IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 29615

AMBER K. CHRISTENSON, and
ALLEN ROBISH,

Appellants,

vs.

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

Appellees.

APPEAL FROM THE CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

DEUEL COUNTY, SOUTH DAKOTA

HON. DAWN ELSHERE

Circuit Court Judge

APPELLANTS' BRIEF

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NOTICE OF APPEAL FILED APRIL 12, 2021

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PRELIMINARY STATEMENT

For ease of reference, Appellants, Amber K. Christenson and Allen Robish, will typically be referred to as either the "Appellants", or, "Grant-Codington Co. Appellants." Appellees in this matter will be referred to as either "PUC Appellee", or as the "Commission", or as the "PUC"; or, as to Crowned Ridge Wind-II, as "CRW-II", or, as "Appellee CRW-II." References herein to the extensive administrative hearing/settled record (over 15,450 pages) herein will be made by the letters "AR" followed by the applicable administrative record page number(s), where such are able to be so noted.

References to any administrative hearing transcript(s) below will typically be made by either "AR" or the letters "AHT:" followed by the applicable page number(s). References to the Transcript of the trial court's hearing on appeal as transpired in the Deuel County Courthouse on November 23, 2020, will be referenced, if and or when perhaps necessary, by reference to "Circuit Ct-Tr:" followed by the applicable page number(s), where necessary.

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

As referenced herein, Appellants Christenson and Robish, as Intervenors below, appeal from PUC Appellee's April 6, 2020, Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; and Notice of Entry as related to its issuance of a wind energy facility permit to Appellee CRW-II. Based on the adverse administrative hearing decision below, the appeal in this matter is taken pursuant to the provisions of SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants each timely and properly filed their respective Notice of Appeals on May 1, 2020 and May 5, 2020, in both Codington and Grant Counties. Thereafter, following PUC Appellee's unopposed motion to change venue (May 11, 2020), the circuit court, pursuant to SDCL § 1-26-31.1, entered its Order changing venue herein (May 19, 2020), and this Court ordered that the Intervenors file(s) would be thereafter combined into this appellate file, 19CIV-000027 (as thereafter filed below by and through the Deuel County Clerk of Court's Office.).

Following briefing and argument(s) by the parties, the circuit court ultimately entered its Memorandum Opinion (February 26, 2021) and corresponding Order affirming Appellee PUC's final decision and indicated that it sought to affirm Appellee PUC's Order Granting Permit to Construct Facility. *See*, Appendix A. In affirming the

PUC's decision, the lower court below did not enter its own findings of fact and/or conclusions of law. Following the circuit court's Order and Notice of Entry, on April 12, 2021, pursuant to SDCL 1-26-37, Appellants timely filed their Notice of Appeal and Docketing Statement herein. As a result, the appeal herein is taken pursuant to Appellants statutory right to appeal pursuant to the provisions of SDCL § 15-26A-3.

STATEMENT OF LEGAL ISSUES

ISSUE 1

THE CIRCUIT COURT'S DECISION BELOW AMOUNTED TO REVERSIBLE ERROR BASED ON THE PROVISIONS OF SDCL § 1-26-36, IN PART, SINCE APPELLEE CRW-II FAILED TO MEET ITS BURDEN OF PROOF AND/OR ITS BURDEN OF GOING FORWARD AS REQUIRED BY SDCL § 49-41B-22 AND/OR ARSD 20:10:01:15.01 BEFORE APPELLEE PUC.

The Circuit Court, Judge Elshere, ruled against Appellants. *See,* Appendix C.

SDCL § 1-26-36;
SDCL § 49-41B-22;
In re Otter Tail Power Co. ex rel. Big Stone II, 2008 S.D. 5, 744 NW2d 594;
In re Conditional Use Permit Granted to Van Zanten, 1999 S.D. 79, 598 NW2d 861.

ISSUE 2

THE CIRCUIT COURT COMMITTTED PREJUDICIAL AND REVERSIBLE ERROR OF LAW BY APPROVING APPELLEE PUC'S FAILURE TO REQUIRE APPELLEE CRW-II TO PROVIDE SUBSTANTIAL EVIDENCE IN ITS APPLICATION IN ORDER TO MEEET THE REQUIREMENTS OF SOUTH DAKOTA LAW, PURSUANT TO SDCL § 49-41B-22 (3), INCLUDING THE SUBMISSION FOR REVIEW OF A PRE-CONSTRUCTION SOUND OR HEALTH STUDY IN EACH (OR ANY) OF THE NEGATIVELY IMPACTED COUNTIES.

The Circuit Court, Judge Elshere, ruled against Appellants. *See,* Appendix C.

SDCL 1-26-36;
Dail v. South Dakota Real Estate Commission, 257 NW2d 709 (S.D. 1977).

STATEMENT OF THE FACTS

Crowned Ridge Wind-II, LLC, as a wholly owned indirect subsidiary of NextEra Energy Resources, LLC, filed its Application with the Commission on July 9, 2019, for a

Wind Facility Permit for a wind energy conversion facility to be located in in Codington, Grant and Deuel Counties. *See*, AR pgs. 000001, 000011. The proposed Application indicated that the Project was to include up to 132 wind turbine generators, access roads to turbines and associated facilities, underground 34.5-kilovolt (kV) electrical collector lines, underground fiber-optic cable, a 34.5-kV to 230-kV collection substation, two permanent meteorological towers, and an operations and maintenance facility. As set forth within the Appellee CRW-II's Application, Crowned Ridge Wind-II entered into a purchase and sale agreement under which it planned to obtain the permit herein and construct the Project and later transfer the Project, along with its facility permits to Northern States Power Company. AR pgs. 000011. Pursuant to state statute then, the Commission was required to issue a written decision within only nine (9) months of receiving Appellee CRW-II's Application.

After receipt of the Application, the Commission received several applications for party status. As applicable herein, party status was thereafter granted for Amber Christenson and Allen Robish, as Intervenors/Appellants herein, at the Commission's regularly scheduled meeting on July 25, 2019. Appellant, Allen Robish, has been a taxpaying property owner and resided on his rural Strandburg, South Dakota property in Grant County since 1981. Appellant, Amber Christenson, has been a taxpaying property owner and resided on her rural Strandburg, South Dakota property (in Codington County) directly located on the border of Grant County since 1994. In addition and thereafter, on August 21, 2019, Intervenor status was also granted to at least five (5) additional persons, Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall and Laretta

Kranz, all having been (and still) being represented by attorney A.J. Swanson, at the Commission's regularly scheduled meeting.

Appellee PUC held a public input meeting on August 26, 2019, in Watertown, S.D. during which Appellee CRW-II was to present a brief description of the proposed wind energy facility project to those persons interested in the same and said persons would be permitted to present their views, comments and questions regarding the Application. The Commission also set the deadline for party status (i.e., intervention deadline) for September 9, 2019.

Thereafter, on September 17, 2019, during the PUC's regular meeting, Appellee PUC entered a procedural schedule requiring intervenors to submit pre-filed testimony by December 9, 2019, and indicating for the parties to provide witness lists, exhibit lists, and pre-filed by January 29, 2020. Following such scheduling, the administrative (evidentiary) hearing was scheduled for February 4-7, 2020. *See*, February 4th: AR pgs. 8844-9133; February 5th: AR pgs. 13309-13625; February 6th: AR pgs. 13630-13771. It was also within and as a part of its pre-hearing meeting (January 29, 2020) that the Commission denied the Motion by Appellee CRW-II attempting to make confidential Section 11.10, the effects clause of the lease(s) offered by the wind farm developer to potential project participants.

Early in the PUC's evidentiary hearing on February 4, 2020, the hearing parties agreed to the admission of all pre-filed and hearing-related exhibits for only foundation purposes. Appellee CRW-II then presented their witnesses and corresponding testimony for Applicant. As part of cross-examination of Applicant's initial witness, senior project manager Tyler Wilhelm, who was responsible for the development, permitting,

regulatory compliance, and meeting the commercial operations date of the project, Appellant Christenson presented and had admitted into the hearing exhibit AC-18, which was actually the Grant County ordinance in effect at the time the Grant County Conditional Use Permit Application was made and approved in 2018. *See*, AR pgs. 8727, 8796; *cf.*, AR pgs. 13074-13112. Ultimately, however, Wilhelm admitted that the project was actually "in compliance" with the different - but significantly less stringent - requirements that Grant County was "working toward adopting" in ordinance to be in effect on and after January 28, 2019 [i.e., for instance in Grant County, [w]ind turbine noise levels at the less stringent - inapplicable - ordinance requirements of less than 45 dBA "measured twenty-five (25) feet from the perimeter of existing non-participating residences, businesses and buildings..."[1]] AHT pgs. 46-55; AR pgs. 008891-008900.

It should be reiterated that Appellee CRW-II's project was to be built in and across three northeast South Dakota counties: Deuel, Codington and Grant. Ordinances vary between counties in distance and noise, in particular. Not only does each county vary in its siting distance and noise threshold, but within each county there were separate distances and thresholds for residents within each county, depending on where any such residence is located. In fact, equal protection was/is *not* applied to each principal and/or accessory structure(s) in the negatively impacted area of this project. Moreover, as borne out at hearing below, Appellee CRW-II failed to provide any evidence on and to include in its key sound study information related to 179 sound receptors (structure locations) in

[1] *See*, Appendix A-2-A-3 (Exhibit A19-3), [new] Grant County Ordinance Section 14: *Noise*. AR pgs. 3207-3215; as compared to Exhibit AC-18 at AR pg. 8796: "Noise level shall not exceed 50 dBA ... *at the perimeter of the principal and accessory structures* of existing off-site residences, businesses and buildings..." [Emphasis added.] *See/cf.*, Appendix A, for ease of comparison of the applicable (2018) Grant Co. noise/sound ordinance provision versus the inapplicable (2019) Grant Co. noise/sound ordinance provision, attached for key review as part of Appellants' Brief.

the adversely impacted area. That is, at the administrative hearing below, Jay Haley in attempting to provide evidence for Appellee CRW-II, testified therein as follows:

> Q: "[The CUP] was passed under the old [governing Grant County] ordinance. So who directed you to drop the accessory structures?
> A: I don't recall, but -- I can tell you that when -- at the time that the accessory structures were a part of the ordinance we calculated -- we went out and surveyed all of the accessory structures, and I calculated all of them and produced reports with those results. [However] [w]hen the ordinance got changed, I then took all the accessory structures back out." AHT pgs. 233-234; 237-238; AR pgs. 9078-9079; 9082-9083.

