IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

AMBER KAY CHRISTENSON, and
ALLEN ROBISH,

Appellants,

#29615

v.

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

Appellees.

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

APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF'S BRIEF

Notice of Appeal was filed on April 12, 2021

R. Shawn Tornow
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109
(605) 271-9006
rst.tlo@midconetwork.com
ATTORNEY FOR APPELLANT

Miles F. Schumacher
Lynn Jackson Shultz & Lebrun, P.C.
110, Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
(605) 332-5999
mschumacher@lynnjackson.com
ATTORNEYS FOR APPELLEES
CROWNED RIDGE WIND II, LLC

Brian J. Murphy
NextEra Energy Resources, LLC
700 Universe Boulevard
Juno Beach, Florida 33408
Brian.J.Murphy@nee.com
Admitted Pro Hac Vice
ATTORNEY FOR CROWNED RIDGE WIND II, LLC APPELLEE

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

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PRELIMINARY STATEMENT

Throughout this brief, Appellants Amber Christenson and Allen Robish are referred to collectively as "Intervenors". Intervenors' brief is cited as "AB" followed by the appropriate page number. The Appellee, Staff of the South Dakota Public Utilities Commission[1], is referred to as the "Commission Staff". Appellee, Crowned Ridge Wind II, LLC, is referred to as "Crowned Ridge." Citations to the Administrative Record are denoted "AR" followed by the appropriate volume and page number. Citations to the transcript of the Evidentiary Hearing held before the Commission are denoted as "EH" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

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

[1] While Intervenors throughout their brief refer to Appellee PUC, the accurate appellee is Commission Staff. Pursuant to SDCL 49-41B-17, Commission Staff is a party to the proceeding, whereas the Commission is the adjudicator.

STATEMENT OF ISSUES AND AUTHORITIES

1. **WHETHER CROWNED RIDGE MET ITS BURDEN TO PROVE THAT THE PROJECT WILL NOT INTERFERE WITH THE SAFETY AND WELFARE OF THE INHABITANTS?**

The Circuit Court held that Crowned Ridge met its burden of proof and the Commission did not err when granting a permit to Crowned Ridge and did not violate SDCL 49-41B-22 or ARSD 20:10:22:15:01.

Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company, 2015 S.D. 55, 866 N.W.2d 545.

Wheeler v. Farmers Mutual Insurance Co. of Nebraska, 2012 S.D. 83, 824 N.W.2d 102.

SDCL 49-41B-2

SDCL 49-41B-22

2. **WHETHER THE COMMISSION PROPERLY DETERMINED THAT THE PROJECT WILL COMPLY WITH ALL APPLICABLE LAWS, SPECIFICALLY AS IT RELATES TO COMPLIANCE WITH THE GRANT COUNTY ORDINANCE?**

The Circuit Court held that the validity of the Conditional Use Permit is a county issue and declined to address the validity of the Conditional Use Permit itself.

Sorensen v. Harbor Bar, 2015 S.D. 88,871 N.W.2d 851.

SDCL 49-41B-22

SDCL 49-41B-25

3. **WHETHER THE COMMISSION PROPERLY DETERMINED THAT CROWNED RIDGE MET ITS BURDEN TO PROVE THAT THE PROJECT WILL NOT IMPAIR THE HEALTH, SAFETY, OR WELFARE OF THE INHABITANTS?**

The Circuit Court found that SDCL 49-41B-22 does not require infrasound or low frequency sound studies to be completed.

In re Luff Exploration Co. 2015 S.D. 27, 864 N.W.2d 4.

Pesall v. Mont. Dakota Utils., Co., 2015 S.D. 81, 871 N.W.2d 649.

Petition of Famous Brands, Inc., 347 N.W.2d 882 (S.D.1984).

ARSD 20:10:22:18

SDCL 49-41B-22

STATEMENT OF THE CASE AND FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC filed with the Commission an application for a permit to construct an up to 300.6-megawatt (MW) wind project (the Project) in Codington, Deuel, and Grant counties, South Dakota. The Project will consist of up to 132 wind turbines. (AR 7:403, 406, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (Decision or Permit)).

