IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

In the Matter of the Administrative Appeal of
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL and LARETTA KRANZ,

Appellants,

v.

CROWNED RIDGE WIND II, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,

Appellees.

#29610

19CIV20-000021

Appeal from the Circuit Court, Third Judicial Circuit
Deuel County, South Dakota
The Honorable Dawn Elshere

APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION'S BRIEF

Notice of Appeal was filed on April 6, 2021

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
E-mail: aj@ajswanson.com
ATTORNEY FOR APPELLANTS

Miles F. Schumacher
Michael F. Nadolski
LYNN JACKSON SHULTZ & LEBRUN, P.C.
110, Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
(605) 332-5999
mschumacher@lynnjackson.com
ATTORNEYS FOR APPELLEE
CROWNED RIDGE WIND II, LLC,

Amanda M. Reiss
Kristen N. Edwards
Special Assistant Attorneys General
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
(605) 773-3201
Amanda.reiss@state.sd.us
Kristen.edwards@state.sd.us
ATTORNEYS FOR SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION

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In the Matter of the Administrative Appeal of GARRY EHLEBRACT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL and LARETTA KRANZ v. CROWNED RIDGE WIND II, LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

PRELIMINARY STATEMENT

Throughout this brief, Appellants Garry Ehlebract, Steven Greber, Mary Greber, Richard Rall and Laretta Krantz are referred to collectively as "Appellants" or "Intervenors". Appellants' brief is cited as "AB" followed by the appropriate page number. The Appellee, Staff of the South Dakota Public Utilities Commission, is referred to as the "Commission Staff". Appellee, Crowned Ridge Wind II, LLC, is referred to as "Crowned Ridge Wind II." The Public Utilities Commission is referred to as "Commission."

JURISDICTIONAL STATEMENT

Appellants appeal the Circuit Court's Order dated March 12, 2021 affirming the April 6, 2020 Final Decision and Order Granting Permit to Construct Facility (Permit) of the Public Utilities Commission issued in Docket EL19-027. This Court has jurisdiction pursuant to SDCL § 15-26A-3 and SDCL § 1-26-37.

STATEMENT OF ISSUES AND AUTHORITIES

A. WHETHER THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S ORDER TO GRANT A PERMIT TO CROWNED RIDGE II WITHOUT FIRST PROMULGATING RULES REGARDING MINIMAL ADVERSE EFFECTS

The Circuit Court did not err in affirming the Commission's decision to grant a permit to Crowned Ridge Wind II without first promulgating rules regarding minimal adverse effects nor in determining there was no equal protection violation. There is no legal requirement that the Commission promulgate rules regarding what constitutes "minimal adverse effects" and Intervenors failed to establish an equal protection violation.

SDCL chapter 1-26
SDCL § 49-41B-1
SDCL §§ 49-1-11
SDCL § 49-41B-22
SDCL §§ 49-41B-11 through 49-41-25
SDCL § 49-41B-35
Cheyenne River Sioux Tribe Tel. Auth. V. PUC, 595 N.W. 2d 604, 612-614 (S.D. 1999).
In re Groseth Int'l, Inc., 442 N.W. 2d 229 (S.D. 1989).
Interstate Telephone Co-Op, Inc. v. Public Utilities Commission, 518 N.W.2d 749, 753 (S.D. 1994).
Smith v. Canton School Dist. No. 41-1, 599 N.W.2d 637 (S.D. 1999).

B. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING APPELLANT'S SDCL 43-13-2(8) CLAIM REGARDING EASEMENTS AND SERVITUDES IS OUTSIDE ITS JURISDICTION IN AN ADMINISTRATIVE APPEAL

The Circuit Court did not err in concluding Appellant's SDCL § 43-13-2(8) claim was outside the jurisdiction of the administrative appeal. The Commission is not a court of

general jurisdiction and its ability to make decisions is limited to the authority conferred by the Legislature.

