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' REPLY BRIEF

R. SHAWN TORNOW
TORNOW LAW OFFICE, P.C.
PO Box 90748
Sioux Falls, South Dakota 57109-0748
Telephone: 605-271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Appellant

AMANDA M. REISS
Special Assistant Attorney General
S.D. Public Utilities Commission
Pierre, South Dakota 57501
Telephone: 605-773-3201
E-mail: amanda.reiss@state.sd.us
One of the Attorneys for Appellee PUC; and

MILES F. SCHUMACHER
Lynn Jackson Shultz and Lebrun, PC
Sioux Falls, South Dakota 57104
Telephone: 605-332-5999
E-mail: mschumacher@lynnjackson.com
One of the Attorneys for Appellee CRW-II

NOTICE OF APPEAL FILED APRIL 12, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITES

FEDERAL CASES CITED:

N/A

STATE CASES CITED:

S.D. ADMINISTRATIVE RULES/REGULATIONS CITED:

STATUTES CITED:

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' REPLY BRIEF

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 previously set forth within Appellants' Initial Brief.

STATEMENT OF LEGAL ISSUES

As previously set forth within Appellants' Initial Brief.

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-

As previously set forth within Appellants' Initial Brief.

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.

Initially, Appellants note that Appellee CRW-II is in error at page 7 of its brief insofar as any claimed failed reference to identification of "ARSD 20:10:20:23" below

since, ultimately, the reference to non-compliance with applicable PUC administrative rules was instead as related to "ARSD 20:10:22:23. Community Impact."[1] *See/cf.*, Appendix D and D-6, Initial Brief. Moreover, as noted by the circuit court below, the overriding issue(s) of concern for Appellants and Intervenors below was addressed both at hearing before Appellee PUC under the auspices of Applicant CRW-II failing to meet its burden of proof and by and through significant "solid waste" concerns for local Intervenors and property owners.

As to the issue at-hand, for which Appellants continue to maintain that as to ARSD 20:10:22:23 - Community Impact, Appellees collectively failed to meet their burden of proof as related to the listed requirements, Appellants assert that – contrary to Appellees arguments as well as the cursory application language used and relied on below – it is axiomatic that "construction, operation and maintenance" must *also* include the key analysis of the how, where, when and to what extent operation and maintenance will directly impact "solid waste management facilities ... and other community and government facilities or services" in the adversely affected area. That is, Appellants respectfully submit that an examination of the evidence – as opposed to the brief cursory language provided in Appellee CRW-II's broad Application (Appendix D, Initial Brief) – clearly demonstrates CRW-II's failure to meet its burden of proof in relationship to the required showing mandated by ARSD 20:10:22:23 – irrespective of any insufficiently supported findings/conclusions of PUC Appellee as referenced.[2] In fact, Appellants

---

[1] That is, contrary to the reference by Appellee CRW-II, there was and is no reference by Appellants in this appeal to "ARSD 20:10:20:23" as might be related to "Refusal and Disconnection of Gas and Electric Service"; additionally, there's no subsection 23 in said rules.

[2] Again, as a matter of straightforward common sense, Appellants assert that it cannot be determined to meet an applicant's burden of proof to simply offer a cursory comment that "operation of the Project is not ... *anticipated* to have significant short- or long-term effects on

specifically point to PUC's brief, at page 6, for the telling admission by and for the Commission insofar as it admits to this Court that "...*there is nothing in the record* to suggest that the Project would have any effect on the Watertown [Regional] Landfill. The Watertown [Regional] Landfill is not within the project area and no evidence was offered..." Appellants respectfully submit that the foregoing admission that "there is nothing in the record" is precisely the point insofar as highlighting the failure by both CRW-II and the PUC in failing to address – with evidence – the necessary requirements of that which is mandated to be *established* and *proven* under ARSD 20:10:22:23 as related to the community impact of those citizens and taxpayers in the Project area. *See*, Appendix D-6, Initial Brief, that is, again: "*Applicant shall include an identification and analysis of the effects*..." Additionally, Commission attempts to somehow claim that the "Watertown [Regional] Landfill is not within the project area..." However, Commission apparently seemingly overlooks the undisputed (and jurisdictional-grounded) fact that the questioned adverse impacts of said project of course broadly stretch across Deuel, Grant and Codington counties. Thus, the obvious – and unaddressed – concerns surrounding the Watertown Regional Landfill – in Codington County. With such concerns legitimately questioning how the landfill necessarily would and will be impacted by the "construction, operation and maintenance" of the Project – both at present and into the