As a result, Appellants submit herein that, contrary to what the court below erroneously found factually, Appellee CRW-II failed to have the necessary information to support any such evidence nor to persuasively testify at hearing in February 2020 that the projected wind farm noise levels would not exceed the new 45 dBA local ordinance requirement. In fact, Exhibit AC-19 (AR pgs. 8686-8723, at pg. 8694 & pgs. 8705-8710) actually indicates that, directly contrary to Appellee PUC's Finding of Fact Nos. 18 & 46, there were and are, in fact, *over fifty* (*50*) locations/structures where the realistic sound would, as shown by and through Appellee CRW-II's own Final Report as to both CRW-I and CRW-II, fall into/exceed that locally prohibited 45-50 dBA range. *See also*, AR 14004; *cf.*, AR 13999-14000.[2]

[2] As part of final (telephonic) arguments before Appellee PUC on March 17, 2020, Appellee CRW-II attempted to obfuscate its shortcomings in regard to its legally deficient sound study "evidence" at hearing when it fallaciously claimed, through counsel, that "...the only potential cumulative impacts that may have not been studied are on accessory structures such as barns where accumulative [sic] impact studies are not required by any state or county regulation." Such statement was/is patently untrue since, as noted, Grant County's ordinance – as specifically governed and continues to govern CRW-II's approved CUP – required that the offensive and intrusive wind turbine noise levels "shall not exceed" 50 dBA "...at the perimeter of the principal

In addition, as part of Appellee PUC's (prior) evidentiary hearing, despite knowing that such a facility, pursuant to state statute, can "not substantially impair the health, safety or welfare of [neighboring occupants]" – Applicant, Appellee CRW-II, presented proposed experts who were capable of conducting air quality studies, yet its witnesses seemingly acknowledged that no air quality study was published or submitted, nor, as it was disclosed, did Appellee CRW-II provide plans to complete an air quality study of the project area. AHT pgs. 313-314; AR pgs. 13373-13374.[3]

Given the extensive length of the underlying record in this matter, any additional relevant facts/evidence - as may be mixed with legal issues herein - will be discussed, as may otherwise be necessary, within Appellants' argument portion of its brief herein.

ARGUMENT(S)

1.) *THE CIRCUIT COURT'S DECISION BELOW AMOUNTED TO REVERSIBLE ERROR BASED ON THE PROVISIONS OF SDCL § 1-26-36, IN PART, SINCE APPELLEE CRW-II FAILED TO MEET ITS BURDEN OF PROOF AND/OR ITS BURDEN OF GOING FORWARD AS REQUIRED BY SDCL § 49-41B-22 AND/OR ARSD 20:10:01:15.01 BEFORE APPELLEE PUC.*

-STANDARD OF REVIEW-

AND accessory structures of existing off-site residences, businesses..." [Emphasis added.] *See*, Appendix A-A-1; *cf.*, FN. 3, *supra.*

[3] *See*, Applicant's witness Rich Lampeter was asked by Appellant Christenson: "Q: Did Crowned Ridge Wind II ask you to perform a preconstruction sound modeling study? A: Yes. That study was conducted and they requested it. Q: And that's the study you were talking about that's not been published or submitted? A: That's correct. We went and collected the data and *put together some draft summary findings*, and that's where it currently stands. ... Q: Did Crowned Ridge Wind II ask you to perform any studies or modeling regarding low frequency noise or infrasound. A: *No*. Q: According to your resume, you have experience in air quality modeling. Did Crowned Ridge Wind II ask you to perform any air quality study or model for this project? A: *No*." [2/5/2020, AHT, page 314]; *see also*, ARSD 20:10:22:21: The applicant *shall provide evidence* that the proposed facility will comply with air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted. [Emphasis added.]

This Court's review of the Appellee PUC's decision granting Applicant/Appellee CRW-II's application for a wind energy facility is, of course, controlled by SDCL § 1-26-36. *Tebben v. Gil Haugen Const., Inc.,* 2007 SD 18, ¶ 5, 729 NW2d 166, 171. SDCL § 1-26-36, in turn, provides, in pertinent part, as follows:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. ...

As such, the Commission's factual findings are, of course, to be reviewed herein under the clearly erroneous standard. *In re Otter Tail Power Co., ex. rel. Big Stone II,* 2008 SD 5, ¶ 26, 744 NW2d 594, 602. As applicable herein, the reviewing court's function is to determine whether there was any substantial evidence in support of the agency's conclusion or finding below. *Dail v. South Dakota Real Estate Commission,* 257 NW2d 709, 712-713 (S.D. 1977); SDCL § 1-26-1(9). Conclusions of law, however, are to be reviewed based on a de novo standard. *Big Stone II,* 2008 SD at ¶ 26, 744 NW2d at 602. In addition, it is also well-established that that, "this Court's review of the administrative agency's decision is unaided by any presumption that the circuit court's review of the [PUC's] decision was correct." *Dakota Truck Underwriters v. S.D. Subsequent Inury Fund,* 2004 S.D. 120, ¶ 15, 689 NW2d 196, 201; *Interstate Tel. Co-op., Inc. v. PUC,* 518

NW2d 749, 751. Finally, as the Court is also aware, mixed questions of law and fact are fully reviewable. *Kuhle v. Lecy Chiropractic,* 2006 SD 16, ¶ 16, 711 NW2d 244, 247.

A.) Appellee PUC's findings of fact were clearly erroneous and its corresponding conclusions of law amounted to reversible error under SDCL § 1-26-36, in light of the fact that Applicant/Appellee CRW-II failed to meet its burden of proof and there failed to be substantial evidence to support Appellee PUC's findings related to the (adverse) "community impact" as required to be identified, analyzed and forecast pursuant to ARSD 20:10:22:23.

As the Court is aware, SDCL § 49-41B-22, as related to Appellee CRW-II's (as Applicant below) minimum threshold burden of proof in administrative hearing matters such as this, provides that:

The applicant has the burden of proof to establish by a preponderance of the evidence that:

(1) *The proposed facility will comply with all applicable laws and rules*;
(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is determined not to threaten the social and economic condition of inhabitants or expected inhabitants in the siting area;
(3) *The facility will not substantially impair the health, safety or welfare of the inhabitants*; and
(4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is in compliance with this subdivision. [Emphasis added.]

See also, ARSD 20:10:01:15.01 ("In any contested case proceeding, the ... applicant ... has the burden of going forward with presentation of evidence...")

Appellants therefore significantly point to Appellee CRW-II's failure to meet its burden below, through at least witness Mark Thompson as its manager of wind engineering within the engineering and construction organization of NextEra Energy, insofar as his failure to provide evidence, let alone a preponderance of evidence, as to what "community impact" the project would have on not only Appellants; but also, their hundreds and/or thousands of neighbors in the Grant County and Codington County area. *See*, ARSD 20:10:22:23. That is, Appellee PUC's rules mandated that (as the Applicant) Appellee CRW-II, "shall include an *identification and analysis* of the effects of the construction, operation and maintenance of the proposed facility will have on the anticipated affected area including the following:"

1.) A *forecast of the impact on* commercial and industrial sectors, housing, land values ... *solid waste management facilities*, fire protection ... *and other community and government facilities or services*; ...[Emphasis added].

See, Appendix D (Proposed "community impact" compliance identification and analysis, as offered by Appellee CRW-II to Appellee PUC). That is, while the court below viewed with favor an unsubstantiated, unproven and essentially bolstered view of Appellee CRW-II's Application[4], Appellants assert such a view was, in fact, clearly erroneous insofar as it should not have construed as any type of "substantial evidence" for Appellees to generically and unsubstantially claim that, "[c]onstruction and operation of the Project ... is *not* '*anticipated*' to have '*significant*' short- or long-term effects on

[4] *See*, Appendix D; D-4-D-5, AR pgs. 000103-000104.

commercial and industrial sectors, housing, land values, labor markets, health facilities, sewer or water treatment, solid waste management facilities, fire or police facilities, schools, recreational facilities and other government facilities or services."[5] Moreover, such cursory and essentially unsupported "fluff language" insofar as Appellee CRW-II summarily opining that it does not "anticipate" the Project to have "significant"[6] effects on the community-impact-sector should not be either condoned nor affirmed as any type of required threshold of evidence that lawfully "identifies" and "analyzes" – *as mandatorily required by state statute* – "the effects of the construction, operation and maintenance of the proposed facility will have on the anticipated affected area."

Once again, with due respect, the circuit court below erroneously determined that any such "effects of the construction, operation and maintenance of the proposed facility will have on the anticipated affected area" somehow carved out some unidentified regulatory exception - to and for the end of the prospective wind farm project operation insofar as decommissioning - as related to the operation and maintenance and pending failure - either during or after a turbine or numerous turbines expected term of life. That is, Appellants had and have strong and valid "local neighbor-related" concerns herein at the time of everyday operation and/or maintenance amounting to or directly relating to turbine failure of such intrusive, outdated and flawed wind turbines. As part of simple

[5] With due respect, Appellants respectfully submit that, seemingly, the only thing left out of Appellee CRW-II's cursory recitation string of so-called "anticipated" "community impact" sectors is the proverbial "kitchen-sink sector" for those South Dakota citizens and taxpayers unfortunate enough to live in the broad, turbine-infested/adversely affected three-county area.

[6] Appellants submit as a fair question then: What if the Project has a "substantial impact" on local solid waste management facilities? Would any such "substantial impact", by way of comparison, amount to or equate with a "significant (negative) impact" to taxpayer/neighbors in the adversely affected area - as otherwise seemingly glossed over by both Appellee CRW-II and Appellee PUC?

common sense factual knowledge, during such everyday operation and maintenance, turbines fail, and fail significantly, causing local problems to deal with, including damage and (negative) impact on Watertown Regional Landfill[7] or, other governmental services.[8] *See/cf.,* Circuit Ct-Tr. pgs. 5-8, 30; and, *see generally, Powers v. Turner County Board of Adjustment*, 2020 SD 60, ¶23, 951 NW2d 284, 294 (Cited/referenced herein only as being generally analogous as to this Court's recent seemingly more broad view of the scope and context of evidence of negative impacts to neighbors from intrusive permitting decisions at the local level and their joint or collective "community impact" and necessary offered proof related thereto – either by or on behalf of opponents or [as would have been necessary here] proponents.).

Additionally, in that regard, at the PUC's administrative hearing below what appears to be the only related exchange with Mr. Thompson on this critically important foregoing topic went as follows:

> Q: ...So, at the end of life of this project there will be 396 blades and many more during the life of the project... So just at the end of [the project] life that will require a disposal of 9,980,575 pounds of refuse, or the shipping weight is 11,840,004 pounds of refuse. Not knowing if any of the blades are toxic at this point, which [you] don't believe they are according to you earlier, ... where is Crowned Ridge II intending to dump 10 to 12 million pounds? And that number would double if there was the – the other project would be at the same time. And I understand now that those are different projects. So we'll just talk about 10 to 12 million pounds of blade refuse. Where have you made plans to dump that much blade refuse? And that doesn't include any rebar, cement, anything else. Just the blade refuse.