SDCL § 43-13-2(8)
Boever v. S.D. Board of Accountancy, 561 N.W.2d 309, 312 (S.D. 1997).

Northwestern Bell Tel. Co. v. Chicago & N.W. Transp., 245 N.W.2d 639, 641 (S.D. 1976).

C. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING APPELLANT'S PER SE NUISANCE CLAIM IS NOT RIPE FOR CONTROVERSY.

The Circuit Court did not err in concluding Appellant's per se nuisance claim is not ripe for controversy.

Boever v. State of South Dakota Board of Accountancy, 526 N.W.2d 747 (S.D. 1995).
Lindgren v. Codington County, 14CIV1-000303 (SD 3rd Cir. Dec. 20, 2019).

D. WHETHER THE CIRCUIT COURT ERRED IN DETERMINING APPELLANTS FAILED TO ESTABLISH THAT THE PERMIT CONSTITUTED A TAKING UNDER SOUTH DAKOTA LAW

The Circuit Court did not err in determining Appellants failed to establish that the permit constituted a taking as Appellant's failed to cite applicable legal authority to support such a claim.

Benson v. State, 710 N.W.2d 131, 149 (SD 2006).
Kostel v. Schwartz, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363 at 377.
Krier v. Dell Rapids Tp., 709 N.W.2d 841, 847 (S.D. 2006).
Penn Central Trans. Co v. New York City, 438 U.S. 104, 125 (1978).

STATEMENT OF THE CASE AND FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC, a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC filed with the Commission an application for a

permit for an up to 301 megawatt (MW) wind energy facility (Project) in Grant, Deuel, and Codington counties, South Dakota. The Project will consist of up to 132 wind turbine generators. (AR 14230-14258, Final Decision and Order Granting Permit to Construct Facility, Permit Conditions, Notice of Entry (Permit)).

South Dakota law requires wind energy facilities with a nameplate capacity of 100 MWs or more obtain a permit from the Commission prior to construction. (See SDCL § 49-41B-2(7), (12) and SDCL § 49-41B-4). Pursuant to SDCL § 49-41B-17, Staff is a party to the proceeding. SDCL § 49-41B-17 permits certain individuals and entities to participate as parties in the proceeding. When the parties to the proceeding are unable to reach a full settlement between all parties, the Commission treats the matter as a contested case proceeding pursuant to SDCL Chapter 1-26 and holds an evidentiary hearing. (See SDCL § 49-41B-17.2).

With its Application filed on July 9, 2019, Crowned Ridge Wind II submitted written testimony of five witnesses. (AR 1-1118). On July 11, 2019, the Commission issued public notice of the application and the public input meeting and established an intervention deadline of September 9, 2019. (AR 1122-1123). The Commission held the public input meeting on August 26, 2019 in Watertown, South Dakota. (AR 1274-1477). The Commission received applications for party status from nine individuals prior to the intervention deadline and the Commission granted party status to each of the nine individuals, including Appellants. (AR 1124-1126, 1193-1194, 1197-1214, and 1478). The Commission established a procedural schedule on September 20, 2019. (AR 3227-3228).

On August 6, 2019, Crowned Ridge Wind II filed a request to redact pages 3-6 of the application for party status filed on August 6, 2019 on behalf of Garry Ehlebracht Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz. (AR 1215-1219). On September 9, 2019, Crowned Ridge Wind II filed a revised request for confidential treatment of Section 11.10 of an easement as found in the August 6, 2019, Application for Party Status. (AR 1925-1933). The Commission held a hearing on this matter on September 17, 2019 and denied Crowned Ridge Wind II's request for confidential treatment of Section 11.10 of the easement. (AR 1972-2006 and 3224-3226).