---

... [unnamed/unidentified] solid waste management facilities ... and other government facilities or services." *See*, Appendix D-3-D-4, under Sec. 18.1.2, Initial Brief. That is to say, once again, such a cursory and overly broad - non-evidentiary - statement provides absolutely no required "analysis" of both the operation *and* maintenance of the effects of the proposed facility nor an evidentiary-based "forecast of the impact" on the key community sectors. Moreover, while CRW-II in its brief, at page 12, also attempted to argue that Appellants, as Intervenors below, somehow "failed to show any prejudicial effect of the Commission's Order" [as related to Appellee CRW-II's failure to meet its burden of proof in this regard] – Appellants simply note that, as Intervenors below, they of course carried no burden of proof – other than seeking to hold CRW-II to its statutorily-required burden of proof and/or its burden of going forward as they very much sought to do here.

upcoming months and also into the next few years, even prior to any subsequent decommissioning. That is, as now conceded by the Commission in its brief, that aspect was wrongfully, erroneously and prejudicially (to Intervenors/Appellants) ignored since, as forthrightly admitted by the Commission: "There is nothing in the record..." Clearly, with nothing in the PUC's record – as Appellants have maintained – it cannot otherwise be claimed that Applicant/Appellee CRW-II met its burden of proof by (not) including the required identification *and* analysis of the effects of the construction, operation and maintenance of the facility on the anticipated (adversely) affected area, including a forecast of the impact on such solid waste management facilities, etc.

Once again, to keep in mind here that, contrary to Commission's description at page 6 of its brief, Applicant has – *not* Intervenors below having – the statutory burden of proof to establish by a preponderance of the evidence that:

> (1) *The proposed facility will comply with all applicable laws and rules;*
> ...
> (3) *The facility will not substantially impair the health, safety or welfare of the inhabitants* [including, of course, by and through use and/or excessive use of the area landfill during the wind farm's construction, operation and maintenance];...[Emphasis added.]

SDCL § 49-41B-22; *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...")

As before, Appellants once again point to Appellee CRW-II's failure to meet its burden below either through the non-identification, non-analysis and overall non-explanation of *any* effects related to such community impact within its application or through the lack of information or evidence provided by its lone witness in this regard, Mark Thompson as its manager of wind engineering within the engineering and

construction organization of NextEra Energy. *See*, ARSD 20:10:22:23. By way of reply, Appellants further note that, in fact, Thompson actually demonstrated his apparent lack of knowledge, and thus corresponding lack of evidence in this regard, when he testified that he "*didn't go through it [the safety data and potential hazardous contents] in its entirety*" but "based [only] on what he [otherwise] s[aw]" he generally didn't believe that there was anything to "suggest" that there are to be materials with the wind farm turbines that would be toxic as part of the Project's forthcoming operation and maintenance. AHT pgs. 178-179; AR Part 5: 9023-9024.

Once again, with due respect, the circuit court below – especially in light of the Commission's concession in its Brief of "nothing in the record to suggest that the Project would have any effect on the Watertown [Regional] Landfill" in Codington County – therefore should be found on review herein to have 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 (additional) 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 (as obviously part of "operation and maintenance") or after a turbine or numerous turbines expected term of life. Once again, as argued overall at hearing, 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. *See generally*, *Powers v. Turner County Board of Adjustment*, 2020 SD 60, ¶23, 951 NW2d 284, 294 (Cited/referenced to the Court 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.). *See/cf.*, Appendix D, Initial Brief.

> 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").

Appellants reiterate that 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*.[3] *See*, pgs. 20-22, Appellants' Initial Brief and its Appendix/Exhibit A.