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[7] *See generally*, Appendix E, included and depicted only by way of a representative comparison type example, as transpired in Northeast South Dakota approximately one-week *after* the trial court's memorandum decision below.

[8] *Again, see generally*, Appendix E, as likely related to the taking of prospective time and limited resources other governmental services – such as small/rural volunteer fire services.

Thompson: So as it stands right now, you're correct. They would be disposed of in a landfill, pursuant to applicable laws. The plan – and I assume that you mean at the end of the life of the project.

Q: Yes.

Thompson: The plan as it stands now is to cut these blades up into pieces for transport and dispose of them in landfills. Now this is usually a contracted process. And the landfills could either be local or off-site or out of state. Given that we're over 20 years away, we think that there would be, you know, processes that are developed or put in place to *maybe* recycle some of these. So disposing of these blades in landfills I think is the worst-case scenario or I would say the last resort. So I think with the options that are *possibly under development*, you could see that the amount of refuse going to these landfills could be significantly less. … As far as the weight and the amount of refuse, when you compare that to [some] landfill, it's relatively small for the amount. And, again, *we're hoping that at the end of the day or the end of life [of the project] we'll find a way to recycle these* Fiberglass blades. Or even reuse them.

Q: How long have they been using Fiberglass blades in this industry? How many years do you think?

Thompson: Oh my God. My first ever wind site that I went to in California … they were Fiberglass blades there. And that site was built in the '80's. So, it's been a long time.

Q: Okay. And they haven't found a way to recycle them as of yet, and that's, oh my gosh, 40 years. …

Thompson: Oh, *sometimes things change, really overnight sometimes*. … [Emphasis added.]; AHT pgs. 185-187; AR pgs. 9030-9032; *see also*, AHT pg. 358.

To be clear, under the legal requirements for Appellee CRW-II to apply and for Appellee PUC to approve or grant such an energy permit, it was not/is not sufficient under ARSD 20:10:22:23 for neither the Applicant nor Commission to put forward any type of meaningful plan as compared to a vague (and likely unrealistic) "hope" that "sometimes things change" which may possibly, potentially or, hopefully, lead to a viable and

recognizable plan for a wind farm like this to reasonably articulate its lawful plan. *See/cf.*, Appendix D.

B.) Appellee PUC committed prejudicial error in violation of statutory provisions insofar as Appellee CRW-II admittedly failed to carry its burden of proof by its failure to establish compliance with all applicable laws and rules since it relied on an erroneous version of the Grant County Ordinance, not in effect at the time of its 2018 locally approved Conditional Use Permit ("CUP").

As known and understood below by Appellee PUC and Appellee CRW-II, as the Applicant, CRW-II had previously (in 2018) secured from the three (3) counties in this case (Deuel County, Codington County and Grant County) conditional use permit(s) (hereinafter "CUP") in order to attempt to pre-address, so to speak, local laws and rules related to the operation of a large wind farm over the approximately 60,996-acres of land in northeastern South Dakota. In one of those adversely impacted counties, Grant County, Appellee CRW-II applied for its CUP on September 17, 2018, and, ultimately, the Grant County CUP was approved and granted pursuant to and under the local authority of Grant County Ordinance 2004-01.[9] Important to this issue is the fact that such Grant County Ordinance was and is the governing ordinance under which Appellee CRW-II's actions and/or key inactions must now be viewed/reviewed by this Court.

Fortunately, however, in the present case this Court has applicable guidance as to how to view and consider this issue. In that regard, Appellants respectfully direct the Court's attention to *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, ¶ 14, 598 NW2d 861, 864-865, which - Appellants submit - provides important clarification and applicable guidance in this matter. As the Court will recall, in *Van*

[9] AR pgs. 13072-13112; Application on September 17, 2018 - CUP granted December 17, 2018; *see also*, Appendix A, AR pg. 8727

Zanten it was outlined that, in the summer of 1997, petitioners applied to the Lake County Board of Commissioners for a conditional use permit to construct a 1,100-unit hog-finishing unit. The CUP was approved by Lake County on August 19, 1997. Shortly thereafter, in September 1997, Lake County's CUP decision was appealed to circuit court by the neighboring property owners.

On appeal, the circuit court had some housekeeping type concerns with the legal description that had been advertised prior to the earlier CUP hearing and it was essentially agreed by the parties and the court to send the CUP back to the County simply to correct the legal description involved in the (prior) CUP approval. Once the legal description was corrected, the circuit court re-considered the matter. However, in the interim and up to the point of the circuit court re-looking at the CUP, Lake County revised its ordinances related to such CUP(s). In fact, on the very day (January 20, 1998) that Lake County was again approving Van Zanten's CUP – the new/revised CUP ordinance regulations took effect. Thereafter, the circuit court ruled that, as part of the challenge and ruling, that the (new/revised) ordinance in effect at the time of Lake County's subsequent CUP-issuance should govern the review of such CUP. *Van Zanten*, ¶ 10, 598 NW2d at 863. However, the Supreme Court overturned that lower tribunal decision when it specifically ruled, as also applicable herein, that in such a case, "...[T]he law in effect was the ordinance[] and regulations that were at issue on the date the notice of appeal was filed [from the application to the time of approval of the CUP]. ...[A]pplication of a new [subsequent] ordinance, ...was [improper]..." *Van Zanten*, ¶¶ 14-16, 598 NW2d at 864-865.

Appellants therefore respectfully submit that *Van Zanten* presents a closely analogous holding which is strong and persuasive supporting authority for their objections raised (but ignored) below as well as here on appeal to the extent that it was entirely improper, in excess of the authority of Appellee PUC and a prejudicial error of law for the Commission and Appellee CRW-II to permit CRW-II, as Applicant, to essentially attempt to improperly bootstrap their claimed compliance with Grant County Ordinance as to "Noise" to a "new" not-yet-effective *and* less stringent noise ordinance requirements in this matter (as beneficial to CRW-II; however, as directly prejudicial all of the adversely affected local South Dakota taxpayer/citizens) – including the extremely prejudicial removal of consideration of nearly 180 noise-receptor locations that Appellee CRW-II wrongfully sought to ignore in 2019.[10]

In fact, Appellants point out what appears to be clear error by Appellee CRW-II in trying to improperly finagle their claimed compliance with such Grant County zoning ordinance requirements, based, in part, on the following exchange at hearing with Tyler Wilhelm, Project Manager CRW-II, about which ordinance(s) were to be applicable as to the important sound/"Noise" level requirements:

> Q: ...The date of the approval for the Grant County Conditional Use Permit was December 17, 2018. Do you agree with that date?
> *Wilhelm:* Yes, I do.
> Q: Okay. Now if you would refer to the Applicant Exhibit 19-3, page 1, in the lower left-hand corner.
> *Wilhelm:* Can you refer to – what document is that? Is that from the county application.
> Q: It's just the county ordinance for Grant County that you submitted...
> Q: ... In the lower left-hand corner of page 1 of that document would you please read to the Commission the date the Grant County ordinance was adopted.

[10] *Cf.*, FN. 1, *supra.*

Wilhelm: It shows December 28, 2018.

Q: Okay. Thank you. December 28, 2018. That would be 11 days *after* you received your Conditional Use Permit [on December 17, 2018]; correct?

Wilhelm: That would be correct, that it was officially adopted after we received our permit approval, but our –

Q: Okay.

Wilhelm: - permit application was also 100 percent consistent with everything that was --

Q: Okay. ... I'm just clarifying dates.

Q: ...Now please read to the Commission the date of the - the effective date of the ordinance. In that same lower corner [of Exhibit A19-3].

Wilhelm: January 28, 2019.

Q. Okay. So, like a month and 10 or 11 days after [CRW-II] received [its] Conditional Use Permit. So, at the time you received approval for your Conditional Use Permit for Crowned Ridge II the prior ordinance was in effect governing that Conditional Use Permit, not the version that's submitted in A19-3; correct?

Wilhelm: That would be correct.

See, AHT pgs. 47-49; AR pgs. 8892-8894;

(Cont.) Wilhelm: I do recognize both [Grant County ordinance] documents. And what we provided is Exhibit A19-3 is the markup version of what the final ordinance came to be. And the providing of this was our means of showing what changed in the ordinance so people could track it, and we were a big part of that process and something that we're proud of. So it's just the redline or marked-up version..." AHT pgs. 53-54; AR pgs. 8898-8899.

With the foregoing in mind, then, it's important to note that the actual governing ordinance in and for Grant County as to turbine-related noise from wind farms such as CRW-II under its December 17, 2018, CUP terms and regulations states as follows:

> 13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference *at the perimeter of the principal and accessory structures* of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity. [Exhibit AC-18] [Emphasis added]; *see also*, Appendix/Exhibit A, as attached.

As such, the governing ordinance for this Grant County CUP, *does not differentiate between participants and non-participants* in regard to "noise" as each is provided a sound pressure limit of 50 dBA at the *perimeter of the principal and accessory structures.*[11] *See*, Appendix/Exhibit A.

In addition, according to the Letter of Assurance provided in Applicant/Appellee's Exhibit A1-K, Appendix K (below) - County Conditional Use Permits, the Grant County CRW-II CUP, Item 3, Subset b, Obligation to Meet Requirements:

> "Applicant agrees that the construction and operation of all WES towers will comply with noise and shadow flicker thresholds *exhibited in the application's noise and shadow flicker analysis.*" [Exhibit A1-K.]

It is also extremely important to note here that in its application to Grant County for the CRW-II CUP, Appellee CRW-II provided a sound study that included accessory structures. [Exhibit AC-19] The sound study included 181 receptors [locations]; but it wrongly excluded nearly all of them under the new/non-governing ordinance provision.[12]

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[11] Appellants jointly submit that it should go without saying that having the additional sound limitation "buffer", so to speak, applicable to and measured from the nearly 180 (additional in-county) sound receptor locations that are, in fact, "accessory structures" specifically identified in and required to be accounted for under the controlling Grant County wind facility ordinance is an extremely important health/safety concern that was, as an unlawful error of law, erroneously overlooked to their direct and distinct prejudice. Moreover, to perhaps otherwise allow both Appellee CRW-II and Appellee PUC to try to manipulate or skirt around and/or to improperly ignore such important local regulation(s) would inappropriately be serving as an indicator of lack of local government control over such locally approved permit issues. Additionally, to ignore such key local regulation(s) would be unlawfully ceding local authority to either or both state government and/or to out-of-state corporate conglomerates to the direct and irreversible detriment of local county citizens and taxpayers – such as Appellants.