On September 20, 2019, Crowned Ridge Wind II filed Supplemental Testimonies and Exhibits. (AR 2007-3223). On October 21, 2019, Crowned Ridge Wind II Filed Corrected Direct Testimony of witness Sarah Sappington. (AR 3233-3254). On December 9, 2019, Staff filed Pre-filed Direct Testimony of five witnesses. (AR 3356-4250). On December 12, 2019, Amy Rall, Laretta Kranz, Garry Ehlebract and Steven Greber each filed Pre-filed Direct Testimony in the form of Affidavits. (AR 4251-4264). On January 8, 2020, Crowned Ridge Wind II filed Rebuttal Testimonies of seven witnesses with corrections filed on January 22, 2020, and January 24, 2020. (AR 4267-4338). On January 23, 2020, Staff filed Pre-filed Supplemental Testimony of David Lawrence. (AR 7054-7079).

The Commission held an evidentiary hearing on February 4, 5, and 6, 2020, in Pierre, South Dakota. (AR 8844-13781). Crowned Ridge Wind II, Staff and Intervenors participated in the evidentiary hearing, presenting testimony and cross-examining witnesses. (AR 8844-13781). Intervenors presented witness testimony. The Hearing

Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing.

On March 2, 2020, the Parties filed Post-Hearing Briefs. (AR 13878-13919 (Crowned Ridge Wind II), 13934-13969 (Mogen, Robish, Christenson), 13920-13933 (Staff), 13977-13981 (Appellants)). On March 17, 2020, the Commission met to consider whether to issue a facility permit for the Project. (AR 13984-14079). At the meeting, the Commission voted unanimously to issue a permit for the Project, subject to 49 conditions. (AR 13994-14079).

On April 6, 2020, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; Notice of Entry. (AR 14230-14258). The Permit includes 49 conditions, including conditions limiting permissible sound levels and levels of shadow flicker at residences in the vicinity of the Project. (AR 14246-14258). Specifically, Permit Condition 26 limits sound levels emitted from the Project to 45 dBA for non-participating residence and 50 dBA for participating residences, as measured within 25 feet of a residence, with an allowance for a landowner to waive the condition. (AR 14251). Permit Condition 35 restricts Shadow Flicker at residences to 30 hours per year, with an allowance for an owner to waive the condition. (AR 14255).

On April 29, 2020, Appellants served Notice of Appeal of the Permit. On May 19, 2020, this Appeal was consolidated with an additional appeal pursuant to SDCL § 1-26-31.1. On February 26, 2021, the Circuit Court issued a Memorandum opinion and on March 12, 2021, issued its Order Affirming the Commission's Decision. Specifically, the Circuit Court determined that regarding "minimal adverse effects," the law requires the Commission to defer to local county ordinances and so the Commission did not err in

granting the Permit; that the SDCL § 43-13-2(8) is outside of the Commission's jurisdiction and outside of the Circuit Court's role in a procedural appeal; and that Appellants have not established that noise and shadow flicker is a taking under South Dakota Law and the per se nuisance claim is not ripe for controversy.

STANDARD OF REVIEW

An agency's conclusions of law are reviewed de novo. *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594at 602. "[Q]uestions of law, including statutory interpretation, are reviewed de novo." *Pesall v. Montana Dakota Util. Co., et al*., 2015 S.D. 81, ¶ 6, 871 N.W.2d 649. Mixed questions of law and fact may be reviewed under either standard, depending upon whether the agency's analysis is predominantly factual or legal. *In re Dorsey & Whitney Tr. Co. LLC*, 2001 S.D. 35, ¶ 5, 623 N.W.2d 468, 471 (noting that when reviewing mixed questions of law and fact, "courts apply the clearly erroneous standard if the 'analysis is essentially factual, and thus is better decided by the agency or lower court …,' and the de novo standard when the 'resolution requires consideration of underlying principles behind a rule of law.'").

The Commission's "findings of fact are reviewed under the clearly erroneous standard .. . . A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594 at 602 (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29). The Court is to give great weight to findings and inferences of an agency on factual questions. *Id*. "Factual findings can be overturned only if we find them to be

'clearly erroneous' after considering all the evidence. *Permann v. South Dakota Dept. of Labor*, 411 N.W.2d 113, 117 (S.D. 1987).