In South Dakota, an energy facility permit from the Commission is required for wind energy facilities with a capacity of 100 MWs or more. SDCL 49-41B-2(7), (13); SDCL 49-41B-4. Where, as in this case, there are intervening parties and no global settlement is reached, the Commission holds a contested case hearing under SDCL Chapter 1-26.

Pursuant to ARSD 20:10:22:40, the Commission established an intervention deadline of September 9, 2019, sixty days after Crowned Ridge's Application was filed. Ten individuals intervened as parties before the September 9, 2019 deadline, and the Commission granted party status to each intervenor who filed before the intervention deadline. (AR 7:404). Two of those individuals, Intervenors, are parties to this appeal.

An evidentiary hearing was held on February 4-6, 2020, pursuant to the rules of civil procedure. (AR 7:405). Seventeen witnesses were called to testify at the evidentiary

hearing. (AR 7:434-437). Intervenors did not submit prefiled testimony or offer any witnesses.

The Commission met on March 17, 2020, to hear oral argument from the Parties and to make its decision on whether to issue the permit to Crowned Ridge II. (AR 7:405). After considering all of the information contained in the evidentiary record, reading post-hearing briefs, and hearing oral argument, the Commission voted to grant the permit subject to 49 conditions, including noise and shadow flicker limits, decommissioning requirements, and environmental issues. (AR 7:403-431).

On May 1, 2020, Intervenors filed a Notice of Appeal of the Commission's Order with the Third Judicial Circuit Court in Codington County. (AR 1:1). Pursuant to SDCL 1-26-31.1, the appeal was later consolidated with two other appeals taken from the same Commission Order. (AR 1:23). After briefing and oral argument, on March 12, 2021, Circuit Court Judge Elshere issued an Opinion affirming the Commission's granting of a Permit to Crowned Ridge to construct the facilities. (AR 7:1439). On April 12, 2021, Intervenors appealed the circuit court's decision to this Court. (AR 7:1482).

STANDARD OF REVIEW

The standard of review in an appeal from the circuit court's review of a contested case proceeding is governed by SDCL 1-26-37. *Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548. "[I]n reviewing the circuit court's decision under SDCL 1-26-37, we are actually making the 'same review of the administrative tribunal's action as did the circuit court.' " *Id.* "The agency's findings are reviewed for clear error." *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417. "A review of an administrative agency's decision requires this

Court to give great weight to the findings made and inferences drawn by an agency on questions of fact. We will reverse an agency's decision only if it is 'clearly erroneous in light of the entire evidence in the record.'" *In Re Pooled Advocate Trust,* 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146; citing *Snelling v. S.D. Dep't of Soc. Serv.,* 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. While statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review, "[a]n agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing*." Krsnak v. S. Dakota Dep't of Env't & Natural Res.,* 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2D 907, 916).

"A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II,* 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602. (citing *Sopko v. C & R Transfer Co., Inc.,* 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228-29). Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Lab*or, 411 N.W.2d 113, 119 (S.D. 1987).

A reviewing court may reverse or modify an agency only if substantial rights of the appellants have been prejudiced because the administrative findings, conclusions, or decision is, inter alia, affected by error of law, clearly erroneous in light of the entire evidence in the record, or arbitrary or an abuse of discretion. SDCL 1-26-36; *In re PSD Air Quality Permit of Hyperion,* 2013 S.D. 10, ¶16, 826 N.W.2d 649, 654.

ARGUMENT

1. WHETHER CROWNED RIDGE MET ITS BURDEN TO PROVE THAT THE PROJECT WILL NOT INTERFERE WITH THE SAFETY AND WELFARE OF THE INHABITANTS?

The Commission found that the Project "will not substantially impair the health, safety, or welfare of the inhabitants" of the Project area. (AR 7:414). Intervenors allege that the Commission erred in not evaluating the Project's effects on the Watertown Landfill. (AB at 16). However, there is nothing in the record to suggest that the Project would have any effect on the Watertown Landfill. The Watertown Landfill is not within the project area and no evidence was offered to suggest that in the event of decommissioning that site would even be utilized. As a party to the proceeding before the Commission, had Intervenors felt there would be an effect to the landfill, they were obligated to offer expert witness testimony to support the need for consideration of the effects, if any, specific to that site or the need for additional studies to be completed. Simply pointing out on appeal that the Watertown Landfill was not studied does not provide factual support for the need for such studies.