[12] Applicant witness Jay Haley testified regarding the sound and flicker studies submitted to/for this docket and to each of the 3-counties for the CRW-II permit hearings for CUPs (Codington and Grant Counties) and a Special Exception Permit (SEP) (Deuel County).

Appellee CRW-II witness Haley: "Q: In the Grant County Conditional Use Permit Letter of Assurance, which is Exhibit A1-K... Okay. It says on page 11, item 3 --...Oh, sorry. It's subset 3 -- or subset B. I'll just read it to you... "Applicant agrees that the construction and operation of all WES towers will comply with noise and shadow flicker thresholds exhibited in the Application's Noise and Shadow Flicker Analysis." In the studies presented in this docket there are four receptors listed for Grant County. In Exhibit AC-19, which is probably in your folder on the

CRW-II's erroneous determination that it could, in spite of the governing Grant County CUP requirements, in 2019 attempt to misleadingly try to sidestep Grant County's original – more stringent – sound/noise regulations by claiming that it was perhaps generally "consistent" with both (2018 and 2019) ordinance provisions cannot be overlooked or approved. Instead, it must be noted that Appellee CRW-II failed to put on sufficient evidence, by any measure, that it was, truth in fact, in full compliance with the

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corner there. My late-filed exhibit. A: You said AC-19?... Q: That's the Grant County...sound and flicker report? A: Yep. Q: If you go to page 17 and the following four pages, so a total of five pages, you'll see those are all receptors for Grant County. And I counted 181 receptors in Grant County for that permit. A: Uh-huh. Yes. Q: And, like I say, the sound and flicker -- or the sound study submitted to this docket has four. A: Yes. Q. So how could you possibly be able to know if you're in compliance with the Conditional Use Permit if you're missing 179 receptors for study? ...A: This is a report from 2018. Q: Yes. This is your Conditional Use Permit that you have to abide by showing -- showing how the sound profile travels out into the county. But there's no receptors in your PUC sound study showing that. A: This report is from 2018, and the layout and the ordinance are completely different today than they were when this report was generated. Q: But the governing ordinance for that Conditional Use Permit and the Letter of Assurance that's been submitted to this docket say that you have to abide by these shadow and sound studies that you submitted to Grant County. You understand? A: I think I do." [Transcript 2/4/2020, page 236 - page 237; page 238 line 6, line 17 - page 239, line 5], [Exhibits A1-K and AC-19]. In addition, and as also included in Exhibit AC-19, the Application to Grant County for a Conditional Use Permit, it was indicated that the Dakota Range turbines added to the sound profile of CRWI and CRWII. However, the entire project of Dakota Range turbines were, for what seem questionable and unexplained reason(s), *not* truthfully and accurately included in the sound study submitted to this PUC docket, Docket EL19-027. The questions below were posed to Mr. Haley by Appellant Christenson on February 5, 2020 (Hearing Day No. 2) to correct his erroneous statement the prior day, when he thought Dakota Range turbines were included in the sound study of this PUC docket: CRW-II attorney, Murphy: "Q: Yesterday in response to questions you were asked whether Dakota Range turbines were included in your studies. Can you elaborate on correcting that statement? CRW-II witness Haley: A: Yes. The Dakota Range turbines are not included in the Crowned Ridge II study. I think when she said Dakota Range my brain heard Deuel Harvest. But, in fact, the Deuel Harvest turbines were included, not Dakota Range." [2/5/2020 AHT, pg. 262; AR pg. 13322]; *see also*, Statement of Facts, FN. 2, *supra*.

Consequently, Appellee CRW-II additionally failed to establish that its Application was in compliance with SDCL § 49-41B-22 (1) insofar as failing to demonstrate compliance with "all applicable laws and rules" since there was no study of all receptors, and not all possible influencing projects were appropriately submitted as part of its purported sound study. To state the fairly obvious, it was/is not possible. Appellee CRW-II therefore, to the direct prejudice of Appellants and the prospective adverse sound effects to which they would otherwise be subject, failed to meet its statutory burden and Appellee PUC failed in not denying same. *See/cf.*, SDCL § 49-41B-22 (1) thru (4); ARSD 20:10:22:04 (5) (mandatory truthful and accurate applications required).

governing (original) Grant County ordinance requirements. Appellee CRW-II not being held to account for failing to carry its burden in proving its mandatory compliance with the applicable local governing laws and regulations as to critically-important/safety-related noise regulations is a prejudicial error of law under SDCL § 1-26-36; but also, adversely affects both Appellants and to their equally concerned neighbors direct detriment, and it also runs directly afoul of SDCL § 49-41B-22(1) and/or (3).

As a result of the above-referenced prejudicial error(s), including Appellee CRW-II's failure to comply with the applicable noise and noise distance monitoring laws and rules, Appellants therefore submit that Appellee PUC's Finding of Fact Nos. 18 and 46 are, in fact, clearly erroneous and constitutes reversible error. In addition, Appellee PUC's decision is, as outlined above, at odds with and therefore in error under Conclusion of Law Nos. 9, 13 and 15. That is, in light of the less stringent noise criteria that Appellee CRW-II attempted to sidestep in its improper effort(s) to try to be (less) governed by, such is prejudicial to persons in the adversely affected areas as to increased and intolerable noise levels – especially for all those good neighbors and taxpaying northeast South Dakota folks subject to any such excessive noise over time at either their nearby residences or at or working in their vitally important *accessory structures* as related to their once protected residences and/or farming operations.

2.) *THE CIRCUIT COURT COMMITTTED PREJUDICIAL AND REVERSIBLE ERROR OF LAW BY APPROVING APPELLEE PUC'S FAILURE TO REQUIRE APPELLEE CRW-II'S TO PROVIDE SUBSTANTIAL EVIDENCE IN ITS APPLICATION IN ORDER TO MEEET THE REQUIREMENTS OF SOUTH DAKOTA LAW, PURSUANT TO SDCL § 49-41B-22 (3), INCLUDING THE SUBMISSION FOR REVIEW OF A PRE-CONSTRUCTION SOUND OR HEALTH STUDY IN EACH (OR ANY) OF THE NEGATIVELY IMPACTED COUNTIES.*

Once again, as applicable herein, SDCL § 49-41B-22 (3), as related to Appellee CRW-II's minimum threshold burden of proof in such matter, provides that:

The applicant ha[d] the burden of proof to establish by a preponderance of the evidence that:

(3) The facility will not substantially impair the health, safety or welfare of the inhabitants...

However, pursuant to the above-referenced requirement as to such large, intrusive and overbearing wind facilities, Appellee CRW-II failed in its burden of proof and/or its burden of going forward to the extent that *no pre-construction sound study*[13] *was submitted to Appellee PUC (and, therefore made public)* in order to thereby provide a necessary description of the adversely impacted area and so as to determine whether such a wind far facility would or would not substantially impair the health, safety or welfare of local inhabitants.

> Question directed to Appellee CRW-II witness Haley: "Q: No pre-construction ambient noise study was conducted by you or anyone else that you're aware of?
> A: That's correct." [2/4/2020, AHT pg. 229; AR pg. 9074.]
> Question directed to Appellee CRW-II witness Lampeter: "Q. *Did Crowned Ridge Wind II ask you to perform a pre-construction sound modeling study?*
> A. *Yes. That study was conducted, and they requested it.*
> Q. *And that's the study that you were talking about that's not been published or submitted*?

[13] Ironically, disappointingly and almost unbelievably Appellee CRW-II, however, did ultimately prepare and submit a "*Pre-Construction Bat Acoustic Study Report for the ... Crowned Ridge Wind II Facility [in] Codington, Deuel and Grant Counties...*" AR pgs. 13865-13877. That is, it would therefore appear that there was a significantly higher level of concern for bats - as in, Chiroptera mammals - in Grant and/or Codington County as compared to humans - taxpaying residents - or as to their animals and pets in northeast South Dakota. All of which served to amplify Appellants' validly expressed and ongoing health/safety concerns in this matter. *See/cf.*, FN. 14, *infra*.

> A. That's correct. We went and collected the data and put together some draft summary findings, and that's where it currently stands." [2/5/2020, AHT pg. 314; AR pg. 13374.]

Although four (4) proposed experts appeared and gave testimony and evidence at the evidentiary hearing for Appellee CRW-II, no infrasound or low frequency sound study was requested to be conducted, nor any study submitted to Appellee PUC for evidentiary analysis and review.

> Question to Applicant witness Haley: Q: "Did Crowned Ridge Wind II approach you about assessing infrasound or low frequency noise for this project?
> A: No. They did not ask for a specific study on low frequency or infrasound noise." [2/4/2020, AHT pg. 230; AR pg. 9075.]

> Question to Applicant witness Ollson: Q: "...Did Crowned Ridge Wind II retain your service for a study pertaining to infrasound or low frequency noise?
> A: In terms -- it was an overview of the knowledge of the scientific literature ... and why we would not be concerned." [2/5/2020, AHT pg. 357; AR pg. 13417.]

Apparently, by Mr. Ollson's answer, a study was neither prepared nor produced, only an unpersuasive and/or non-committal "overview of the knowledge of literature" was considered by CRW-II's witness.

> Question to CRW-II witness Lampeter: "Q: Did Crowned Ridge Wind II ask you to perform any studies or modeling regarding low frequency noise or infrasound?
> A: No." [2/5/2020, pg. 314, lines 12-15.]

> Question to Staff witness Hessler: "Q: Okay. Did Staff ask you to do any study in regard to infrasound and/or low frequency noise for this project?
> A: They didn't ask me to do it, but I did talk about it in my direct testimony.
> Q: Okay. Not an actual study, just ---
> A: Oh, no. No study." [2/5/2020, AHT pg. 511, AR pg. 13571.]

In addition, contrary to the regulatory requirements of ARSD 20:10:22:21, no air quality study was requested nor submitted to Appellee PUC for review.

> Question to Appellee CRW-II witness Lampeter: "Q: According to your resume, you have experience in air quality modeling. Did

> Crowned Ridge Wind II ask you to perform any air quality study or model for this project?
> A: No." [2/5/2020, AHT pg. 314; AR pg. 13374.]

Furthermore, the underlying record surprisingly indicates that no health expert - none - was obtained nor offered by either CRW-II or Appellee PUC in an effort to try to protect the public in the negatively impacted area. Instead, PUC staff sought to otherwise attempt to rely on a generic pro forma type letter from the South Dakota Department of Health that specifically did *not* "take[ ] a formal position on wind turbines and human health," apparently as some type of entirely unpersuasive and unsubstantial "evidence" of a claimed absence of health impairment by the project. *See*, Ex. DK-3; AR pg. 7357; 2/6/2020, AHT pg. 564; AR pg. 13673; and, also as attached as Appendix/Exhibit B herein.