ARGUMENT

A. The Circuit Court did not err because the Commission is not required to promulgate rules regarding what constitutes "minimal adverse effects."

Intervenors' Brief alleges that the Commission imposed an arbitrary and capricious limit on permissible sound and shadow flicker limits on residences near the Crowned Ridge Wind II Project because the Commission did not promulgate rules establishing what constitutes "minimal adverse effects" referenced in SDCL § 49-41B-1. Intervenors further allege that this results in an equal protection violation because the Commission imposed lower limits in a previous permit for a wind energy facility, Prevailing Wind Park.

There is no requirement under SDCL § 49-41B-35, or any other statute, that the Commission promulgate rules regarding what constitutes "minimal adverse effects" as contemplated by Intervenors. While SDCL §§ 49-1-11 and 49-41B-35 do grant some rulemaking authority to the Commission, these statutes use the term "may," conferring a permissive rulemaking authority. "Ordinarily, the word "may" in a statute is given a permissive or discretionary meaning. It is not obligatory or mandatory as is the word "shall."" *In re Groseth Int'l, Inc.,* 442 N.W. 2d 229 (S.D. 1989). Because these statutes do not include a requirement that the Commission shall promulgate rules regarding what constitutes "minimal adverse effects," the Commission did not commit error when it proceeded to review the Crowned Ridge Wind II application on an ad hoc basis.

Contrary to Intervenor's claims, the Commission's use of an ad hoc contested case proceeding and the resulting decision to impose different sound and shadow flicker conditions in Crowned Ridge Wind II than was imposed in a previous matter, the Prevailing Wind Park docket did not result in a violation of equal protection. The equal protection clause does not entirely prohibit a state action from having an inconsistent effect on residents.

The Court has a long-established test to identify whether an equal protection violation has occurred:

> "[W]hen a statute has been called into question because of an alleged denial of equal protection of the laws," we employ our traditional two-part test. *Accounts Management,* 484 N.W.2d at 299–300. First, we determine whether the statute creates arbitrary classifications among citizens. *City of Aberdeen v. Meidinger,* 89 S.D. 412, 233 N.W.2d 331, 333 (1975). Second, if the classification does not involve a fundamental right or suspect group, we determine whether a rational relationship exists between a legitimate legislative purpose and the classifications created. *Accounts Management,* 484 N.W.2d at 300.
>
> *In re Davis*, 2004 SD 70, ¶ 5, 681 N.W.2d 452, 454 (citations and internal quotations omitted)

In this case, Intervenors fail to show that non-participants in the Crowned Ridge Wind II matter are a protected class under the Equal Protection Act, so the correct test to apply is whether there is a rational basis for applying the law in such a manner that produced a different result. Chey*enne River Sioux Tribe Tel. Auth. V. PUC*, 595 N.W. 2d 604, 612-614 (S.D. 1999).

Intervenors' argument relies heavily on *Smith v. Canton School Dist. No. 41-1*, which ruled that a decision is arbitrary and capricious if there is no standard, or if the

decision-making body failed to apply or disregarded an established standard. *Canton*, 599 N.W.2d 637 (S.D. 1999). *Canton* is not instructive here. In *Canton*, the Court had previously established specific factors for the school board to consider in making boundary determinations. Those factors were not considered by the school board in *Canton*, and the Court ruled the decision arbitrary.

