foregoing reasons, Intervenors' assertion that the Commission was legally required to adopt uniform sound and shadow flicker threshold rules prior to the issuance of a Facility Permit to Crowned Ridge II is baseless, and, therefore, should be rejected.

II. The Circuit Court correctly concluded that SDCL § 43-13-2(8) is outside the jurisdiction of the Commission.

Intervenors assert that the Commission's issuance of a Facility Permit conflicted with SDLC § 43-13-2(8) or otherwise impacted the property rights of Intervenors by imposing a *de facto* easement. Intervenors Br. at 16-22. Contrary

to Intervenors' assertions, the Circuit Court correctly concluded that such claims are outside the jurisdiction of the Commission, and, by extension, outside the Circuit Court's jurisdiction when reviewing whether the issuance of the Facility Permit was clearly erroneous. (AR-7 1512-1514)

A long-settled maxim of administrative law is that an agency, such as the Commission, is a creature of statute. *Sunnywood Common Sch. Dist. No. 46 v. County Bd. of Edu*., 131 N.W.2d 105, 110 (S.D. 1964). Intervenors' citation to SDCL § 43-13-2(8) is therefore misplaced, because this law resides in a statutory scheme related to easements, which is wholly outside the statutes the Legislature enacted for the Commission to administer. In the instant case, the statutory mandate from the Legislature is for the Commission to evaluate the Project against the criteria set forth in SDCL § 49-41B-22, none of which mandate the application SDCL § 43-13-2(8) to wind energy facilities. Further, it is axiomatic that the Commission is not a court. Thus, absent direction from the Legislature, the Commission is not legally empowered to decide Intervenors' private property rights whether those rights arise under SDCL § 43-13-2(8) or simply because they will experience any amount of sound and shadow flicker. *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp*., 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions.") quoting *Application of Svoboda*, 54 N.W.2d at 327. Therefore, absent controlling South Dakota legal precedent interpreting SDCL §

43-13-2(8) as prohibiting a wind project from casting any amount of shadow flicker or sound on the property of a non-easement holder, the Commission correctly did not seek to interpret or apply SDCL § 43-13-2(8) to the Project. Tellingly, Intervenors concede that there is no controlling South Dakota *corpus juris* on SDCL § 43-13-2(8). (Intervenors Br. at 21: "The old statute (SDCL 43-13-2(8)) does not seem to have been cited in *any* decision of this Court . . . .") (emphasis in original). Hence, when boiled down to the logical conclusion, Intervenors' property right assertions turns on a wildly unsupportable premise that Commission is without legal authority to approve Crowned Ridge II, and by extension any generation project, that results in any amount of sound being heard or any amount of shadow flicker being cast on the land of a property owner who has not executed an easement with the project's owner. Given the absurd results that would occur if Intervenors assertions were found to have merit, it is not unexpected, therefore, that this Court rejected a similar argument in the context of SDCL § 49-41B-22. *See*, *Application of Otter Tail Power Co*., 2008 S.D. 5, ¶¶ 34, 35, 744 N.W.2d at 604 ("Our review of the record shows the PUC entered a well-reasoned and informed decision when it concluded that Big Stone II would not pose a threat of serious injury to the environment. . . . Nothing in SDCL Chapter 49-41B so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment. Rather, it is a question of the acceptability of a possible threat . . . . Based on all the evidence and our limited scope of review, the PUC's decision was not clearly erroneous."). Consonant with *Otter*

Tail, as explained in Section I, *infra*, Commission's application of 49-41B-22(3) to the record in the instant case was well-reasoned, informed, and not clearly erroneous, because Crowned Ridge II met its burden through the submission of substantial evidence that the sound and shadow flicker produced from the Project would not substantially impair the health and welfare of inhabitants, which includes inhabitants that executed easements and those that have not executed easements. Hence, fundamentally, Intervenors' hypothetical that SDCL § 43-13-2(8) or some other property right could be interpreted as prohibiting the Project from casting shadow flicker or producing any level of sound on a non-easement holder's property is a wholly insufficient basis upon which remand or otherwise invalidate the Circuit Court affirmation of the Commission's granting of a Facility Permit to Crowned Ridge II.

III. The Commission's granting of a Facility Permit to Crowned Ridge II was not a taking of property.

Intervenors loosely speculate that the Commission's Order constitutes a taking of property without compensation, while, at the same time, conceding that "this is not yet an inverse condemnation case . . . this is an administrative appeal . . . ." Intervenors Br. at 24. Consistent with the Intervenors' concession, mere speculation as to a future impact of the Project is insufficient to create a ripe controversy for a taking claim. *Muscarello v. Winnebago County Bd. ("Winnebago County")*, 702 F.3d 909, 913 (7th Cir. 2012) (holding that "no property of the plaintiff's has yet been taken, or will be until and unless a wind

farm is built near her property – and probably not even then.") In addition, and tellingly, Intervenor-Ehlebracht asserted in response to a series of questions from Commissioner Nelson that any impact from the Project no matter how minor or *de minimis* was a taking of his property.[5] (AR-7 903-904) Unquestionably, however, as a matter of law, minor or *de minimis* impacts – especially those that are the same as are shared by the general public (*i.e.*, the surrounding inhabitants) – do not constitute a regulatory taking of property without compensation. *Krsnak v. Brant Lake Sanitary Dist.*, 2018 S.D. 85, ¶¶ 17-23, 921 N.W.2d 698, 702-704 (holding a taking claim under the "damages clause" of the South Dakota Constitution was properly dismissed, because the odor plaintiffs experienced from treatment pond was not unique or peculiar to odors experienced by other nearby