Clearly, such cursory information and/or such an unsupported communication cannot be deemed to meet Appellees (collective) burden of proof under SDCL § 49-41B-22 (3) – nor, Appellants claim, can it amount to substantial evidence under even deferential standards. *See/cf., Dail v. South Dakota Real Estate Commission*, 257 NW2d 709, 712-713 (S.D. 1977); *Matter of Certain Territorial Electric Boundaries*, 281 NW2d 65 (S.D. 1979). Instead, in conjunction with other failed and/or overlooked evidence put forward by Appellee CRW-II, such serves to demonstrate that the Appellee PUC's findings of fact, in total, are failed to be supported by substantial evidence and, as such, reversible error occurred as to fully reviewable conclusion of law matters below – to the direct prejudice and detriment of Appellants, who now (try to) live and work in the negatively impacted area with all remaining health and safety unknowns as they sought to address below – unfortunately, essentially to no avail for them and for their concerned friends and neighbors as well.[14]

[14] *See also*, other related health/safety/habitat concerns as essentially ignored and/or as failed to be answered below with substantial evidence, for instance: No study or proposed conditions

CONCLUSION:

Appellants respectfully submit that, by and through their arguments and authorities submitted herein, they have established that there were, in fact, prejudicial errors, including errors of law, committed below which rise to the level of showing that

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concerning safety of travelers on the roadway were submitted to the Commission. This question was directed to Applicant witness Sappington "Q: Did your company conduct any studies concerning shadows on the roadway? A: No." [2/5/2020, pg. 385, lines 4-6.] A question was directed to staff witness Kearney by Appellant Robish regarding safe travel near turbines: "Q: Okay. Some of the turbines proposed will be sited 600 feet or less from a highway or roadway. Will there be a requirement for a placard or warning sign to be placed at such sites by that specific turbine to warn the public of a danger of ice throws? It's been done before. A: Yeah. And there's not a specific proposed permit condition in this one." [2/6/2020, page 612, line 23-page 613, line 4].

Even though CRW-II hired qualified consultants for some studies, it did not perform, nor submit to the Commission and ice throw study for review. Question directed to Applicant witness Haley: "Okay. On line 15 you mentioned you've performed ice throw studies, and you said that in your opening statement. Did you perform any ice throw studies for this project? A: No, I did not. Q: Did Crowned Ridge Wind II ask you or anyone that you are aware of for any ice throw study to be done for this project? A: They did not ask me, and I do not know if they contacted anyone else." [2/4/2020, AHT pg. 229, line 21-pg. 230, line 5.]

No study for domestic animals or wildlife for audible noise, air quality, shadow, low frequency noise or infrasound were requested or submitted to the Commission for review. ARSD 20:10:22:18 (1) (3) Question directed to Applicant witness Sappington: "Q: Did your company conduct any study concerning noise, audible and inaudible, including low frequency noise or infrasound on domestic animals? A: No." [2/5/2020 AHT pg. 385.] Question directed to Applicant witness Sappington: "Q: Did your company conduct any study concerning shadow effects on wildlife or domestic animals? A: No." [2/5/2020, AHT pg. 385, lines 7-9]

The density of not only this potential project in combination with existing projects, will affect the precious wildlife of South Dakota. Chairman Hanson and Staff witness Morey from the South Dakota Game, Fish and Parks discuss the egregious effects: "Chairman: Your answers talk about – on page 8 specifically, your answer to question on page 12 state that 'some species will not use grassland or wetland habitat within a certain distance of wind turbines.' And on page 16 you speak of the cumulative impacts. There are a lot of wind towers in that area presently. A lot is a relative term, I suspect. But this one is going to have – if it's approved, would have a *greater concentration of turbines*. With all of those turbines presently there and the potential for these, are you concerned about the cumulative impact, knowing that there's -- there is, in fact, according to your testimony, that some species will not use the grassland areas close to wind towers?" Witness: *Yes. We are concerned with cumulative impacts.* There has been, as you mentioned, a lot of development in this area. And some of the research out of North and South Dakota, there's *seven out of nine breeding grassland bird species will avoid turbines* up to 300 meters, so about a quarter mile - not quite a quarter mile. About two-tenths of a mile." [2/6/2020, AHT pg. 546, line 8 - pg. 547, line 4]. [Emphasis added.]

Appellee CRW-II confidentially filed safety information with Appellee PUC, however, such claimed confidential safety information was not and has not been conveyed to landowners.

mistakes have been made by and through the administrative hearing/contested case hearing process and appeal to circuit court. As a result, Appellants respectfully request that, pursuant to the provisions of SDCL § 1-26-36, this Honorable Court accordingly reverse and remand this matter and thereby grant their requested relief herein.

/s/ R. Shawn Tornow

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Attorney for Appellants

CERTIFICATE OF COMPLIANCE:

Pursuant to SDCL 15-26A-66, R. Shawn Tornow, Appellants' attorney herein, submits the following:

The foregoing brief, not including the signature page herein, is 29 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Said brief has been reviewed and referenced as containing 7,104 words and 39,762 characters.

Respectfully submitted this 6th day of July, 2021, at Sioux Falls, S.D.

/s/ R. Shawn Tornow

CERTIFICATE OF SERVICE:

This is to certify that on this 6th day of July, 2021, your undersigned's office, in conformance with the Court's most recent Order, timely e-mailed a copy of Appellants Brief as well as mailing an original and two (2) copies to the Court and, if requested and if necessary, is prepared to mail by first-class United States mail, a true and correct copy of Appellants' Brief to Amanda M. Reiss, one of the attorneys for Appellee PUC, at amanda.reiss@state.sd.us; Miles F. Schumacher, one of the attorneys for Appellee CRW-II, at mschumacher@lynnjackson.com.

/s/ R. Shawn Tornow
R. Shawn Tornow

APPENDIX TABLE OF CONTENTS:

Grant County Compiled Zoning Ordinances

01/25/2018

Appendix: A

EXHIBIT A

008727

10. Abandoned Turbines. The permittees shall advise the County of any turbines that are abandoned prior to termination of operation of the WES. The County may require the permittees to decommission any abandoned turbine.

11. Height from Ground Surface. The minimum height of blade tips, measured from ground surface when a blade is in fully vertical position, shall be twenty-five (25) feet.

12. Towers.

    a. Color and Finish. The finish of the exterior surface shall be non-reflective and non-glass.

    b. All towers shall be singular tubular design

13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity. [Ord. 2004-1, Rev. 2004-1G]

13. Permit Expiration. The permit shall become void if no substantial construction has been completed within two (2) years of issuance.

14. Required Information for Permit. [Ord. 2004-1, Rev. 2004-1G]

    a. Boundaries of the site proposed for WES and associated facilities on United States Geological Survey Map or other map as appropriate.

    b. Map of easements for WES.

    c. Affidavit attesting that necessary easement agreements with landowners have been obtained.

    d. Map of occupied residential structures, businesses, churches and buildings owned and/or maintained by a governmental entity.

    e. Preliminary map of sites for WES, access roads and collector and feeder lines. Final map of sites for WES, access roads and utility lines to be submitted sixty (60) days prior to construction.

    f. Proof of right-of-way easement for access to utility transmission lines and/or utility interconnection.

    g. Location of other WES in general area.

    h. Project-specific environmental concerns (e.g. native habitat, rare species, and migratory routes). This information shall be obtained by consulting with state and federal wildlife agencies. Evidence of such consultation shall be included in the application.

    i. Final haul road agreements to be submitted sixty (60) days prior to construction.

Appendix A-1

EXHIBIT A19-3

ORDINANCE 2016-01C

AN ORDINANCE AMENDING GRANT COUNTY ORDINANCE #2004-1, AN ORDINANCE ESTABLISHING ZONING REGULATIONS FOR GRANT COUNTY, SOUTH DAKOTA, AND PROVIDING FOR THE ADMINISTRATION, ENFORCEMENT, AND AMENDMENT THEREOF, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTERS 11-2, 1967 SDCL, AND AMENDMENTS THEREOF, AND FOR THE REPEAL OF ALL RESOLUTIONS AND ORDINANCES IN CONFLICT THEREWITH

WHEREAS, the Grant County, South Dakota, Board of County Commissioners, hereinafter referred to as the Board of County Commissioners, deems it necessary, for the purpose of promoting the health, safety, and the general welfare of the County, to enact zoning regulations and to provide for its administration, and

WHEREAS, the Board of County Commissioners has appointed a County Planning Commission, hereinafter referred to as the Planning Commission, to recommend the district boundaries and to recommend appropriate regulations to be enforced therein, and

WHEREAS, the Planning Commission has divided Grant County into districts, and has established by reference to maps the boundaries of said districts for administration and interpretation; has provided for definitions and for amendments to this Ordinance; has provided for the enforcement; prescribed penalties for violation of provisions; has provided for building permits within the districts; has provided for invalidity of a part and for repeal of regulations in conflict herewith; and has prepared regulations pertaining to such districts in accordance with the county comprehensive plan and with the purpose to protect the tax base, to guide the physical development of the county, to encourage the distribution of population or mode of land utilization that will facilitate the economical and adequate provisions of transportation, roads, water supply, drainage, sanitation, education, recreation, or other public requirements, to conserve and develop natural resources, and

WHEREAS, the Planning Commission has given reasonable consideration, among other things, to the character of the districts and their peculiar suitability for particular uses, and

WHEREAS, the Planning Commission and Board of County Commissioners has given due public notice to a hearing relating to zoning districts, regulations, and restrictions, and has held such public hearings, and

WHEREAS, all requirements of SDCL 11-2, with regard to the preparation of these regulations and subsequent action of the Board of County Commissioners, has been met, and

WHEREAS, copies of said zoning regulations have been filed with the Grant County Auditor for public inspection and review during regular business hours, and

WHEREAS, all ordinances, or parts of regulations in conflict herewith are hereby expressly repealed;

THEREFORE BE IT ORDAINED that Ordinance **2016-01C** is hereby adopted by the Board of County Commissioners, Grant County, South Dakota.

Voting aye: Commissioners Buttke, Dummann, Mach, Stengel Voting nay: Commissioner Street

Adopted this 28th day of December, 2018.

Marty Buttke

Chairperson

Grant County Board of County Commissioners

ATTEST:

Grant County Auditor

This ordinance shall become effective 20 days after publication of this notice in the official newspaper, thereby repealing all ordinances or parts thereof in conflict herewith unless a referendum in a timely manner is file.

