IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

AMBER K. CHRISTENSON
AND
ALLEN ROBISH
Petitioners-Appellants,

v.

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

Appeal No. 29615

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

APPELLEE CROWNED RIDGE WIND II, LLC'S BRIEF

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NOTICE OF APPEAL FILED APRIL 12, 2021

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JURISDICTIONAL STATEMENT

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

STATEMENT OF THE ISSUES AND AUTHORITIES

Issue 1. WHETHER CROWNED RIDGE II MET ITS BURDEN OF PROOF WITH RESPECT TO ARSD 20:10:22:23?

The Commission correctly concluded that Crowned Ridge II met its burden of proof with respect to the evidence required to be submitted pursuant to ARSD 20:10:22:23.

Lagler v. Menard, Inc., 2018 S.D. 53, 915 N.W.2d 707
In re Black Hills Power, 2016 S.D. 92, 889 N.W.2d 631
State v. Rederth, 376 N.W.2d 579 (S.D. 1985)

Issue 2. WHETHER CROWNED RIDGE II MET ITS BURDEN OF PROOF WITH RESPECT TO COMPLIANCE WITH ALL APPLICABLE LAWS AND RULES?

The Commission correctly concluded that Crowned Ridge II met its burden of proof with respect to the evidence required to be submitted to establish it will be in compliance with all applicable laws and rules.

Sorensen v. Harbor Bar, LLC., 2015 S.D. 88, 871 N.W.2d 851
In re Application of Svoboda, 54 N.W.2d 325 (S.D. 1952)

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

Issue 3. WHETHER CROWNED RIDGE II MET ITS BURDEN OF PROOF THAT THE PROJECT WILL NOT SUBSTANTIALLY IMPAIR THE HEALTH, SAFETY, OR WELFARE OF THE INHABITANTS?

The Commission correctly concluded that Crowned Ridge II met its burden of proof with respect to the evidence required to be submitted to show the Project will not substantially impair the health, safety, and welfare of the inhabitants.

Sorensen v. Harbor Bar, LLC., 2015 S.D. 88, 871 N.W.2d 851
Application of Otter Tail Power Co., 2008 S.D. 5, 744 N.W.2d 594
In re Application of Svoboda, 54 N.W.2d 325 (S.D. 1952)

STATEMENT OF THE CASE

On July 9, 2019, Crowned Ridge II filed an Application for a Facility Permit to construct and operate the Project to be located in Grant County, Deuel County, and Codington County, South Dakota. (AR-1 71-1107) The Commission conducted a contested case to review the Application, which included the submission of pre-filed testimony, discovery, the granting of party status to ten intervenors,[1] three days of evidentiary hearings, the submission of legal briefs, oral argument, and the issuance of the April 6, 2020 Order granting a Facility Permit to Crowned Ridge II. On April 29, 2020, Intervenors filed a Notice of

[1] The Intervenors from the underlying proceeding who comprise the Appellants-Intervenors are Amber K. Christenson and Allen Robish.

Appeal of the Commission's Order with the Third Judicial Circuit Court in Codington County ("Circuit Court"). After briefing and oral argument, on March 21, 2021, Circuit Court Judge Elshere issued an Opinion affirming the Commission's granting of a Facility Permit to Crowned Ridge II. On April 12, 2021, Intervenors appealed the Circuit Court's Opinion to this Court.

STATEMENT OF THE FACTS

On July 9, 2019, Crowned Ridge II filed an Application and accompanying appendices with the Commission for a Facility Permit to construct and operate the Project, a 300.6-megawatt wind facility located in Codington, Grant, and Deuel Counties, South Dakota. (AR-1 71-1107) Also, on July 9, 2019, Crowned Ridge II submitted the pre-filed Direct Testimony and exhibits of Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter. (AR-2 5-81)

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

On July 31, 2019, the Commission issued an order granting party status to Amber Christenson, Allen Robish, and Kristi Mogen. (AR-2 156-157) On August 26, 2019, the Commission also issued an order granting party status to

Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Loretta Kranz. (AR-2 441) On August 26, 2019, the Commission held the public input hearing. (AR-2 240-440)

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

On October 1, 2019, the Commission issued an Order For and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for February 4-7, 2020 to be conducted in the Matthew Training Center, Foss Building, 523 E. Capital Ave., Pierre, South Dakota. (AR-2 2192-2193)

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

On January 8, 2020, Crowned Ridge II submitted the pre-filed Rebuttal Testimony and exhibits of Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson. (AR-3 789-856) An evidentiary hearing was held on February 4-6, 2020, pursuant to the rules of civil procedure. (AR-7 432-1152) Seventeen witnesses were called to testify at the evidentiary hearing. On February 27, 2020 and March 2, 2020, post-

hearing briefs were filed by Crowned Ridge II, Commission Staff, and Intervenors. (AR-7 4-45; 62-100;103-115; 117-148) On April 6, 2020, the Commission issued an Order granting a Facility Permit to Crowned Ridge II, subject to 49 conditions. (AR-7 403-431)