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

landowners); *Winnebago County,* 702 F.3d at 913 ("A taking within the meaning of the takings clause of the U.S. Constitution has to be an actual transfer of ownership or possession of property, or the enforcement of a regulation that renders the property essentially worthless to its owner. . . . . The 2009 Winnebago ordinance does not transfer possession of any of the plaintiff's land or limit her use of it.") (citations omitted) Similar to *Krsnak,* Intervenors cannot and do not even attempt to show that the amount of sound or shadow flicker they will experience is different in kind to the sound and shadow flicker that will be experienced by others. (*See*, Section I, *infra*, comparing the Commission approved limits to the low levels of sound and shadow flicker Intervenors will experience) Likewise, as in *Winnebago County,* not only is Intervenors' taking claim not ripe for adjudication, the Commission's Order does not transfer possession of Intervenors' property or limit their use.

Instructively, similar arguments alleging an unconstitutional taking were brought against the Deuel County and Codington County approvals of Crowned Ridge II, and those arguments were rejected by the SD Third Circuit Court and by this Court. *Lindgren v. Codington County,* 14CIV1-000303, Order Granting Motion to Dismiss and Granting Motion for Costs, J. Means (SD 3rd Cir. Dec. 20, 2019); affirmed by Order Directing Issuance of Judgement of Affirmance, (SD June 1, 2020); *In the Matter of Specific Exception Permit Application of Crowned Ridge II, LLC,* 19 CIV18-000061, J. Elshere (SD 3rd Cir. May 19, 2020).

Accordingly, for these reasons, the Circuit Court correctly concluded that the Intervenors failed to establish that the sound and shadow flicker from the Project amounts to a taking of Intervenors' property without just compensation. (AR-7 1513)

IV. The Circuit Court properly determined that Intervenors' claim of a *per se* nuisance is not ripe.

Intervenors speculate that the Commission's approval frustrates their ability to bring a nuisance claim, while, at the same time, repeating its factual disagreement with the Commission's establishment of sound and shadow flicker thresholds. Intervenors Br. at 22, n. 38; 25-33. As established in Section I, *infra*, Intervenors factual disagreements fail, because Commission's adoption of the sound and shadow flicker thresholds were well-reasoned and supported by substantial evidence and conditions. Furthermore, the Circuit Court correctly rejected Intervenors pontifications on *per se* nuisance law as not bring a ripe controversy. (AR-7 1513) Like Intervenors' vaguely presented taking claim, Intervenors' speculative claim of nuisance is insufficient to create a ripe controversy, and, therefore, it is not properly before this Court. *See Muscarello v. Ogle County Bd. of Commissioners*, 610 F.3d 416, 425 (7th Cir. 2010) (holding action for nuisance was not ripe where there had been no construction of the wind turbines; "the windmills have not been built yet, and so it is difficult to see how they might either by causing a trespass on Muscarello's land or creating a nuisance. . . . We cannot see how the permit, unexercised, causes trespass or

nuisance. . . .") *see also Winnebago County*, 702 F.3d at 915. In addition to the instructiveness of these federal cases, in South Dakota it is well settled that:

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

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

Furthermore, as explained above, the Commission is not a court, and, therefore, its Order is not implicated by Intervenors' vague claim of *per se* nuisance, as it is not the role of the Commission to adjudicate such claims. Similar to Intervenors' taking vague assertion, analogous arguments of *per se* nuisance were rejected in an appeal of the Deuel County and Codington County approvals of Crowned Ridge II. *Lindgren v. Codington County*, 14CIV1-000303, Order Granting Motion to Dismiss and Granting Motion for Costs, J. Means (SD 3rd Cir. Dec. 20, 2019); affirmed by Order Directing Issuance of Judgement of Affirmance, (SD June 1, 2020); *In the Matter of Specific Exception Permit Application of Crowned Ridge II*, LLC, 19 CIV18-000061, J. Elshere (SD 3rd Cir.

May 19, 2020). Similarly, the Circuit Court's affirmation of the Commission's Order should be upheld, because the Order does not constitute a *per se* nuisance.

CONCLUSION

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

Respectfully submitted this 9th day of July 2021.

/s/ Miles F. Schumacher
Miles F. Schumacher
Lynn, Jackson, Shultz & Lebrun, P.C.
110 N. Minnesota Ave., Suite 400
Sioux Falls, SD 57104
Office 605-332-5999
mschumacher@lynnjackson.com

Brian J. Murphy
Managing Attorney
NextEra Energy Resources, LLC
700 Universe Boulevard
Juno Beach, Florida 33408
Brian.J.Murphy@nee.com
Office (561) 694-3814
Admitted *Pro Hac Vice*

Attorneys for Crowned Ridge Wind II, LLC

CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A66(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, Appellee Crowned Ridge Wind II, LLC's Brief contains 7,179 words as counted by Microsoft Word.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Miles F. Schumacher
Miles F. Schumacher

CERTIFICATE OF SERVICE

Miles F. Schumacher, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 9th day of July 2021, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

Amanda M. Reiss
Special Assistant Attorney General
South Dakota Public Utilities Commission
Amanda.reiss@state.sd.us

Kristen N. Edwards
Special Assistant Attorney General
South Dakota Public Utilities Commission
Kristen.edwards@state.sd.us

A.J. Swanson
Arvid J. Swanson, P.C.
27452 482nd Ave.
Canton, SD 57013
aj@ajswanson.com
Attorney for Appellants

The undersigned further certifies that the original and two (2) copies of the foregoing in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Miles F. Schumacher
Miles F. Schumacher