First Reading: December 18, 2018
Second Reading: December 28, 2018
Adopted: December 28, 2018
Published: January 9, 2019
Effective: January 28, 2019

Published once for an approximate cost of _____.

Appendix A-2

Effective Jan. 2019

e. Failure to Decommission. If the WES facility owner or operator does not complete decommissioning, the Board may take such action as may be necessary to complete decommissioning, including requiring forfeiture of the bond. The entry into a participating landowner agreement shall constitute agreement and consent of the parties to the agreement, their respective heirs, successors, and assigns, that the Board may take such action as may be necessary to decommission a WES facility.

~~10~~ 11 Abandoned Turbines. The permittees shall advise the County of any turbines that are abandoned prior to termination of operation of the WES. The County may require the permittees to decommission any abandoned turbine.

~~11~~ 12 Height from Ground Surface. The minimum height of blade tips, measured from ground surface when a blade is in fully vertical position, shall be twenty-five (25) feet.

~~12~~ 13 Towers.

a. Color and Finish. The finish of the exterior surface shall be non-reflective and non-glass.

b. All towers shall be ~~singular~~ tubular design

~~13~~ 14 Noise. Noise level shall not exceed ~~50~~ 45 dBA, average A-weighted Sound pressure including constructive interference effects measured twenty-five (25) feet from ~~at~~ the perimeter of the ~~principal and accessory structures of~~ existing ~~off site~~ non-participating residences, businesses, and buildings owned and/or maintained by a governmental entity.

Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects measured twenty-five (25) feet from the perimeter of participating residences, businesses, and buildings owned and/or maintained by a governmental entity.

Noise level measurements shall be made with a sound level meter using the A-weighting scale, in accordance with standards promulgated by the American National Standards Institute. A L90 measurement shall be used and have a measurement period no less than ten (10) minutes unless otherwise specified by the Board of Adjustment.

~~14~~ 15 Permit Expiration. The permit shall become void if no substantial construction has ~~been completed~~ commenced within ~~two (2)~~ three (3) years of issuance~~;~~ or if a State Permit from the South Dakota Public Utility Commission has not been issued within two (2) years of issuance of the permit.

~~15~~ 16 Required Information for Permit.

a. Boundaries of the site proposed for WES and associated facilities on United States Geological Survey Map or other map as appropriate.

b. Map of easements for WES.

c. Affidavit attesting that necessary easement agreements with landowners have been obtained.

Appendix A-3

600 East Capitol Avenue | Pierre, SD 57501 P605.773.3361 F605.773.5683

SOUTH DAKOTA DEPARTMENT OF HEALTH
Office of the Secretary

December 5, 2019

South Dakota Public Utilities Commission
ATTN: Amanda Reiss
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501

RE: PUC Docket EL19-027-Crowned Ridge Wind II

Dear Attorney Reiss:

The South Dakota Department of Health has been requested to comment on the potential health impacts associated with wind facilities. Consistent with our prior statement and based on the studies we have reviewed to date, the South Dakota Department of Health has not taken a formal position on the issue of wind turbines and human health. A number of state public health agencies have studied the issue, including the Massachusetts Department of Public Health[1] and the Minnesota Department of Health[2]. These studied generally conclude that there is insufficient evidence to establish a significant risk to human health. Annoyance and quality of life are the most common complaints associated with wind turbines, and the studies indicate that those issues may be minimized by incorporating best practices into the planning guidelines.

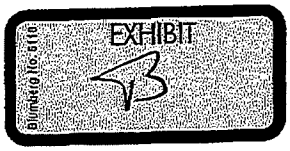
Sincerely,

Kim Malsam-Rysdon

Kim Malsam-Rysdon
Secretary of Health

1. http://www.mass.gov/eea/docs/dep/energy/wind/turbine-impact-study.pdf
2. www.health.state.mn.us/divs/eh/hazardous/topics/windturbines.pdf

Appendix:



007357

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
IN THE MATTER OF ADMINISTRATIVE APPEAL GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL AND LARETTA KRANZ and AMBER KAYE CHRISTENSON AND ALLEN ROBISH, Appellants, v. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	19CIV20-000021, and 19CIV20-000027 **NOTICE OF ENTRY** **OF ORDER**

NOTICE IS HEREBY GIVEN that on March 12, 2021, the Honorable Dawn Elshere, Circuit Court Judge of the Third Judicial Circuit, signed an Order affirming the Decision and Order of the South Dakota Public Utilities Commission, which Order was entered and filed on March 12, 2021. Attached hereto and served herewith is a true and correct copy of said Order.

Appendix C-1

Dated this 15th day of March, 2021.

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

Miles F. Schumacher
Dana Van Beek Palmer
Attorneys for Defendants
110 N. Minnesota Avenue, Suite 400
Sioux Falls, SD 57104
Telephone: (605)332-5999
mschumacher@lynnjackson.com
dpalmer@lynnjackson.com

Appx. C-2

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the **Notice of Entry of Order** affirming the Decision and Order of the South Dakota Public Utilities Commission were served electronically to the Parties listed below, on the 15th day of March, 2021, through the Odyssey file and serve system:

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

Mr. R. Shawn Tornow
Tornow Law Office, P.C.
P.O. Box 90748
Sioux Falls, SD 57109-0748
rst.tlo@midconetwork.com

Amanda Reiss
Kristen N. Edwards
SD Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501
amanda.reiss@state.sd.us
kristen.edwards@state.sd.us

Dated this 15th day of March, 2021.

Miles F. Schumacher

Appx. C-3

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
IN THE MATTER OF ADMINISTRATIVE APPEAL GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL AND LARETTA KRANZ and AMBER KAYE CHRISTENSON AND ALLEN ROBISH, Appellants, v. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	19CIV20-000021, and 19CIV20-000027 **ORDER**

Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz having appealed from the South Dakota Public Utilities Commission's Final Decision and Order Granting Permit to Construct Facility in EL 19-027, and Appellants Amber Christenson and Allen Robish having separately appealed as a part of their separate issues in both Codington County and Grant County, and with the appeals being thereafter combined for purposes of judicial economy, and with all parties having appeared by and through their respective counsel of record, and the Court having considered the Briefs submitted by all parties as well as all arguments of counsel, and the Court having

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issued its Memorandum Opinion on February 26, 2021, which is attached as Exhibit A and incorporated herein by this reference, it is hereby,

ORDERED, ADJUDGED and DECREED that the Decision and Order of the South Dakota Public Utilities Commission, entered April 6, 2020, is affirmed.

Signed: 3/12/2021 10:56:19 AM

Dated this _____ day of March, 2021.

BY THE COURT:

Honorable Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

Attest:
Reichling, Sandy
Clerk/Deputy

Appx. C-5

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

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

And

AMBER KAYE CHRISTENSON AND ALLEN ROBISH,

Appellants,

Vs.

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

Appellees

19CIV20-21 and 20-27

MEMORANDUM OPINION

INTRODUCTION

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

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

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Exhibit A

STATEMENT OF JURISDICTION

The Christenson Appellants appeal from Commission's April 6, 2020, Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; and Notice of Entry as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants each timely and properly filed their respective Notice of Appeals on May 1, 2020, and May 5, 2020, in both Codington and Grant Counties, South Dakota. Thereafter, following Commission's unopposed motion to change venue (May 11, 2020), the circuit court entered its Order changing venue herein (May 19, 2020), pursuant to SDCL § 1-26-31.1. This Court ordered that the Intervenors files would be thereafter combined into this appellate file, 19CIV20-27.

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

STATEMENT OF FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC[4] ("Applicant", "Crowned Ridge", or "CRWII") submitted its application for a facility permit for a 300.6-megawatt (MW) wind energy facility to consist of up to 132 wind turbines in Deuel, Grant, and Codington counties (the "Project").[5] (AR 14230-14258). Within its application, CRWII submitted written testimony from six witnesses.[6] (AR 1-1118, 3233-3254). The commercial operation date of the Project was estimated to be in the fourth quarter of 2020. (AR 11).

On July 11, 2019, the Staff issued the Notice of Application; Order for and Notice of Public Input Hearing; and a Notice for Opportunity to Apply for Party Status and established an intervention deadline of September 9, 2019. (AR 1122-1123).

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

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

Appx. C-7

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

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

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

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

---

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

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

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

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

[11] Seventeen witnesses testified at this hearing.

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

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

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On April 29, 2020, the Ehlebracht Appellants filed a Notice of Appeal of the Order in the Third Circuit Court located in Deuel County followed by a Statement of Issues on May 7, 2020. On May 1, 2020, the Christenson Appellants filed a Notice of Appeal followed by a Statement of Issues on May 11, 2020. With the consent of the parties, the appeals were consolidated in the Third Circuit Court in Deuel County.

On July 13, 2020, Ehlebracht Appellants filed their initial brief. On August 10, 2020, Christenson Appellants filed their initial brief. On September 11, 2020, Staff filed its Response Brief to Christenson Appellants. ("Staff's Brief to Christenson"). On September 23, 2020, CRWII submitted its Response Brief to both Christenson and Ehlebracht Appellants ("CRWII's Brief"). On September 24, 2020, Staff filed its Response Brief to Ehlebracht Appellants. ("Staff's Brief to Ehlebracht"). On October 8, 2020, Christenson Appellants submitted their Reply Brief to both Staff and CRWII. On October 13, 2020, Ehlebracht Appellants submitted their Reply Brief. On November 23, 2020, a hearing was held on the matter in Deuel County, South Dakota

STANDARD OF REVIEW

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

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

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

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;

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

Appx. C-9

(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . ..

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

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

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

Questions of law are reviewed de novo on appeal from an administrative agency's decision. *Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548) (emphasis added). Matters of reviewable discretion are reviewed for abuse. *Id.* (citing SDCL § 1-

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

Appx. C-10

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

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

PART I: CHRISTENSON APPELLANTS

Burden of Proof

South Dakota law requires the following:

> The applicant has the burden of proof to establish by a preponderance of the evidence that:
> (1) The proposed facility will comply with all applicable laws and rules; [and]
> . . .
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants. . ..

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

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

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

Appx. C-11

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

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

Christenson Appellants assert that the PUC's findings of fact were clearly erroneous, and its corresponding conclusions of law amounted to reversible error under SDCL § 1-26-36, in part, since Applicant failed to meet its burden of proof and/or its burden of going forward as required by SDCL § 49-41B-22 and/or ARSD 20:10:01:15.01. Under this burden of proof issue, the Christenson appellants assert several issues where the burden of proof failed. The court will address them below.