The administrative rules applicable to wind energy facility permit applications make no mention of a requirement for a study of all local landfills. *See generally* ARSD 20:10:22. This is in stark contrast to the rules for energy conversion facilities. SDCL 49-41B-2(6) defines an energy conversion facility as "any new facility, or facility expansion, designed for or capable of generation of one hundred megawatts or more of electricity, but does not include any wind or solar energy facilities." (Emphasis added). Unlike for wind energy facilities, applicants for an energy conversion facility permit must

"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." *See* ARSD 20:10:22:05 and 20:10:22:31. It is telling that the requirement is included in ARSD 20:10:22:31 but is not included in any statute or rule applicable to wind energy facilities.

This Court has held that the exclusion of language from [one] statute indicates that although the Legislature contemplated certain language, it did not intend for the language to apply where it was not used. *See, Wheeler v. Farmers Mutual Insurance Co. of Nebraska*, 2012 S.D. 83, ¶ 23, 824 N.W.2d 102, 109 (Holding that the Court presumes "that the Legislature meant something when it included this language in the underinsured motorist statute, but did not include such language in the uninsured motorist statute."). Had the solid waste requirement been intended to apply to wind energy facility permits, it would have been included in the applicable administrative rules. *See, Id*.

The argument put forth by Intervenors fails to acknowledge that ARSD 20:10:22:23 is forward-looking. The rule merely calls for a forecast of affects on "community and governmental facilities or services." ARSD 20:10:22:23(1). This rule is very pragmatic in that it would make little sense for the Commission to mandate that decommissioning some thirty or fifty years into the future be done using today's standards and today's technology. Neither a permit applicant nor the Commission has any way of knowing what laws and environmental regulations will be in force at the time the Project is decommissioned.

The information Intervenors attempt to insert into the discussion through Intervenors' brief is improper. Intervenors attempt to proffer new alleged evidence through Intervenors' Appendix E, which appears to be a Facebook post by a person unknown to Commission Staff, has no bearing on this appeal. Should Intervenors have compelling new evidence, the only proper mechanism for bringing forth that evidence is by making a motion pursuant to SDCL 1-26-34, which provides

> Circuit court may order agency to take additional evidence. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

The time for utilizing that procedural mechanism has passed. The Circuit Court's appellate review is confined to the record. SDCL 1-26-35. This Court has held that it makes "the same review of the administrative tribunal's action as did the circuit court." *Dakota Trailer*, *supra* at ¶ 11 (quoting, *Peterson v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 13, 816 N.W.2d 843, 847). Therefore, neither the Circuit Court nor this Court is the proper forum for Intervenors to attempt to admit this Facebook photograph into the record. Intervenors' Exhibit E is improper and should not be added to the record.

The Commission properly evaluated the evidence as it related to all applicable rules, and the Circuit Court correctly found that the Commission did not err in its

decision with respect to the question of disposal of solid waste. Even if the Commission did err, Intervenors can show no prejudice, as there is nothing in the record to suggest that disposal upon decommissioning of the Project would take place at the Watertown Landfill or any other location near to Intervenors.

2. WHETHER THE COMMISSION PROPERLY DETERMINED THAT THE PROJECT WILL COMPLY WITH ALL APPLICABLE LAWS, SPECIFICALLY AS IT RELATES TO COMPLIANCE WITH THE GRANT COUNTY ORDINANCE?

The Commission found that the Project will comply with all applicable laws and rules. (AR 7:408). In the Permit, the Commission noted the fact that there was some question as to which version of the Grant County Ordinance was applicable to the Project but noted that the Project complied with both versions of the ordinance in question. (AR 7:408, FN 24).

The applicant in a siting permit proceeding has the burden to establish that it will comply with all applicable laws and rules. *See* SDCL 49-41B-22(1). This does not impose upon the Commission the authority to adjudicate the validity of a county conditional use permit. The proper procedure to challenge a county conditional use permit is to seek a writ of mandamus from the proper circuit court, an action which Intervenors have undertaken. *See*, 25CIV20000010, *Allen Robish and Amber Christenson v. Grant County Planning Commission, et al.*[2] The Circuit Court agreed, noting the pending appeal from the Grant County action and declined to address the

[2] The Circuit Court issued a Memorandum Decision on July 28, 2021. The Memorandum Decision upheld the Grant County CUP but did not address the specific argument put forth here.

validity of the Conditional Use Permit (CUP). (AR 7:408). The Circuit Court specifically noted that "[t]his is an appeal from an *agency* decision, and not an appeal from a *county* decision. Because [the Grant County CUP] is a *county* issue […] the Court will not address the validity of the CUP itself in this case." (AR 7:1430-1431).