SUMMARY OF THE ARGUMENT

Intervenors' assert that Crowned Ridge II did not meet its burden of proof on: (1) the disposal of wind turbine blades; (2) compliance with the Grant County sound ordinance in effect when the Crowned Ridge II Conditional Use Permit ("CUP") was voted on by Grant County; and (3) whether the Project would substantially impair the health, safety, or welfare of the inhabitants. Intervenors' assertions ignore the manner in which the thorough and well-reasoned Commission Order, which was supported by substantial evidence, addressed these issues. Intervenors' assertions also fail because a plain language reading of the applicable statutes and regulations does not mandate the information and studies Intervenors claim are required for Crowned Ridge II to satisfy its burden of proof. Further, Intervenors overlook well-settled deferential precedent this Court applies to appeals of Commission orders. Accordingly, as shown herein, a reading of the Commission's Order in the context of the relevant statutes, regulations, and precedent fully supports that the Circuit Court's Opinion and Commission's Order should be affirmed in all respects.

STANDARD OF REVIEW

The Supreme Court affords great weight to the Commission's findings and the inferences drawn by the Commission on questions of fact. *See* SDCL § 1-26-36; *In Re Prevention of Significant Deterioration*, 2013 S.D. 10, ¶¶ 16, 48, 826 N.W.2d 649, 654, 662 ("We 'give great weight to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire record.'") (quoting *Williams v. South Dakota Dep't of Agric.*, 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400). Questions of law are reviewed *de novo*. *See Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545); *State v. Geise*, 2020 S.D. 161, ¶ 10, 656 N.W.2d 30, 36. The Supreme Court will afford a well-reasoned and fully informed Commission decision with "due regard", unless there is a clear error of judgment or conclusion not supported in fact. *In re Application of Otter Tail Power Co.*, 2008 S.D. 5, ¶ 29, 744 N.W.2d 594, 603.

In addition, the Supreme Court does not weigh the evidence or substitute its judgment for that of the Commission, but, rather, its function is to determine whether there was substantial evidence in support of the Commission's conclusion or finding. *See In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952); *In re Application of Dakota Transp., Inc.*, 291 N.W. 589, 593, 595-596 (S.D. 1940). Under SDCL § 1-26-1(9), substantial evidence is defined as "relevant and competent evidence as a reasonable mind might accept as being sufficiently

adequate to support the conclusion." The Court only reverses the Commission's factual determinations when it is "left with a definite and firm conviction that a mistake has been committed." *In re Application of Midwest Motor Express*, 431 N.W.2d 160, 162-163 (S.D. 1988). In addition, for the Court to find an abuse of discretion, the agency's action must be "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." *Sorensen v. Harbor Bar*, LLC, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856. Even if the Court finds the Commission abused its discretion, for the Court to overturn the Commission's decision it must also conclude that the abuse of discretion had a prejudicial effect. *Id*. at ¶ 20, 871 N.W.2d at 856.

ARGUMENT

I. Crowned Ridge II met its burden of proof with respect to ARSD 20:10:22:23.

Intervenors assert that Crowned Ridge II did not meet its burden of proof on the community input regulation, ARSD 20:10:20:23, because it did not present an analysis of wind turbine blade disposal in the context of local landfills. Intervenors Br. at 13-18. As a threshold issue, it is undisputable that Intervenors did not identify ARSD 20:10:20:23 as an issue in their brief in the underlying Commission proceeding. Instead, Intervenors claimed Crowned Ridge II had not met its burden under ARSD 20:10:22:31 (AR-7 132-133) – a regulation the Circuit Court correctly ruled does not apply to Crowned Ridge II. (AR-7 1470-1471) Intervenors cannot now present a new argument to this Court, because arguments

not presented in the underlying proceeding are waived. *See Lagler* v. *Menard, Inc.*, 2018 S.D. 53 ¶ 42, 915 N.W.2d 707, 719 (". . . the parties must preserve their arguments for review by stating their reasons why the agency decision, ruling, or action identified as the object of the appeal should be reversed or modified"); *In Re LAC Minerals USA*, 2017 S.D. 44, ¶ 13, 900 N.W.2d 283, 288 (holding that the issue was waived because it was not presented during underlying administrative proceeding).

Additionally, Intervenors inappropriately attempt to introduce post-hearing evidence in Appendix E to their brief. *See State v. Rederth*, 376 N.W.2d 579, 580 (S.D. 1985) ("Appeals are decided entirely on the record received from the trial court. This court cannot take new evidence on appeal, SDCL 15-26A-47, or take judicial notice of facts subject to reasonable dispute. SDCL 19-10-2."). Intervenors concede the internet posting of a photograph of a wind turbine attached in their Appendix E occurred after the Circuit Court's decision, which is well after the record in the underlying Commission proceeding closed. Intervenors also do not allege that the wind turbine depicted in the photograph has any relationship to Crowned Ridge II. Further, Appellee-Crowned Ridge II disputes the authenticity of Appendix E and any inference that it shows an existing need to dispose of wind turbine blades. Hence, given that Appendix E is not part of the official record and is subject to a reasonable dispute, Appendix E is not properly before this Court and should be stricken.

