

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

AMBER CHRISTENSON, LINDA
LINDGREN, and TIMOTHY LINDGREN,

Complainants,

v.

CROWNED RIDGE WIND, LLC

Respondents.

Docket No. CE22-001

**MOTION AND BRIEF IN SUPPORT
OF MOTION TO DISMISS
FORMAL COMPLAINT**

Respondent, Crowned Ridge Wind, LLC, (“Crowned Ridge”), by and through their attorneys of record, and pursuant to ARSD 20:10:01:11.01, SDCL 15-6-12(b)(5); SDCL § 1-26-18, respectfully move the Commission for dismissal of the formal complaint (“Complaint”) filed by Amber Christenson, Linda Lindgren, and Timothy Lindgren (collectively” Complainants”) for failure to state a claim upon which relief can be granted. Crowned Ridge submits and incorporates the following Brief in support of its Motion to Dismiss.

RELEVANT FACTUAL BACKGROUND

On July 26, 2019, in Docket No. EL19-003, the Commission granted Crowned Ridge a Facility Permit to construct a wind energy conversion facility in Grant and Codington Counties. As a condition to approval (Condition No. 26), the Commission established sound thresholds and a process for conducting post-construction sound studies. Crowned Ridge has conducted three post construction sound studies, each pursuant to Commission-approved protocols. *See*, EL19-003, *Order Approving Post Construction Noise Compliance Test Protocol* dated Feb. 19, 2020, *Order Approving Sound Level Measurement Program Protocol* dated Oct. 2, 2020, *Order Approving Mitigation Plan*, dated April 9, 2021, *Order Granting Petition for Reconsideration and Order*

Granting Motion to Amended Sound Study Mitigation Plan dated Sept. 9, 2021, orders hereto provided as Attachment A. All three sound studies were conducted by a third-party expert retained by Crowned Ridge, Epsilon Associates, Inc. (“Epsilon”). The sound studies were reviewed by the Commission Staff’s independent expert Hessler Associates, Inc. (“Hessler”). The last and third sound study conducted by Epsilon was submitted on April 11, 2021. Both Epsilon and Hessler concluded that the third sound study showed that Crowned Ridge was in compliance with the Commission’s sound thresholds. *See*, Attachment B, 2021 Epsilon and Hessler Sound Reports.

LEGAL STANDARD

ARSD 20:10:01:11.01 expressly authorizes the Commission to dismiss a complaint through a motion to dismiss which raises a defense set forth in SDCL 15-6-12(b), including the failure of the complaint to state a claim upon which relief can be granted – SDCL 15-6(b)(5). Under South Dakota law, a complaint sought to be dismissed under SDCL 15-6(b)(5) is evaluated using the following standard:

“[f]actual allegations must be enough to raise a right to relief above the speculative level. The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause action will not do.” The rules “contemplate a statement of circumstances, occurrences, and events in support of the claim presented.” Ultimately, the claim must allege facts, which, when taken as true, raise more than a speculative right to relief.

Hernandez v. Avera Queen of Peace Hospital, 2106 SD 68, ¶ 15 (other citations omitted). The South Dakota Supreme Court has further elaborated in *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 9 that:

A motion to dismiss under SDCL 15–6–12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. . . . However, facts “well pled” and not mere conclusions may be accepted as true. A 12(b)(5) motion does not admit conclusions of the pleader either of fact or law. Therefore, [w]hile the court must accept allegations of fact as true when considering a motion to dismiss, **the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.**

(emphasis added) (internal and other citations omitted).

ARGUMENT

Complainants make the following assertions as basis for their request for relief: (1) the 2021 Sound Study did not meet all the requirements Condition No. 26 in Crowned Ridge’s Final Order; and (2) the 2021 Sound Study did not meet the requirements of the approved Mitigation Plan. Complaint at 2-17. Based on these factual allegations, Complainants request remedies in which include, among other things, that the Commission order another sound study to be conducted in January 2023 to be paid by Crowned Ridge, with Complainants having approval rights to the protocols, locations studied, and the entity conducting the sound study. *Id.* at 18. Complainants also seek the Commission to pay for a third-party evaluator of the sound study, and that Complainants have approval rights over the selection of the evaluator. *Id.*

A straightforward application of South Dakota’s legal standard for a complaint to survive a motion to dismiss SDCL 15-6(b)(5) for failure of the complaint to state a claim upon which relief can be granted requires the dismissal of the instant Complaint. As explained above, two well-recognized experts (Epsilon and Hessler) in the field of sound studies concluded that the 2021 Sound Study comported with Condition No. 26 and the approved Mitigation Plan.

Epsilon Report at 8-1.

Per the requirements of the Order Approving Mitigation Plan dated April 9, 2021 and the Order Granting Petition for Reconsideration and Order Granting Motion to

Amend Sound Study Mitigation Plan in Part on Reconsideration, a post-construction sound level measurement program was conducted in the Fall of 2021 in Grant and Codington Counties for the Crowned Ridge Wind Energy Center. Measurement data from a two-week program were analyzed and compared to the appropriate limits identified in the permit conditions set forth by the SD PUC Final Decision.

Hessler Report at 2.

As a result of this finding a mitigation plan was devised by CRW where winter ice operating mode (WIOM) software would be installed to automatically monitor for ice and shut down affected units to prevent a spike in noise. A facet of the mitigation plan was to retest the Project's sound emissions during similar winter conditions without limiting the evaluation to 100% power output in order to see if the problem persisted or not, should icing conditions occur. This test was carried out by Epsilon over a two week period in November of 2021 and their final report was submitted to the SDPUC on February 14, 2022.

As important, the same two experts found that Crowned Ridge complied with the Commission-imposed sound thresholds.

Epsilon Report at 8-1

The sound level compliance assessment focused on periods meeting all evaluation criteria identified in Section 7 of this report that were also close in time to wind turbine shutdowns. The results show that calculated wind turbine only sound pressure levels under conditions meeting the evaluation criteria established, comply with the Final Decision sound level limit of 50 dBA at participating residences and 45 dBA at non-participating residences.

Hessler Report at 2, 41

Our independent analysis of the survey data indicates that the sound emissions from the project are, in fact, compliant with the noise limits contained in the permit conditions. Additionally, we find no faults or errors in Epsilon's final report on the survey and agree with its conclusions. In fact, Epsilon should be commended for the massive amount of time and effort that went into properly carrying out this lengthy field survey during difficult wintertime conditions.

* * *

In short, we conclude, based on both the Epsilon and our own analysis, that the sound emissions from the Project are in compliance with the permit noise conditions.

The Complaint should be dismissed. Complainant's factual predictions and conclusions are mere speculation and conjecture, "legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." Complainants' speculative inferences and conclusions are not well-pled facts, they do not show an injury or harm, and, hence, they do not support the requested relief compelling an additional sound study. Indeed, Complainants' selective quoting of the Crowned Ridge 2021 Sound Study conducted by Epsilon cannot show non-compliance when not only did Epsilon conclude that Crowned Ridge was in compliance with the Commission's sound thresholds, but Hessler's independent review did the same. Accordingly, there is no legal basis on which the Commission can allow the Complaint to proceed, because there are no well-pled facts that show an injury that needs to be remedied through another sound study. Therefore, the Complaint should be dismissed.

In the spirit of helping Complainants understand the 2021 Sound Study, Richard Lampeter of Epsilon drafted a point-by-point correction of their incorrect inferences for informational purposes, which is attached hereto as Attachment C.

CONCLUSION

For all these reasons, Crowned Ridge respectfully requests that the Commission dismiss the Complaint.

Dated this 28 day of October, 2022.

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

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