SDCL 49-41B-25 provides that when ruling on a wind siting permit application, the Commission may grant, deny, or grant, subject to conditions, the permit. The Commission attached 49 conditions to the Permit issued to Crowned Ridge. (AR 7:419-431). Condition 1 requires Crowned Ridge to obtain all necessary permits from all levels of government. (AR 7:419). Condition 2 requires Crowned Ridge to comply with all applicable permits. *Id*. The effect of these two conditions is that Crowned Ridge must obtain a valid CUP from the county and comply with the terms of that CUP. Therefore, even if the Circuit Court in 25CIV200000010 had not upheld the CUP, Crowned Ridge would be in violation of Conditions 1 and 2 if the facility is constructed and operated without a CUP and would be subject to fines and penalties that the Commission could order in accordance with SDCL 49-41B-34. It would then be the responsibility of Crowned Ridge to ensure compliance or cease operation. However, the record demonstrates that Crowned Ridge is able to comply with either of the two versions of the Grant County Ordinance in question. (EH 217-218, 233-234, 237-239).

Intervenors suggest that *Van Zanten* provides guidance in this case. (AB at 18, citing, *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, 598 N.W.2d 861). To the contrary, as was recognized by the Circuit Court, *Van Zanten* has no relevance in an appeal from a permit issued by the Commission. *Van Zanten*

establishes precedent for the law that is to be applied in a zoning case. This appeal is clearly distinguishable. This appeal is not from a zoning case and is not a review of a county action. The Commission has no zoning authority and does not issue zoning permits.

Even if the Court were to find that the Commission erred on this issue, Intervenors can show no prejudice. *See Sorensen v. Harbor Bar*, 2015 S.D. 88, ¶ 20,871 N.W.2d 851,856 (" ... [E]ven if the agency did abuse its discretion, we will not overturn unless the abuse produced some prejudicial effect." (internal citation omitted)). Intervenor Allen Robish is the only party to this appeal who resides in Grant County, South Dakota. The sound level modeled for the Robish residence is 30.0 dBA. (AR 2:2382). The Robish residence is located 12,651 feet, or more than two miles, from the nearest turbine. (AR 2:2382).

The various sound levels are depicted on iso-maps in the record. (AR 3:3534). Although the Robish residence is too far outside the Project boundary to appear on the iso-map, a comparison between the full map and the corresponding iso-map demonstrates that the residence is a significant distance from the iso-lines denoting an increase in sound levels. (AR 3:3534, 3536). Therefore, even if the Grant County ordinance is determined to require noise limitations for not just non-participating residences, but also at the perimeter of principal and accessory structures, as required in the previous version of the ordinance, the residence is well beneath the threshold level and no adjustment of the Project layout would be necessary. Thus, the sound level at Robish's home would be unaffected. Therefore, neither Intervenor would personally suffer prejudice if the

appropriate Court determines Crowned Ridge must comply with the previous version of the ordinance.

Moreover, as previously discussed, Condition 2 of the Permit requires Crowned Ridge to comply with all applicable permits, which includes the Grant County CUP. (AR 7:419). Therefore, it is incumbent upon Crowned Ridge to obtain and comply with a valid CUP, regardless of which version of the ordinance ultimately applies. If a Court determines the current CUP is invalid and a CUP must be sought under the previous ordinance, Crowned Ridge must secure a new CUP and comply with both the noise thresholds established in that CUP and those in the Commission's Permit.

Finally, the record shows that Crowned Ridge had a CUP from Grant County at the time the Commission issued the Permit. As there was no decision from a court that vacated or remanded the CUP, this proved prima facie that the Project complies with county ordinances.

The Commission did not err when it found that the Project will comply with all applicable laws and regulations. The Circuit Court correctly affirmed the Commission.