Even if Intervenors' assertion related to ARSD 20:10:20:23 is properly before the Court, Intervenors' reading of the Commission's regulation is misplaced and inconsistent with the rules of statutory construction in South Dakota. It is well-established that when the language of statute or regulation is "clear, certain and unambiguous," the Court's function is to follow the clearly expressed meaning. *In re Black Hills Power*, 2016 SD 92, ¶ 9, 889 N.W.2d 631, 634, quoting *Citibank, N.A. v. S.D. Dep't of Revenue*, 2015 S.D. 67, ¶ 12, 868 N.W.2d 381, 387. As the Circuit Court concluded, ARSD 20:10:20:23 does not expressly mention the disposal of wind turbine blades:

> . . . 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 . . . . (Emphasis in original)
>
> (AR-7 1471)

It is clear from the Circuit Court's ruling that Intervenors conflate the plain language of ARSD 20:10:20:23 which, in pertinent part, requires: "The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility [including] . . . A forecast of the impact on . . . solid waste management facilities . . . ." with the requirements associated with the decommissioning of the Project's infrastructure at the end of its life. With respect to the analysis forecasting the impact on solid waste management facilities during construction, operation, and maintenance, Crowned

Ridge II provided a forecast in its Application explaining that there would be no material impact on solid waste management facilities. (AR-1 170-174) Intervenors presented no expert witness or evidence refuting this forecast. Thus, the unchallenged Crowned Ridge II solid waste forecast constituted the preponderance of the evidence on the record, which, in turn, the Commission concluded was sufficient for Crowned Ridge II to meet its burden of proof on ARSD 20:10:20:23 for solid waste management facilities. (AR-7 413-414)

With respect to decommissioning of the Project and removal of its infrastructure, the Commission promulgated a specific regulation, ARSD 20:10:22:33:01,[2] which Intervenors overlooked. As required by ARSD 20:10:22:33:01, Crowned Ridge II submitted a Decommissioning Plan as Appendix N to its Application. (AR-1 1093-1107) ARSD 20:10:22:33:01 does not require the Decommissioning Plan to include a specific discussion on which landfill or if any landfill will be used for the disposal of wind turbine blades. Rather, consistent with the plain language of ARSD 20:10:22:33:01, Crowned Ridge II's Decommissioning Plan discusses how Crowned Ridge II would dismantle and remove wind turbines, including their blades, at the end of the life of the Project in 25 years. (AR-1 186-187; AR-1 1095) Therefore, Crowned Ridge

[2] In pertinent part, ARSD 20:10:22:33:01 reads: "The applicant shall provide a plan regarding the action to be taken upon the decommissioning and removal of the wind energy facilities."

II met its burden of proof to submit evidence associated with the Commission regulation that addresses the removal of wind turbine blades.

In addition, the Commission imposed Condition No. 32 requiring Crowned Ridge II to comply with its Decommissioning Plan: "If the Project is decommissioned, Applicant shall comply with Section 21 of the Application and the decommissioning plan set forth in Appendix N of the Application. The Commission shall be notified prior to the commencement of any decommissioning activities at the Project." (AR-7 426) *See Pesall v. Mont. Dakota Utils., Co.*, 2015 S.D. 81 ¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring the resubmittal of the application to consider additional information). Hence, not only do Intervenors misread ARSD 20:10:22:23, they overlooked the applicable regulation, ARSD 20:10:22:33:01, and the unchallenged fact that Crowned Ridge II submitted a Decommissioning Plan as required by ARSD 20:10:22:33:01 that addressed the removal of wind turbine blades. Accordingly, Crowned Ridge II met its burden of proof to provide a forecast of the impact to solid waste facilities pursuant to ARSD 20:10:22:23 during the construction, operation, and maintenance, and also met its burden of proof to file a Decommissioning Plan pursuant to ARSD 20:10:22:33:01 that included how it would dismantle and dispose of the Project, including wind turbine blades, at the end of the life of the Project.

Even if, *arguendo*, the Commission abused its discretion with respect to its finding regarding Crowned Ridge II's ARSD 20:10:22:23 evidence, which it did not, Intervenors have failed to show any prejudicial effect of the Commission's Order with respect to the disposal of wind turbine blades. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (even if the decision was an abuse of discretion, a court will not overturn an agency's decision unless the abuse produced some prejudicial effect). Intervenors' speculative and generalized assertions related to wind turbine disposal fall far short of a showing of prejudicial effect on Intervenors. For instance, there is no showing of the proximity of Intervenors to any landfill, and, even if there was such a showing, there is only speculation that any Crowned Ridge II wind turbine blades would be disposed of in said landfill and that there would be any impact on Intervenors that would rise to the level of being prejudicial. Compounding the speculative nature of any impact on Intervenors is the fact that the removal and disposal of wind turbine blades will occur some 25 years into the future. (AR-1 186-187; AR-1 1095) For the foregoing reasons, Intervenors failed to show any prejudicial effect.