[3] 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

Moreover, as acknowledged by the Commission in its Brief at page 13, applicant's – such as Appellee CRW – are mandated (i.e., "shall provide") information on "[a]nticipated noise levels at the exterior of all occupied residences located within the [adversely] affected area during construction and operation." *See*, ARSD 20:10:33.02(5). Here, by governing ordinance then, such requirement was legally expanded to include accessory structures. However, once again, Appellee CRW-II failed to include nearly 180-sound receptors in the area for any reasonable and fair showing of the required "anticipated noise levels" that were required to be provided – but were erroneously *not provided* – by Appellee CRW-II to Appellee PUC. As result, Appellants again submit that, in turn, any purported noise level finding(s) by Appellee PUC is legally and prejudicially deficient to Appellants, based on the requirements of ARSD 20:10:33.02(5). *See/cf.*, Appellants' Initial Brief at pgs. 20-24, including FN. Nos. 11-12.

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 reiterate 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.

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,*

---

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.

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.

As to such issue, Appellants rely on their Initial Brief, pgs. 24-27. In addition, Appellants respond to Appellees collective briefs by additionally citing to this Court's decision in *Coyote Flats, LLC. v. Sanborn County Com'n*, 1999 S.D. 87, 596 NW2d 347, as related to this Court's past review of fairly analogous evidentiary support by a lower tribunal of findings surrounding the substantial impairment of key health, safety or welfare of inhabitants who are subject to adverse impacts of disruptive and intrusive neighboring land uses. That is, 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...

In *Coyote Flats*, this Court essentially lauded the "ample evidence in the record" that addressed the health, safety and general welfare concerns of the area residents as related to, for instance: population, roads, devaluation of surrounding real estate, noxious odors and pollution – resulting from the local granting of a special use permit for the construction of a large 6,000-head hog confinement unit in Sanborn County. Coyote Flats special [hog/CAFO] use permit was initially denied by Sanborn County because of such significant adverse health, safety and welfare concerns to county inhabitants. Thereafter, however, Coyote Flats special [hog/CAFO] permit was ordered by the lower court to be issued by Sanborn County. Following appeal from circuit court though, this Court reversed the circuit court as it detailed the full extent of the required and necessary

evidence directly related to health, safety and welfare concerns of the local adversely affected citizens.

By way of contrast in the case at bar then, Appellants point out that 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 was submitted to Appellee PUC. Appellants therefore submits that such failure, contrary to Appellees arguments, falls short of the mandatory rule requirements within ARSD 20:10:33.02(5). *See*, Appellants' Initial Brief at pgs. 25-26. Moreover, the clear and obvious prejudicial effect on and to Appellants (as Intervenors needing to bear no burden of proof in such regard) cannot be overlooked insofar as the voluminous record herein is chalk-full of questions surrounding the negative health, safety and welfare aspects of excessive noise and/or necessary sound limitations on such intrusive wind farm projects (much like large hog confinement/CAFO units) to persons in and across the three-county area of Appellee CRW-II's project.

As previously noted, the underlying record surprisingly indicates that no South Dakota 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, Initial Brief. As to Appellee's attempted reliance on Robert McCunney, Massachusetts, in this regard, Appellants continue to rely on their argument

below (Circuit Ct-Tr. pgs. 12-13) and further pointing to the proposed undated and wrongly-paginated[4] affidavit should not be deemed as reliable evidence that sufficiently supports Appellee CRW-II's burden of proof. *See*, AR Part 5: 11507.

CONCLUSION:

As a result, Appellants respectfully request that, based on a just and fair review under 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
R. Shawn Tornow, for
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: (605) 271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for 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 14 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 3,125 words and 18,204 characters.

Respectfully submitted this 1st day of September, 2021, at Sioux Falls, S.D.

/s/ R. Shawn Tornow

[4] Appellants properly raised questions below about any reliance on such an undated document constituting any form of reliable "testimony" – that is, questions which were unaddressed – especially given that such purported signature document indicates that it is "page 9 of 9" when, in fact, the prior typed-up and unsigned page of "testimony" information also purported to (somehow) otherwise be "page 9 of 9" too. *See/cf.*, AR Part 5:11506-11507.

CERTIFICATE OF SERVICE:

This is to certify that on this 1st day of September, 2021, your undersigned's office, in conformance with the Court's most recent Order, timely e-mailed a copy of Appellants' Reply 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 such Reply Brief to Amanda M. Reiss, one of the attorneys for Appellee PUC, at amanda.reiss@state.sd.us, and also to Kristen Edwards, one of the attorneys for Appellee PUC, at kristen.edwards@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