3. WHETHER THE COMMISSION PROPERLY DETERMINED THAT CROWNED RIDGE MET ITS BURDEN TO PROVE THAT THE PROJECT WILL NOT IMPAIR THE HEALTH, SAFETY, OR WELFARE OF THE INHABITANTS?

A. Sound Study

Despite the enormity of the administrative record in this proceeding, this particular issue is simple, as it comes down to the fact that 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. While SDCL 49-41B-22(3) requires an applicant to establish that a proposed project will not substantially impair health and welfare, neither it nor any other rule mandates how the applicant must satisfy its burden.

The statute is silent as to the mechanism for establishing the burden, whether it is through the testimony of health experts and acousticians, iso-maps, or modeled projections and comparisons. The only specific requirements are that the applicant must provide a map showing noise sensitive land uses and must provide information concerning the anticipated noise levels during construction and operation. *See* ARSD 20:10:22:18(1) and 20:10:22:33.02(5). It is within the sole discretion of the Commission to determine whether the burden was met utilizing the evidence within the record. Here, the Commission found that there was sufficient evidence in the record to demonstrate that the sound from the Project would not substantially impair the health and welfare of the community. (Finding of Fact 68, AR 7:417).

Pursuant to SDCL 1-26-36, Courts give great deference to the Commission's findings. *Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute

its judgment for that of the agency when there is ample evidence in the record to support the agency's finding). The Commission's conclusion that the sound produced by the Project would not substantially impair the health, safety, or welfare of the local inhabitants was supported by substantial evidence in the record, was reasonable and not arbitrary, and was therefore within the discretion of the Commission. The Circuit Court agreed, holding that SDCL 49-41B-22 "does not require an act that Intervenors claim exists. Rather, it simply states that [Crowned Ridge] must prove its facility will not substantially impair the health, safety, or welfare of the inhabitants. … [T]here are no specific mandates on completing this task." (AR 7:1434).

Furthermore, the substantial evidence before the Commission included expert testimony from both health experts and acousticians, with no corresponding testimony put forth by Intervenors to contradict these experts. For example, Crowned Ridge provided testimony of Dr. Robert McCunney, addressing the Intervenors' concerns and stating that the proposed turbine placements and setbacks proposed by Crowned Ridge II will not substantially impair the health of the inhabitants. (AR 5:11501, Prefiled Supplemental Testimony of Dr. Robert McCunney).

The Commission found this testimony to be convincing, finding that

> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge Wind II witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge Wind II witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical

> doctor specializing in occupational health and the impact of sound on humans.

(AR 7:415). This Court has held that it gives great deference to the Commission's special expertise in siting dockets. *See*, *Pesall v. Mont. Dakota Utils., Co.*, 2015 S.D. 81, ¶ 8, 871 N.W.2d 649, 652.

Intervenors contend that Commission Staff should have called a health expert. (AB at 27). Intervenors seem to allege that Commission Staff bears a burden of proof, referring to "Appellees['] (collective) burden of proof under SDCL 49-41B-22(3)." (AB at 27). To the contrary, the Legislature placed the burden of proof solely on an applicant for a siting permit. *See* SDCL 49-41B-22. Commission Staff bears no burden of proof, and thus, no responsibility to put on a case or call expert witnesses.

Commission Staff, nonetheless, went above and beyond by calling experts in areas where it felt necessary, contacting appropriate government agencies, offering testimony, and putting several hundred pages worth of evidence into the record. The letter from the South Dakota Department of Health stated that the "studies generally conclude that there is insufficient evidence to establish a significant risk to human health." (AR 5:3257, Letter from Department of Health). Based upon this response from the appropriate government agency, Commission Staff determined there was no need to hire a health expert. If Intervenors disagreed, it was incumbent upon them to provide expert testimony.

Contrary to arguments made by Intervenors in footnotes within their brief, there is also no requirement that studies be provided to address the effects of noise or infrasound

on domestic animals. (AB at 28, FN 14). Intervenors cite to ARSD 20:10:22:18 as supporting a requirement that "audible noise, air quality, shadow, low frequency noise, or infrasound" should have been studied for their effects on animals. However, with respect to the burden of proof, ARSD 20:10:22:18 implicates SDCL 49-41B-22(2), which provides that an applicant has the burden to prove that

> 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.