In addition, Intervenors' citation to *Powers v. Turner County Board of Adjustment*, 2020 SD 60, 951 N.W. 2d 284 as "generally analogous" is unavailing. Intervenors Br. at 16. The narrow issue in *Powers* was whether the appellant-landowners had standing to challenge the Turner County Board of Adjustments' approval of a feedlot. In that case, the Court held that the landowners had standing, because "[t]hey substantiated their allegations with expert opinions

rather than relying on mere speculation, conjecture, or fantasy." There is no holding or conclusion in *Powers,* as inferred by Intervenors, that indicates this Court is now taking a more expansive view of community impacts in the context of state agency regulations. Hence, the Court's holding in *Powers* on standing is neither instructive nor informative on whether Crowned Ridge II carried its burden of proof in the instant case.

II. Crowned Ridge II met its burden of proof with respect to compliance with all applicable laws and rules.

Intervenors aver that Crowned Ridge II did not meet its burden of proof regarding the 49-41B-22(1) requirement that the applicant, by a preponderance of the evidence, establish the Project will comply with the Grant County Ordinance in effect when Grant County voted to approve the Project. Intervenors Br. at 18-24. Contrary to Intervenors' assertion, the Commission thoroughly and reasonably considered Intervenors' position and rejected it:

> 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.

(AR-7 408)

Additionally, the Commission concluded:

> The evidence submitted by Crowned Ridge Wind II 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. (footnotes omitted)

Id.

The above-quoted rulings show that the Commission, based on substantial evidence, concluded that Crowned Ridge II established it would comply with all applicable laws and rules as required by 49-41B-22(1), including the Grant County CUP and the Grant County sound ordinance in effect at the vote approving the CUP as well as the ordinance enacted after the vote. *Application of Svoboda*, 54 N.W.2d at 327 ("The court's authority extends only to a determination whether the Commission acted with its power and whether it's determination is supported by substantial evidence."), citing *Application of Dakota Transp., Inc.*, 291 N.W. at 593, 595-596; *See Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856 (the court will not substitute its judgment for that of the agency when there is ample evidence in the record to support the agency's finding); *Application of Svoboda*, 54 N.W.2d at 328 (reversing circuit court, and directing it to affirm a Commission order that was

based on substantial evidence, concluding that ". . . the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission."); *In Re Northwestern Pub. Serv. Co.*, 297 N.W.2d 462, 467 (S.D. 1980) ("It is not for this court to weigh the evidence."); *Application of Dakota*, 291 N.W. at 593, 595-596 (reversing circuit court, and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "[t]he ultimate question is whether there was substantial evidence to support the order of the Commission."). Intervenors' assertion that this Court substitute its judgment for the Commission and weigh the evidence submitted in the underlying proceeding is against the great weight of precedent and should be rejected. The Commission had ample substantial evidence of Crowned Ridge II's compliance with all applicable laws and rules, including that Crowned Ridge II had a valid CUP from Grant County and Crowned Ridge II's commitment to comply with both sound ordinances. Therefore, the Circuit Court correctly ruled that the Commission did not err in finding that Crowned Ridge II had met its burden of proof with respect to under 49-41B-22(1). (AR-7 at 1430-1431)

In addition, Intervenors assert that the Commission should have adjudicated or re-litigated evidence submitted to Grant County in support of the Crowned Ridge II CUP proceeding. Intervenors Br. at 20, 22, n11. Intervenors' assertion, however, is antithetical to the Court's well-established precedent that the

Commission is not a court, and, therefore, the Commission has no jurisdiction to second guess Grant County's issuance of a CUP nor Grant County's application of its ordinances to Crowned Ridge II – that jurisdiction is vested in Grant County. *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp*., 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions.") quoting *Application of Svoboda*, 54 N.W.2d at 327. When boiled down, Intervenors' argument is nothing more than a transparent collateral attack on Grant County's issuance of a CUP to Crowned Ridge II, which should be rejected. In this regard, the Circuit Court correctly ruled:

> 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. (Emphasis is original)
>
> (AR-7 at 1431)

Additionally, the Circuit Court correctly rejected Intervenors' assertion that *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, 598 N.W.2d 861 is analogous to the instant case:

> 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 zoning ordinance.
>
> (AR-7 at 1430-1431)

Despite the Circuit Court's ruling, Intervenors again raise *In re Conditional Use Permit Granted to Van Zanten* as analogous in its brief before this Court. Intervenors Br. 20. Contrary to Intervenors' assertion, any reasonable reading of *Van Zanten* indicates that it is neither informative nor instructive. In that case, the underlying proceeding involved the scope of a remand to correct the legal description of a hog-finishing application. There is no remanded case before the Court in the instant appeal nor a need to correct a legal description in the Crowned Ridge II Application. Therefore, Intervenors' citation to *Van Zanten* simply reinforces its intent to collaterally attack the Grant County CUP, which is not a subject matter properly before this Court.