Since *Canton*, this Court has held that "[a]n arbitrary or capricious decision is one that `is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.'" *Hicks v. Gayville-Volin Sch. Dist.*, 2003 S.D. 92, ¶ 11, 668 N.W.2d 69, 73 (*quoting Coyote Flats, L.L.C. v. Sanborn Cnty. Comm'n*, 1999 S.D. 87, ¶ 14, 596 N.W.2d 347, 351). "An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Id.*

In this case, state statute specifically established a procedure and standard with specific factors for the Commission to consider when processing an application for a wind energy permit. SDCL §§ 49-41B-11 through 49-41-25 establishes basic information to be included in the application; a filing fee for the Commission to offset the cost to investigate, review, process, and serve notice of the application; a procedure for the Commission to follow including notifying local governing bodies and scheduling and providing notice for a public input meeting; permitting interested entities to request to be parties to the case; establishing that a party to the proceeding is entitled to a contested case hearing pursuant to SDCL Chapter 1-26; and a requirement that the Commission receive evidence from state and local agencies related to projected changes in environment, social, and economic conditions. The Commission followed that procedure,

held an evidentiary hearing with significant evidence presented regarding noise and shadow flicker limits, and the Commission made a finding of fact that Crowned Ridge Wind II met its burden and the Permit should be granted with specific limitations on the amount of sound and shadow flicker at surrounding residences. Despite Intervenors' claims, no evidence has been shown that the Commission's decision was based on a lack of relevant or competent evidence.

Furthermore, the Court has held that "administrative agencies are not bound by stare decisis as it applies to previous agency decisions." *Interstate Telephone Co-Op, Inc. v. Public Utilities Commission*, 518 N.W.2d 749, 753 (S.D. 1994) (citing *City of Alma v. United States,* 744 F.Supp. 1546, 1561 (S.D.Ga.1990) ("An agency is not forever bound by its prior determinations, as its view of what is in the public interest may change, even if the circumstances do not.")). A change in public interest is particularly evident in this matter because in 2019, between the Prevailing Wind Park and Crowned Ridge Wind II dockets Intervenors referenced, the Legislature amended SDCL § 49-41B-22(2) and (4) to specify that a facility holding a conditional use permit from the applicable locality is in compliance with the subdivisions requiring an applicant prove the facility will not pose a threat to the social and economic conditions of the inhabitants and will not interfere with the orderly development of the region. This shift in law places a significant deference on county determinations and not on past decisions by the Commission. Neither the Prevailing Wind Park decision nor any other past Commission decision establish binding precedent regarding the appropriate levels of sound and shadow flicker on residences near a wind farm. Rather, the Commission considers the evidence before it in each individual docket and makes an informed decision based on the evidence before it.

Therefore, the outcome of the previous decision does not mandate a mirror outcome in this case.

Although Crowned Ridge Wind II and Prevailing Wind Park may have resulted in slightly different sound and shadow flicker conditions imposed in their respective permits, the Commission followed the well-established statutory procedure and applied the statutory standards, and relied on ample evidence to support the conditions imposed. As a result, the decision was not arbitrary and capricious, nor an equal protection violation. The Commission's decision was a finding of fact, based on the substantial record as a whole and should be given deference and the permit affirmed.

B. The Circuit Court did not err in concluding Appellants' SDCL § 43-13-2(8) claim regarding easements and servitudes is outside its jurisdiction in an administrative appeal.

The Commission is a body of limited jurisdiction, holding only the authority conferred by the Legislature, so the Commission was correct in not applying SDCL § 43-13-2. An agency may only act, or promulgate rules, when a Legislative delegation includes "(1) a clearly expressed legislative will to delegate power, and (2) a sufficient guide or standard to guide the agency." *Boever v. S.D. Board of* Accountancy, 561 N.W.2d 309, 312 (S.D. 1997) (citing Application *No. 5189-3,* 467 N.W.2d at 913 (citing *First Nat'l Bank of Minneapolis,* 394 N.W.2d at 718; *In re Ackerson, Karlen & Schmitt,* 335 N.W.2d 342, 345 (S.D.1983)). The Commission is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines.

Northwestern Bell Tel. Co. v. Chicago & N.W. Transp., 245 N.W.2d 639, 641 (S.D. 1976).