As previously discussed, Crowned Ridge holds a CUP from the relevant counties. Therefore, SDCL 49-41B-22(2) does not apply to Crowned Ridge, and, by extension, ARSD 20:10:22:18 also does not apply. Rules cannot be in contravention of statute. *In re Luff Exploration Co*. 2015 S.D. 27, ¶ 17, 864 N.W.2d 4, 9 (quoting, *Paul Nelson Farm v. S.D. Dep't of Revenue*, 2014 S.D. 31, ¶ 24, 847 N.W.2d 550, 558). Intervenors' reliance on ARSD 20:10:22:18 would nullify the exception created by the Legislature in SDCL 49-41B-22(2) and effectively expand the statute. *Id*. (Holding that Luff's interpretation of the rule would not only expand the statute, it would nullify [the statute's] requirement…).

While Crowned Ridge still had the burden of prove pursuant to SDCL 49-41B-22(3) that the Project "will not substantially impair the health, safety, or welfare of the inhabitants," the administrative rule specifically implements subpart two, not subpart three, of SDCL 49-41B-22.

The Commission properly considered all of the evidence in the record and did not abuse its discretion in finding that the Project will not substantially impair health and welfare of the inhabitants. The Commission's decision should be affirmed.

B. Air Quality Study

Intervenors note that no air quality study was submitted to or reviewed by the Commission. (AB 26). Such an allegation is a misinterpretation of ARSD 20:10:22:21, which provides

> 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.

Nothing in the language of ARSD 20:10:22:21 mandates an air quality study. The rule is clear and unambiguous. The rule requires Crowned Ridge to provide evidence that it will comply, not to provide a study demonstrating how it will comply with air quality standards. "The legislative intent is determined from what the [L]egislature said, rather than from what we or others think it should have said." *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D.1984) (citation omitted). Intervenors may think the rule should include a requirement that an air quality study be completed. However, that is not what the rule says.

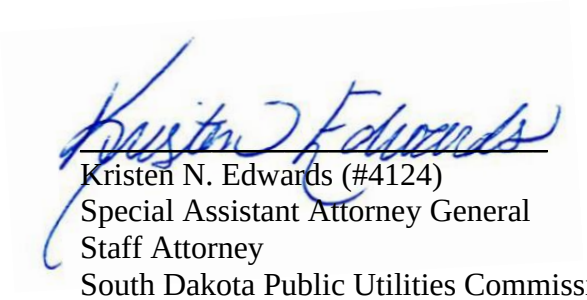
Intervenors provide no support for the contention that a requirement of a study should be read into the rule.

VI. CONCLUSION

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

Dated this 4th day of August 2021.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF



Kristen N. Edwards (#4124)
Special Assistant Attorney General
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us

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CERTIFICATE OF COMPLIANCE

Kristen N. Edwards, staff attorney for Appellee South Dakota Public Utilities Commission, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface described in SDCL 15-26A-66(b) as follows:

a. The typeface of the brief is in Times New Roman 12 point; and
b. The brief contains 4,110 words, according to the word counting system in Microsoft Office 2010 for Windows used by the undersigned.

Kristen N. Edwards, #4124
Special Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Ph. (605) 773-3201
Kristen.Edwards@state.sd.us

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Appellee South Dakota Public Utility Commission Staff's Brief in the above-referenced case were served upon the following persons by electronic mail at the addresses listed below:

R. Shawn Tornow
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109
(605) 271-9006
rst.tlo@midconetwork.com

Miles F. Schumacher
Lynn Jackson Shultz & Lebrun, P.C.
110 , Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
(605) 332-5999
mschumacher@lynnjackson.com

Brian J. Murphy
NextEra Energy Resources, LLC
700 Universe Boulevard
Juno Beach, Florida 33408
Brian.J.Murphy@nee.com

And the original and 2 copies were hand delivered to the South Dakota Supreme Court, 500 East Capitol Ave., Pierre, South Dakota 57501, as well as filing by electronic service in to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@state.sd.us on the 4th day of August 2021.

Kristen N. Edwards, #4124
Special Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Ph. (605) 773-3201
Kristen.Edwards@state.sd.us