Intervenors have also failed to show the Commission's actions had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. Not only did Crowned Ridge II commit to comply with both sound ordinances in question, the Intervenors are well below the Commission-imposed sound threshold of 45 dBA for non-participants: Christenson 41.2 dBA and Robish 30.0 dBA. (AR-7 69-70) For additional context, the record shows that the sound produced from the Project for Christenson is approximately that of a soft whisper at a distance of 3 feet, while for Robish it is sound below that produced in a library. (AR-1 229) There is no showing of prejudicial effect, because the Project's sound for the Intervenors is below the Commission-imposed thresholds, which were based on substantial evidence that sound produced by the Project below the thresholds will not substantially impair the health or welfare of the inhabitants.

III. Crowned Ridge II met its burden of proof that the Project will not substantially impair the health, safety or welfare of the inhabitants.

SDCL § 49-41B-22(3) reads: "The applicant has the burden of proof to establish by a preponderance of the evidence that: . . . The facility will not substantially impair the health, safety or welfare of the inhabitants." Intervenors assert that Crowned Ridge II did not meet its burden with regard to SDCL § 49-41B-22(3) because Crowned Ridge II did not submit studies on: (1) pre-construction sound; (2) infrasound; (3) low-frequency sound; (4) air quality; (5) shadows on roadways; (6) ice throw; and (7) domestic animals or wildlife sound, air quality, shadow, or frequency or infrasound. Intervenors Br. at 24-28. However, as is evident from the clear, certain, and unambiguous language of SDCL § 49-41B-22(3), there is no mandate that any particularized study be submitted, including those identified by Intervenors, in connection with a wind project application. *In re Black Hills Power,* 2016 SD 92, ¶ 9, 889 N.W.2d 631, 634. Indeed, Intervenors do not point to any statute or regulation in which the plain language can be read to mandate the studies identified by Intervenors. Given the lack of any expressed statutory mandate, Intervenors' assertion that the identified studies are required to meet Crowned Ridge II's burden of proof is fatally flawed. *Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 34-35, 744 N.W.2d at 604 (Commission's application of SDCL § 49-41B-22 upheld: "Our review of the record shows the PUC entered a well-reasoned and informed decision when it concluded that Big Stone II would not pose a threat of serious

injury to the environment. . . .what will pose a threat of serious injury to the environment under SDCL 49-41B-22 is a judgment call initially vested with the PUC by the Legislature. Nothing in SDCL Chapter 49-41B so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment."). Therefore, as a threshold matter, Intervenors' assertions regarding the identified studies are without merit and should be rejected.

Additionally, as part of the Commission's careful and thorough review of the record, the Commission found that Crowned Ridge II met its burden of proof, including on the subjects associated with the identified studies.

A. Pre-Construction Sound, Infrasound, and low-frequency sound.

Intervenors incorrectly claim that ". . . *no pre-construction sound study was submitted to Appellee PUC* . . . ." (emphasis in original; footnote omitted.) Intervenors Br. at 25. A straightforward reading of the Commission's Order belies Intervenors' claim, because the Commission, based on Crowned Ridge II's witness Jay Haley's pre-construction sound study, concluded that:

> The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the receptors were assumed to be downwind of the wind turbines; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants property boundaries for those residences in Codington

> County. Applicant modelled sound levels with consideration of the cumulative sound impacts from Deuel Harvest and Crowned Ridge Wind I wind projects. Further, Applicant agreed to Permit Condition No. 27 in order to further reduce certain non-participant sound levels, consistent with the proposal advocated by Staff witness Mr. David Hessler. Pursuant to Permit Condition No. 26, Applicant agreed to a post construction sound protocol to be used in the event the Commission orders post construction sound monitoring.
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> * * *
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> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge Wind II witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge Wind II witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR-7 414-415) (footnotes citing to Crowned Ridge II's preconstruction study studies evidence omitted).

The above passages, and the record evidence cited within the passages, demonstrate that the Commission, based on substantial evidence found Crowned Ridge II's preconstruction sound study satisfied the burden of proof required of SDCL § 49-41B-22(3). *Application of Svoboda*, 54 N.W.2d at 327. Thus, not only did Intervenors overlook the fact that Crowned Ridge II filed a pre-construction sound study, they ignore the Commission's thorough and careful consideration of that study. Also, in Attachment A to the Order, the Commission conditioned the granting of the Facility Permit on Crowned Ridge II complying

with the sound thresholds of 45 dBA for sound within 25 feet of a nonparticipant's residence and 50 dBA for sound within 25 feet of a participant's residence, which further belies Intervenors' claim. (AR-7 424-425 Condition No. 26) *See Pesall v. Mont. Dakota Utils., Co.,* 2015 S.D. 81¶ 8, 871 N.W.2d 649, 652.