While the Legislature has delegated the Commission the authority to process and oversee permits for large wind energy facilities generating more than 99 MW, there is no statutory provision that instructs or even permits the Commission to adjudicate and interpret laws falling outside of the Commission's authority. Because the Legislature has not granted the Commission this authority, the Commission was correct in declining to rule on this matter and the Circuit Court's ruling should be affirmed.

C. The Circuit Court did not err in concluding Intervenors' *per se* nuisance claim was not ripe for controversy.

Boever v South Dakota Board of Accountancy instructs that the court should not waste resources on abstract, hypothetical or remote potential controversies. *Boever v. State of South Dakota Board of Accountancy*, 526 N.W.2d 747 (S.D. 1995). When this case was contemplated by the Circuit Court, Intervenors' *per se* nuisance claim was based entirely on sound and shadow-flicker models for a project that was not yet in service. As described to the Commission, the models presented a conservative scenario of potential noise and shadow flicker possible at specific locations in the proposed project area. (AR 10303-10315). As testified, the models use numerous conservative inputs that show the maximum levels of shadow flicker and sound expected at receptors. (AR 10303-10315). However, the actual sound and shadow flicker levels that would be experienced by Intervenors were merely conjecture or

speculation. Any nuisance claim must present evidence of actual, not potential, impact. The court recognized this in *Lindgren v. Codington County*, and rejected similar arguments made regarding takings and nuisance claims. See *Lindgren*, 14CIV1-000303 (SD 3rd Cir. Dec. 20, 2019). Since Intervenors failed to make such a showing, the Circuit Court did not err in concluding that Intervenors' *per se* nuisance claim was not ripe.

D. The Circuit Court properly determined that the Permit was not a taking under South Dakota Law.

In the appeal before the Circuit Court, Intervenors provided no legal authority nor submitted sufficient evidence for the court to determine a taking or a *per se* nuisance had occurred. *Kostel v. Schwartz* requires legal claims include authority, or the claim is waived. *Kostel*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363 at 377. "The court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences[,] and sweeping legal conclusions cast in the form of factual allegations." *Mordhorst v. Dakota Truck Underwriters*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 323.

Intervenors' claim fails to assert how noise and shadow flicker emitted onto another's property meets the established test to show a taking has occurred. *Benson v. State* concisely explains the four theories available to show a taking:

> plaintiff must allege either 1) a *per se* regulatory physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), "where government requires an owner to suffer a permanent physical invasion of her property"; 2) a *per se* total regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), that deprives an owner of "*all* economically beneficial uses of the property"; 3) a

> regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), when a temporary or partial taking is alleged; or 4) a land-use exaction violating the standards as set forth in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). *Lingle,* 544 U.S. at 125 S.Ct. at 2081-82, 2086-87, 161 L.Ed.2d 876.
>
> *Benson*, 710 N.W.2d 131, 149 (SD 2006).

The facts asserted by Intervenors fail to show 1) any physical invasion of property; 2) that Intervenors have been deprived of "all economically beneficial uses of the property"; or 4) that the state has in any way restricted how Intervenors may use their own property. It is a settled standard that determining whether a regulatory taking has occurred is dependent on the circumstances of each case. *Penn Central Trans. Co v. New York* City, 438 U.S. 104, 125 (1978). "Not every destruction or injury to private property by governmental regulation will be a taking within the meaning of the Fifth Amendment." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-510, 43 S.Ct. 437, 438, 67 L.Ed. 773 (1923).

Intervenors further claim the consequential damages rule supports a ruling that a taking occurred based on sound and shadow flicker at Intervenors' residences but misinterprets the rule when taken as a whole. (Appellant Brief 23).

> Under the taking and damaging clause of our constitution and the condemnation statute referred to, it is a basic rule of this jurisdiction governing compensation for consequential damages that where no part of an owner's land is taken but because of the taking and use of other property so located as to cause damage to an owner's land, such damage is compensable if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole.