Solid Waste

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

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

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

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

Appx. C-12

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

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

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

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

Compliance with Grant County Ordinance

Christenson Appellants argue the following:

> Appellee PUC wrongly and prejudicially entered Finding of Fact No. 18 (FN. 24) in erroneously finding, in essence, that Appellee CRWII will be in compliance with applicable laws, including the Grant County Ordinance since, directly contrary to testimony by Jay Haley, that Appellee CRWII "complies with both versions of the Grant County Ordinance – the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the December 2018 CUP vote."

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

Appx. C-13

> FOF 18. The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules.[18] Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit.[19]

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

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

> 13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity.

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

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

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

> 46. The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any

[18] FOF 18 (Footnote 23): Ex. A1 at 72-76, 111-112 (Application) and Ex. A5 at 8-11 (Wilhelm Direct Testimony).
[19] FOF 18 (Footnote 24): At the evidentiary hearing, pro se Intervenor Christenson questioned whether Applicant was in compliance with the Grant County Ordinance in effect at the time Grant County voted to approve the Project or the Ordinance that was made effective after the County's vote to approve the Project. Applicant testified that Grant County has indicated it intends to apply the Ordinance made effective shortly after approval of the CUP for the Project. Evid. Hrg. Tr. at 47-49 (Wilhelm) (February 4, 2020). The record in this proceeding shows that Crowned Ridge Wind II complies with both versions of the Grant County Ordinance - the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the vote. Evid. Hrg. Tr. at 217-218, 233-234, 237-239 (Haley) (February 4, 2020); Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A14-1 through Ex. A14-4 (Supplemental Testimony Sound and Shadow Flicker Studies); Ex. A21-1 through Ex. A21-3; and Ex. A28 and Ex. 29 (Rebuttal Testimony Sound and Shadow Flicker Results); and Ex. AC-19. Therefore, the record shows that Crowned Ridge Wind II will be in compliance with applicable laws, including the Grant County Ordinance.

Appx. C-14

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

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

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

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

> The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules. Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit. The record demonstrates that construction and operation of the Project, subject to the Permit Conditions, meets all applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

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

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

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

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

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

Aircraft Detection Lighting System (ADLS)

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

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

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

Christenson Appellants argue the following:

> Appellee Commission committed error in violation of statutory provisions insofar as Applicant [CRWII] failed to meet the statutory requirements of SDCL § 49-41B-25.2 by and through its failure, at the time of the Commission's hearing on the merits of Appellee CRWII's wind energy facility permit, of being equipped with – or even having applied for – the necessary and statutorily required aircraft detection lighting system (ADLS).

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

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

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

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

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

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

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

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

Sound and Air Quality Studies

A. Sound Study

Christenson Appellants argue the following:

> Appellee Commission failed to receive and consider Appellee [CRWII's] complete application for a wind energy facility permit through the time of the evidentiary hearing herein contrary to the requirements of South Dakota law, pursuant to SDCL § 49-41B-22(3), including the submission for review of a pre-construction sound or health study in each (or any) of the adversely affected counties.

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

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

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

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

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

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

B. Air Quality Study

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

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

ARSD 20:10:22:21.

CRWII argues that in its Application, it explained in detail that the Project's operations did not implicate air quality standards. CRWII's Brief, at 30. (AR 99-100). The Commission concluded "The evidence further demonstrates that there are no anticipated material impacts to existing air and water quality, and the Project will comply with applicable air and water quality standards and regulations." *Id.*; (AR 14237).

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

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

PART II: EHLEBRACHT APPELLANTS

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

Minimal Adverse Effect

Ehlebracht Appellants argue the following issue:

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

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

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

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

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

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

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

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

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

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

Issue 2: Easements and Servitudes

Ehlebracht Appellants argue the following issue:

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

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

> The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances, and are called easements:
> . . .
> (8) The right of receiving air, light, or heat from or over, or discharging the same upon or over land . . .

SDCL § 43-13-2(8).

Ehlebracht Appellants argue that the right to discharge light upon or over land is an affirmative easement. Ehlebracht Brief, at 21. Staff argues that the "Commission is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines." Staff's Ehlebracht Brief, at 12. CRWII argues that this statute "is wholly outside the statute the Legislature enacted for the Commission to administer." CRWII's Brief, at 20; *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp.*, 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions").

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

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

Taking and *Per Se* Nuisance

Ehlebracht Appellants argue the following issue:

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

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

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

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

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CONCLUSION

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

BY THE COURT:

Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

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18.0 Community Impact (ARSD 20:10:22:23)

ARSD 20:10:22:23. Community impact. *The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:*

(1) A forecast of the impact on commercial and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities, schools, transportation facilities, and other community and government facilities or services;

(2) A forecast of the immediate and long-range impact of property and other taxes of the affected taxing jurisdictions;

(3) A forecast of the impact on agricultural production and uses;

(4) A forecast of the impact on population, income, occupational distribution, and integration and cohesion of communities;

(5) A forecast of the impact on transportation facilities;

(6) A forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance. The information shall include the

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applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility; and
(7) An indication of means of ameliorating negative social impact of the facility development.

This section describes the main community characteristics in and around the Project Study Area, including the Project's impacts on socioeconomics, community resources, agriculture, transportation, and cultural resources. Socioeconomic variables evaluated include population, minority populations, poverty, employment and income, and housing. These variables were obtained or derived from the U.S. Census Bureau 2010 census and the 2013–2017 American Community Survey data and projections.

18.1 Socioeconomic and Community Resources

The socioeconomics analysis area is Codington, Deuel, and Grant Counties. Data for the City of Watertown and the State of South Dakota are used occasionally for comparison purposes.

18.1.1 Existing Socioeconomic and Community Resources

Table 18.1 summarizes select demographic factors for Watertown, Codington County, Grant County, Deuel County, and South Dakota. Deuel County's percentage of minorities is lower than Codington County, Grant County, Watertown, and the state. The percent of population living below the poverty level is highest for the state, followed by Watertown, Codington County, Deuel County, and Grant County.

Table 18.1. Socioeconomic Factors in Select Regions

Location	Population	Minority Populations (Percent)	Population Below Poverty Level (Percent)	Per Capita Income
Watertown	22,083	5.5	13.0	$28,783
Codington County	27,963	5.3	11.7	$29,249
Grant County	7,133	4.5	7.6	$29,363
Deuel County	4,282	0.4	10.0	$29,204
State of South Dakota	855,444	15.3	13.9	$28,761

Source: U.S. Census Bureau 2013-2017

The median annual household income in 2017 (using 2017 inflation-adjusted dollars) was $48,485 in Watertown, $52,025 in Codington County, $56,276 in Grant County, $57,969 in Deuel County, and $54,126 in the state of South Dakota (U.S. Census Bureau 2013-2017). The median annual household income accounts for multiple household earners, whereas the per-capita income (see Table 18.1) is the average income earned by each person in a given area so that multiple income earners in the same family or household are counted separately. Using 2017 inflation-adjusted dollars, the per-capita income in Watertown was $28,783, in Codington County was $29,249, in Deuel County was $29,204, and in Grant County was $29,363, while the

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per-capita income for the state was $28,761. The percentage of persons living below the poverty level ranked highest at the state level at 13.9.%, followed by Watertown at 13.0%, Codington County at 11.7%, Deuel County at 10.0%, and Grant County at 7.6% (U.S. Census Bureau 2013-2017).

As shown in Table 18.2, the largest employment and labor markets by occupation in Watertown and Codington County are similar and consist of sales and administration (29.7% and 27.9%, respectively), production and transportation (18.7% for each region), science and arts, including health facilities (11.5% and 11.6%, respectively), management (8.6% and 10.6%, respectively), and construction and extraction (5.5% and 5.6%, respectively). The largest employment and labor markets by occupation in Grant County are sales and administration (24.8%), management (14.6%), production and transportation (12.9%), science and arts, including health facilities (8.9%), and installation, maintenance, and repair (6.3%). The three largest employment industries in Watertown and Codington County are similar and include manufacturing (17.6% and 17.5%, respectively), educational and healthcare services (17.8% and 17.7%, respectively), and retail trade (18.3% and 15.8%, respectively). The three largest employment industries in Deuel County include manufacturing (18.3%), agriculture, forestry, fishing and hunting, and mining (18.1%), and healthcare and social assistance (17.0%). The three largest employment industries in Grant County are educational and healthcare services (20.6%), agriculture, forestry, fishing and hunting, and mining (15.5%), and manufacturing (10.7%) (U.S. Census Bureau 2013-2017). Smaller industries and labor markets with fewer employees in Watertown, Codington County, Deuel County, and Grant County include infrastructure, fire protection, law enforcement, recreational facilities, schools, and other community or government services.

Table 18.2. Employment by Occupation in Select Regions, Shown as Percentage of Employed Persons

Industry/Labor Market	Watertown	Codington County	Grant County	Deuel County
Sales and Administration	29.7	27.9	24.8	17.3
Production and Transportation	18.7	18.7	12.9	16.4
Science and Arts, including Health Facilities	11.5	11.6	8.9	12.5
Management	8.6	10.6	14.6	19.6
Farming	0.9	1.2	5.5	4.8
Construction and Extraction	5.5	5.6	6.1	8.8
Installation, Maintenance, and Repair	3.5	3.4	6.3	4.5
Business	3.6	3.3	2.9	1.5

Source: U.S. Census Bureau 2013-2017

Current housing and land values in the region are similar across all areas. In 2017, the U.S. Census Bureau reported 10,181 housing units in Watertown, 12,898 housing units in Codington

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County, 2,225 housing units in Deuel County, and 3,561 housing units in Grant County. The Codington County 2017 data reflect a 4.96% increase in housing units when compared with 2010 Census data, while the Deuel County 2017 data show a 0.14% increase, and the Grant County 2017 data show a 1.05% increase. Watertown shows a 3.14% increase since 2010. In 2010, the median values of owner-occupied housing units in Watertown and Codington County were similar at $127,800 and $131,000, respectively, while Deuel County was lower at $87,200, and Grant County was at $99,800. The Codington County 2017 figures reflect a 27.10% increase in value since the 2010 Census, Deuel County shows a 29.24% increase, Grant County shows a 16.03% increase, and Watertown shows a 25.98% increase.

The U.S. Census Bureau provides periodic socioeconomic estimates for selected geographies to help provide information on the changing demographics of the population between decennial censuses. Through the American Community Survey, the Census provided 3-year socioeconomic estimates for Codington, Deuel, and Grant Counties and the State of South Dakota, as summarized in Table 18.3 (U.S. Census Bureau 2013-2017).