Against the weight of the Commission's findings, conclusions, and condition related to the Project's sound, Intervenors claim that Crowned Ridge II failed to meet its burden of proof because it did not file an ambient (*i.e.*, background) sound study. However, SDCL § 49-41B-22 does not require the submittal of an ambient sound study, or any specific sound study for that matter. (AR-7 1433) Accordingly, not only is Intervenors' claim regarding the requirement of an ambient sound study without a legal basis, it also fails in light of Commission's findings and ultimate conclusion that the sound produced from the Project will not substantially impair the health or welfare of the inhabitants, which were based on substantial evidence and were reasonable and not arbitrary. Further, clearly a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge II (including its conservative sound modelling assumptions used by Mr. Haley and the unchallenged testimony of Dr. McCunney, a Harvard-trained medical doctor specializing in the field of occupational health) as supporting the findings and conclusion that the sound to be produced by the Project will not substantially impair the health or welfare of the inhabitants. *See* SDCL § 1-26-1(9) (whether there is substantial evidence is determined by whether a

reasonable mind might accept the evidence as being sufficiently adequate to support the conclusion). Additionally, the Commission's findings, conclusions, and imposition of the sound in Condition No. 26 are within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856; *Pesall*, 2015 S.D. 81 ¶ 8, 871 N.W.2d at 652; *Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 34-35, 744 N.W.2d at 604. Thus, Intervenors claim that a background sound study was required is without merit and should be rejected.

Equally without merit is Intervenors' assertion that Crowned Ridge II could only satisfy its burden of proof through the submittal of infrasound and low-frequency sound studies.[3] Intervenors again overlook Crowned Ridge II's evidence that demonstrated that neither an infrasound or low-frequency sound project-specific study was needed, because wind turbines do not result in infrasound or low-frequency health or welfare issues. For instance, Dr. Robert McCunney testified that the Project posed no impact on health from infrasound and low frequency sound. (AR-2 2016) Further, Richard Lampeter, an environmental scientist, with over 15 years of experience in conducting sound assessments, including over 90 wind energy projects,

[3] "Low frequency noise and infrasound are present in the environment due to other sources besides wind turbines. For example, refrigerators, air conditioners, and washing machines generate infrasound and low frequency sound as do natural sources such as ocean waves." (AR-2 59)

testified that a peer-reviewed study he co-authored demonstrated that wind turbines do not present audible infrasound inside a household, and, also, that the low frequency produced from a wind turbine meets the applicable American National Standards Institute standard for low-frequency sound in households. (AR-2 59, 70-81) No expert witness was presented by Intervenors to contest the conclusions of Dr. McCunney or Mr. Lampeter. Therefore, the evidence submitted by Crowned Ridge II on infrasound and low-frequency sound coupled with the Commission's thorough and reasonable consideration of the impact of the sound produced by the Project on the health and welfare of the inhabitants demonstrates that the Commission findings on sound impact from the Project were reasonable and not arbitrary. For these reasons, the Commission's rulings that the sound produced by the Project will not substantially impair the health or welfare of the inhabitants should be affirmed.

As established in Section II, *supra*, Intervenors also failed to show the Commission's actions on sound had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. Therefore, even if the Court were to find that the Commission abused its discretion on the sound to be produced from the Project, which it did not, Intervenors are not entitled to any relief as there is no prejudicial effect resulting from the Commission's findings and conclusions on the sound produced from the Project.

B. Air Quality.

Intervenors misread the Commission's regulation related to the submission of air quality information as requiring a study. Intervenors Br. at 26-27. Commission regulation, ARSD 20:10:22:21, reads:

> 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.

The plain language of this regulation is clear, certain, and unambiguous, and does not include the term "study." Therefore, the regulation cannot be read to mandate an air quality study, as Intervenors aver. Consistent with the language of the regulation, in its Application Crowned Ridge II submitted evidence regarding the current state of air quality regulations in South Dakota and that the Project's operations did not implicate air quality standards. (AR-1 169-170) The Application further detailed that any dust produced during the temporary construction of the Project would be mitigated by practices, such as dust suppression/control as well as during reclamation, as required by the stormwater pollution prevention plan and Codington County, Deuel County, and Grant County Haul Road permits. (AR-1 170) Based on this evidence, 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." (AR-7 411) Hence, Intervenors not only misread ARSD 20:10:22:21, they overlooked the substantial

evidence relied on by the Commission on the issue of air quality. *Application of Svoboda*, 54 N.W.2d at 327. Thus, the Circuit Court correctly concluded the Commission did not err when granting the Facility Permit to Crowned Ridge II without a record that included an air quality study. (AR-7 1434)