> *Krier v. Dell Rapids Tp.*, 709 N.W.2d 841, 847 (S.D. 2006)
> *citing State Highway Commission v. Bloom*, 77 S.D. 452,
> 93 N.W.2d 572 (1958).

In the same case, *Krier* specified "[t]he injury to the plaintiff "must be different in kind and not merely in degree from that experienced by the general public." *Id* at 848 (quoting *Hurley v. State*, 82 S.D. 156 at 162, 143 N.W.2d at 726 (citing *Hendrickson v. State*, 267 Minn. 436, 127 N.W.2d 165 (1964)). A large portion of Intervenors' arguments rest on the different sound and shadow flicker limits imposed in a previous docket and on the different levels between participants and non-participants, but Intervenors have failed to show a separate and distinct injury to themselves. Following *Krier*, the consequential damages rule is not applicable in this matter.

Even if *in arguendo,* a taking occurred, the Permit granted to Crowned Ridge Wind II is not, as argued by Intervenors, the "*sole instrument"* affording adverse use. (Ehlebracht Brief, at. 28). When reviewing a regulatory taking, the court must examine the character of the government action to determine whether that action is the cause-in-fact of the harm. *Benson v. State*, 710 N.W.2d 131, 153 (SD 2006) (citing *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003)). *Griggs v. County of Allegheny* applied this test to determine the Civil Aeronautics Administration (CAA) could not be held responsible for a taking merely because the CAA established standards for airstrips and clearance for takeoff and landing strips, instead the entity selecting the site and securing the properties to construct the runway was responsible. *Griggs*, 369 U.S. 84 (1962). This rule was further recognized in *Harms v. City of Sibley* when the Iowa Supreme Court determined the county was not responsible for a taking after property

damage occurred following rezoning of an area from light industrial to heavy industrial, instead the industrial entity that chose to operate within that zone was the responsible party. *Harms*, 702 N.W.2d 91 (Iowa 2005). Under guidance from these cases, it is clear the Commission's granting of a permit is merely incidental to, and not cause-in-fact of any noise and shadow flicker emitted onto Intervenors' property

Based on the instructive cases mentioned, it is clear the Circuit Court was correct in ruling the Intervenors failed to establish that the Permit issued by the Commission constitutes a taking and the decision should be affirmed.

VI. CONCLUSION

Based on the foregoing, Commission Staff respectfully requests the Court affirm the Circuit Court's Order Affirming Decision of South Dakota Public Utilities Commission.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellee PUC Staff's Response Brief complies with the requirements set forth in South Dakota Codified Laws, being 17 pages in length. This Brief was prepared using Microsoft Word, Times New Roman (12 point), and contains 3,928 words and 20,806 characters (no space) and 24,790 characters (with space), excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: July 9, 2021 /s/ Amanda M. Reiss

CERTIFICATE OF SERVICE

I, Amanda M. Reiss, attorney for the Appellee South Dakota Public Utilities Commission, hereby certify that on the 9th day of July, I served the forgoing document via email upon the following:

Mr. Miles Shumacher
Lynn, Jackson, Shultz and Lebrun, PC
110 N. Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
mschumacher@lynnjackson.com
(605)332-5999

Mr. Brian J. Murphy
NextEra Energy Resources, LLC
700 Universe Blvd.
Juno Beach, Fl 33408
Brian.J.Murphy@nee.com
(561) 694-3814

Ms. Dana Van Beck Palmer
Lynn, Jackson, Shultz and Lebrun, PC
110 N. Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
dpalmer@lynnjackson.com
(605) 332-5999

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

I further certify that the signed original and two (2) copies of the foregoing in the above-entitled action were hand-delivered to Clerk of South Dakota Supreme Court, 500 E. Capitol Ave., Pierre, SD 57501, as well as filing by electronic service in portable document format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

All such service being accomplished the date entered below:

Date: July 9, 2021

/s/ Amanda M. Reiss
Amanda M. Reiss (#4212)
Special Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Ph. (605) 773-3201
Amanda.reiss@state.sd.us