Table 18.3. Socioeconomic Projections from 2013 to 2017

Location	Population	Race Percentage (White)	Percentage of Population Below Poverty Level	Per Capita Income
Watertown	22,083	94.5	13.0	$28,783
Codington County	27,963	94.7	11.7	$29,249
Grant County	7,133	95.5	7.6	$29,363
Deuel County	4,282	99.6	10.0	$29,204
South Dakota	855,444	84.7	13.9	$28,761

Source: U.S. Census Bureau 2013-2017

18.1.2 Socioeconomic and Community Resources Impacts/Mitigation

There will be short- and long-term benefits from the Project that include, but are not limited to, an increase in the Counties' tax base as a result of the incremental increase in revenues from utility property taxes (based on the Project value of $425 million; see Section 5). The chief economic effect of the Project will result from property taxes paid for the proposed improvements in Codington, Deuel, and Grant Counties infrastructure of approximately $39 million. Land lease payments to Project landowners will result in approximately $40 million over the contracted term of the Project. Additional benefits will result from the Project's capability to transmit energy generated from renewable energy resources that could spur energy development in the area, thereby generating additional economic gains. Further information on benefits of the Project is presented in Section 4.0.

Construction and operation of the Project is not expected to affect the local distribution of jobs or occupations in the community and is not anticipated to have significant short- or long-term

effects on commercial and industrial sectors, housing, land values, labor markets, health facilities, sewer or water treatment facilities, solid waste management facilities, fire or police facilities, schools, recreational facilities, and other government facilities or services. The Applicant does not expect a permanent impact on the population, income, occupation distribution, or integration or cohesion of communities.

The Project will be offset from roads and section lines, and the turbines and Project Construction Easement are not located within state or county highway ROWs. Also, collection lines will bore under roads. The final engineering design will consider planned or programmed future improvements to area roadways to ensure that sufficient roadway ROWs are maintained for future roadway widening. The Applicant has developed a Road Use Agreement with each County that will govern procedures for road use, repair, and restoration after construction, and any operational maintenance required.

The Project will have a positive impact on the local area as a result of lodging and food sales and other indirect economic benefits associated with transient workers. The Applicant expects the Project will employ workers associated with the construction and support services areas. Employee estimates are described in Section 19.

A common concern of communities surrounding wind energy facilities is the potential impact on residential property values. Wind energy projects drive economic development, job growth, and tax revenue which benefits landowners and land values in areas (Appendix L; NextEra Fact Sheet). Landowners who host wind turbines on their property earn regular lease payments, which add to its value, and lease payments continue with a sale of the property. Hoen et al. (2009) collected data from 7,500 sales of single-family homes situated within 10 miles of 24 existing wind facilities in nine different states. Rural areas in Iowa, Illinois, and Wisconsin that were analyzed in the study are similar in nature to the communities in South Dakota found in the current Project Area.

Analysis of eight hedonic pricing models on repeat sales and sales volume models shows no conclusive evidence of impacts of wind facilities to widespread property value in communities surrounding these facilities. Hoen et al. (2009) conclude the following:

> Neither the view of the wind facilities nor the distance of the home to those facilities is found to have any consistent, measurable, and statistically significant effect on home sales prices. Although the analysis cannot dismiss the possibility that individual homes or small numbers of homes have been or could be negatively impacted, it finds that if these impacts do exist, they are either too small and/or too infrequent to result in any widespread, statistically observable impact. (Hoen et al. 2009:iii).

The base model for the study also concluded the following: 1) there is no statistically significant difference in sales price between homes found within 1 mile and 5 miles of wind energy

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facilities; and 2) while home buyers and sellers consider the scenic vista of a home when establishing sales prices, there is no statistically significant home sale price difference apparent in the model for homes having minor, moderate, substantial, or extreme views of wind turbines (Hoen et al. 2009).

Additionally, Hoen et al. (2013) examined data from 50,000 home sales in 27 counties in nine states analyzed, including Minnesota, Iowa, and Illinois, which are similar in rural nature to South Dakota. The study found no statistically significant difference in home sales prices between 1 to 5 miles of wind turbines within a wind energy facility during the post-construction or post announcement/pre-construction periods of wind energy facilities. Research suggested that the "property-value effect of wind turbines is likely to be small, on average, if it is present at all" (Hoen et al. 2013:iii).

RM Hoefs & Associates, Inc., completed a 2015 survey of marker reactions to wind turbines and/or wind energy facilities with the objective of studying the effects of wind turbines on property values (see Appendix L, RM Hoefs & Associates, Inc. 2015). The analysis was based on 12 wind farms in North Dakota, although paired sales were only found at five wind farms. Out of a review of 26 participants, 25 did not consider any negative impacts or detrimental conditions on property values by adjacent wind energy facilities (see Appendix L, RM Hoefs & Associates, Inc. 2015). Based on the studies outlined above, the Project is expected to have a negligible effect, if any, on the assessed values of private property and, therefore, on property taxes.

The transportation, treatment, and disposal of hazardous waste will be required in accordance with state and federal regulations. The use and storage of petroleum products will be in accordance with applicable local, state, and federal regulations, the spill prevention and response procedures established in the SWPPP, and the SPCC Plan developed for the Project. Additionally, there is the possibility that the improper use, storage, and/or disposal of hazardous materials such as fuels, oils, and maintenance fluids could result in a release that could cause contamination and exposure during construction, operation, and maintenance activities associated with the Project. Direct effects of a release will include contaminating soil and water resources; while indirect effects could include exposing humans, wildlife, and vegetation to the contamination. The SPCC Plan implemented by the Applicant will minimize this risk and the contamination potential. Specifically, this plan will ensure that necessary resources are available to respond to a release and will minimize the risk of contaminating soil and water resources and the associated exposure to humans, wildlife, vegetation, and air quality. The risk of contamination and exposure will be further minimized by the Project's overall design and SPCC Plan requirements, such as adequately sized containment structures, regular facility inspections, and properly trained personnel. As required by the SPCC rule (40 CFR 112.7(j)), the Project SPCC Plan will incorporate county and state oil storage requirements as well.

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20:10:22:23. Community impact.

Currentness

The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:

(1) A forecast of the impact on commercial and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities, schools, transportation facilities, and other community and government facilities or services;

(2) A forecast of the immediate and long-range impact of property and other taxes of the affected taxing jurisdictions;

(3) A forecast of the impact on agricultural production and uses;

(4) A forecast of the impact on population, income, occupational distribution, and integration and cohesion of communities;

(5) A forecast of the impact on transportation facilities;

(6) A forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance. The information shall include the applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility; and

(7) An indication of means of ameliorating negative social impact of the facility development.

Credits

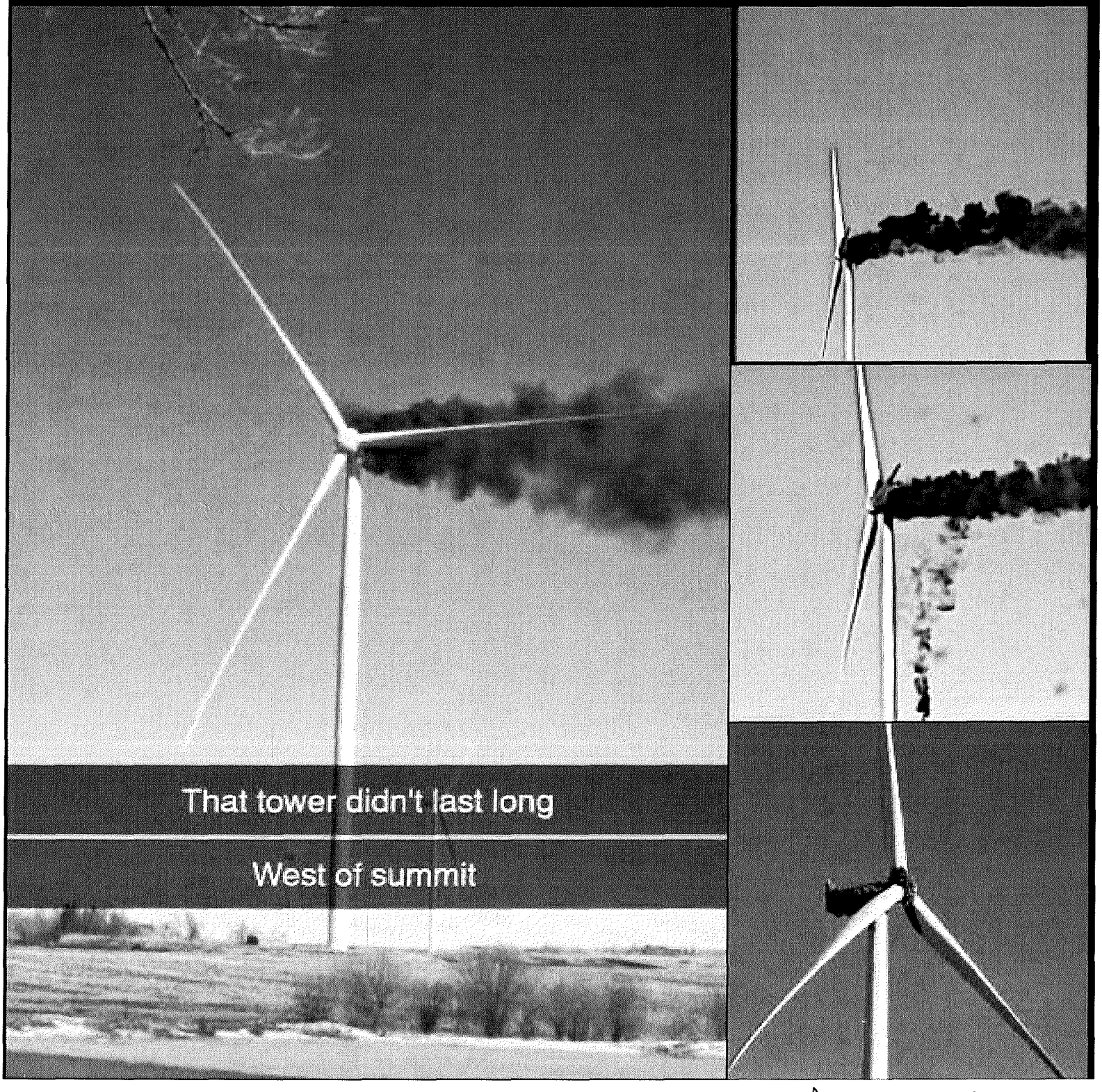
Source: 5 SDR 1, effective July 25, 1978; 12 SDR 151, 12 SDR 155, effective July 1, 1986.

General Authority: SDCL 49-41B-35.
Law Implemented: SDCL 49-41B-11(3), 49-41B-22.

S.D. Admin. R. 20:10:22:23, SD ADC 20:10:22:23

Jon Schliesman shared a **post.**
March 2 ·

This is around the summit area.



Appendix E