C. Shadows on roadways.

Intervenors assert that Crowned Ridge II was required to submit a study with respect to shadows on roads. As with all of Intervenors' study-related assertions, there is no statute or Commission regulation mandating that Crowned Ridge II submit such a study. Intervenors also fail to acknowledge that Crowned Ridge II submitted a detailed shadow flicker study, which included isoline maps showing the modelled shadow flicker for inhabitants, as well as shadow flicker amounts for the entire Project area.[4] Hence, if the Intervenors desired to understand the amount of shadows on roadways due to the Project, the maps would have provided them that information. (*See, e.g.,* AR-2 2495-2501) As with Intervenors' other assertions, they presented no expert to testify on this issue. Furthermore, in contrast to Intervenors' curt and speculative assertion on shadows, the Commission thoroughly and reasonably considered the issue of shadow flicker:

[4] Shadow flicker from wind turbines occurs when rotating wind turbine blades move between the sun and the observer. Shadow flicker is generally experienced in areas near wind turbines where the distance between the observer and wind turbine blade is short enough that sunlight has not been significantly diffused by the atmosphere. When the blades rotate, this shadow creates a pulsating effect, known as shadow flicker. If the blade's shadow is passing over the window of a building, it will have the effect of increasing and decreasing the light intensity in the room. . . ." (AR-2 11)

> . . . . the record also demonstrates that Applicant has appropriately minimized the shadow and flicker for the Project to no more than 30 hours for all participants and nonparticipants inclusive of cumulative impacts from Deuel Harvest and Crowned Ridge Wind I, with the understanding that wind turbine CRII-Alt-3 will need to be curtailed to ensure the shadow and flicker is no more than 30 hours at receptor CR1-C10-P. Applicant also used conservative assumptions, such as the greenhouse-mode, no credit for blockage due to tree and assumed the wind turbines were operating 100% of the time to model shadow and flicker, which, in turn, produces conservative results.
>
> There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge Wind II witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. . . .
>
> (AR-7 414-415)
>
> On safety, the Commission also concluded:
>
> There is no evidence in the record that the Project will substantially impair safety. Applicant will meet or exceed required setbacks established for safety, and, also, implement safety practices during construction, operation, and maintenance . . . .
>
> (AR-7 415).

Similar to the Commission's consideration of sound, the above passages, and the record evidence cited within the passages, demonstrate that the Commission, based on substantial evidence, found Crowned Ridge II's shadow flicker study satisfied the burden of proof required of SDCL § 49-41B-22(3) to show that the Project will not substantially impair the health or welfare of the inhabitants. *Application of Svoboda*, 54 N.W.2d at 327. In this regard, a

reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge II (including its conservative sound modelling assumptions used by Mr. Haley and the unchallenged testimony of Dr. McCunney) as supporting the findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. *See* SDCL § 1-26-1(9) Also, similar as to sound, the Commission imposed Condition No. 35 setting a shadow flicker threshold of 30 hours per year at a residence unless the owner of the residence has waived the 30-hour per year threshold. (AR-7 428) *See Pesall v. Mont. Dakota Utils., Co.*, 2015 S.D. 81¶ 8, 871 N.W.2d 649, 652. The Commission's findings, conclusions, and imposition of Condition No. 35 related to shadow flicker are within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. Thus, Intervenors' claim that Crowned Ridge II did not meet its burden on the issue of studying shadows on roadways is without merit and should be rejected

In addition, Intervenors failed to demonstrate that the Commission's actions on shadow flicker had a prejudicial effect. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. With regard to shadow flicker, the record shows that Intervenors are well below the Commission-imposed shadow flicker threshold of 30 hours per year established in Condition No. 35: Christenson 6 hours and 54 minutes annually and Robish will experience no shadow flicker. (AR-7 69-70) Thus, even if *arguendo* the Court found that the Commission abused its discretion, there is no

showing of prejudicial effect, because the Project's shadow flicker for the Intervenors is below the Commission-imposed thresholds that substantial evidence shows will not substantially impair the health or welfare of the inhabitants.

D. Ice throw.

On the subject of ice throw, the Commission addressed the issue by adopting Condition No. 36:

> Applicant will use 2 methods to detect icing conditions on wind turbine blades: (1) sensors that will detect when blades become imbalanced or create vibration due to ice accumulation; and (2) meteorological data from on-site permanent meteorological tower(s), on-site anemometers, and other relevant meteorological sources that will be used to determine if ice accumulation is occurring. These control systems will either automatically shut down the wind turbine(s) in icing conditions (per the sensors) or Applicant will manually shut down wind turbine(s) if icing conditions are identified (using meteorological data). Wind turbines will not return to normal operation until the control systems no longer detect an imbalance or when weather conditions either remove icing on the blades or indicate icing is no longer a concern. Applicant will pay for any documented property damage caused by ice thrown from a wind turbine.
>
> (AR-7 428).

In addition, the Commission concluded, as quoted in Section III, C, *supra*, that there was no evidence that the Project would substantially impair safety, because the setbacks proposed by Crowned Ridge II will meet or exceed the required setbacks established for safety. Intervenors presented no safety expert to contest Crowned Ridge II's evidence. Thus, the Commission properly concluded that Crowned Ridge II met its burden of proof regarding the safety of the location of its wind turbines and reinforced such safety through the adoption of Condition

No. 36. *Pesall v. Mont. Dakota Utils., Co.*, 2015 S.D. 81¶ 8, 871 N.W.2d 649, 652; *Application of Svoboda*, 54 N.W.2d at 327. The Commission's findings, conclusions, and imposition of Condition No. 36 related to ice throw are within the range of permissible choices given the record, and, therefore, were reasonable and not arbitrary. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856. Furthermore, given that there is no statute that requires an ice throw study, Intervenors' assertion that such a study is required lacks a legal basis and should be rejected. *Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 34-35, 744 N.W.2d at 604.

E. Animals and Wildlife.

Intervenors' assertion related to animals and wildlife overlooks the multiple wildlife impact studies submitted by Crowned Ridge II and the Commission's finding that:

> The evidence demonstrates that the Project does not pose a threat of serious injury to wildlife. Applicant has conducted extensive studies and consulted relevant studies to understand the potential impact to wildlife. Applicant will implement an avoidance, minimization, and mitigation approach to lessen the impact the Project has on wildlife, including mammals and avian species. Crowned Ridge Wind II also agreed to Staff's condition on the monitoring and mitigation of impacts to Whooping Cranes, which is included as Permit Condition No. 46. There will be no turbines or other infrastructure sited on Waterfowl Production Areas, Game Production Areas, walk-in areas, grassland, wetland/grassland combination easements, or on Farmers Home Administration Easements. Pursuant to Permit Condition No. 30, Applicant will file a Bird and Bat Conservation Strategy prior to the start of construction. Also, Staff witness Ms. Hilary Meyer Moyer testified that Applicant had appropriately coordinated with the SD GF&P on the impact of the Project on wildlife.
>
> (AR-7 410) (footnotes citing wildlife studies and evidence omitted)

This passage and the evidence cited show that the Commission's conclusion that the Project would not pose a serious threat to wildlife, including mammals and avian species, was based on substantial evidence. *Application of Svoboda*, 54 N.W.2d at 327. The Commission also adopted Condition No. 29 on avian and bat mortality monitoring; Condition No. 30 directing Crowned Ridge II to submit a Bird and Bat Conservation Strategy prior to the start of construction; Condition No. 46 directing Crowned Ridge II to establish a procedure to protect whooping cranes; and Condition No. 49 requiring coordination between Crowned Ridge II and Crowned Ridge Wind I on a prairie grouse study. (AR-7 426, 430-431) *Pesall v. Mont. Dakota Utils., Co.,* 2015 S.D. 81 ¶ 8, 871 N.W.2d 649, 652. Intervenors presented no expert to contest Crowned Ridge II's studies; nor did they point to any statute that requires the specific studies they claim are needed for Crowned Ridge II to meet its burden of proof.

Additionally, Intervenors' assertion that domestic animals and pets are covered by SDCL § 49-41B-22 (3) is without merit, because the clear, certain, and unambiguous language in that statute refers to "inhabitants" and that term is afforded its ordinary meaning. *In re Black Hills Power*, 2016 SD 92, ¶ 9, 889 N.W.2d 631, 634; *Hofer v. Redstone Feeders, LLC*, 2015 SD 75, ¶ 15, 870 N.W.2d 659, 662. The ordinary meaning of "inhabitants" does not include domestic animals or pets. ("a person who dwells or resides permanently in a place …." Webster's Third New International Dictionary, Unabridged at 1163.) Therefore, Intervenors' assertion that Crowned Ridge II, pursuant to SDCL § 49-41B-22 (3),

was legally mandated to include studies on the health and welfare of domestic animals and pets is without merit.

Furthermore, in the context of SDCL § 49-41B-22 (2), the Commission correctly concluded, based on substantial evidence, that Crowned Ridge II had met its burden of proof that the Project will not pose a threat of serious injury to the environment, including wildlife such as mammals and avian species. (AR-7 410) Accordingly, Intervenors' assertions related to animal and wildlife studies are based on a misreading of SDCL § 49-41B-22 and should be rejected.

CONCLUSION

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

Respectfully submitted this 3rd day of August 2021.

/s/ Miles F. Schumacher

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellee Crowned Ridge Wind II, LLC's Brief contains 7,994 words as counted by Microsoft Word.

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

/s/ Miles F. Schumacher
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CERTIFICATE OF SERVICE

Miles F. Schumacher, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 3rd day of August 2021, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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

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