

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CODINGTON)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

TIMOTHY LINDGREN and
LINDA LINDGREN,

Plaintiffs,

vs.

CODINGTON COUNTY, *a political
subdivision of the State of South Dakota,*
CODINGTON COUNTY BOARD OF
ADJUSTMENT, *an agency of Codington
County, having issued a certain
Conditional Use Permit, # CU018-007,*
CROWNED RIDGE WIND, LLC,
CROWNED RIDGE WIND II, LLC,
BOULEVARD ASSOCIATES, LLC,
*all other Persons having present or future
interests in #CU018-007, and*
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION, *having issued a certain
Facility Siting Permit, Docket EL19-003, and
all other Persons having
present or future interest in a certain
Energy Facility Permit issued by the
South Dakota Public Utilities Commission in
Docket EL19-003,*

Defendants.

14CIV19-000303

PLAINTIFFS' OBJECTIONS
TO TAXATION OF
COSTS OR DISBURSEMENTS

PLAINTIFFS, by and through their counsel, file this as their objections to the affidavit of the Finance Manager of Defendant PUC, dated and filed January 10, 2020, taken to be an application for taxation of costs and disbursements, in accord with SDCL 15-6-54(d).

Plaintiffs submitted their Notice of Appeal to the South Dakota Supreme Court on January 10, 2020, with Defendant's affidavit being filed soon thereafter that same date. Considering *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 15, 693 N.W.2d 656, it appears the trial court does not lose jurisdiction of a case for purposes of taxing costs to the prevailing party, even

while the case is on appeal. The Court in *Picardi* cited SDCL 15-17-37, and quoted also the first sentence of the statute:

The prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial.

The Lindgren complaint, of course, was dismissed on December 20, 2019 under Rule 12(b)(1) and (5). The Court's order has granted the PUC's Motion for costs (as ordered in the bench ruling of December 9, 2019), which itself references SDCL 21-24-11, providing for an award of costs as may seem equitable and just.

Plaintiffs – continuing in their new capacity as Appellants – are challenging the granting of the PUC's Motion for costs, on the assumption the PUC was claiming, given the dismissal under Rule 12(b), this civil action was either frivolous or brought for malicious purposes (within the context of SDCL 15-17-51), in which case the Court may order the payment of part or all of the expenses and reasonable attorneys fees incurred. The order entered December 20, 2019 does not clarify the point.

In any event, if the affidavit of the PUC's Finance Manager (this writer is able to decipher the first name of "Cindy," but the full last name of this affiant remains unknown, not having been printed anywhere within the filing) is intended as an application under Rule 54(d), these Plaintiffs wish to object thereto. This affidavit asserts (¶ 3):

The cost to the Commission is \$4,291.90 staff time dedicated to this matter, and \$223.84 for travel expense to the motion hearing on December 9, 2019.

The basis of this objection is the assertion, as presented in the affidavit of the PUC's Finance Manager, that "staff time" of the PUC is either a recoverable disbursement, or perhaps sought to be recovered as a claim for attorney's fees. The concept that Defendant's "staff time" might become a taxable disbursement appears nowhere in this writer's copy of SDCL 15-17-37.

Further, the “travel expense” item, it is assumed, is for the travel of PUC’s in-house counsel, Ms. Edwards and Ms. Reiss, from Pierre to Watertown on December 9, 2019. In *Schrader v. Tjarks*, 522 N.W.2d 205 (S.D. 1994), the court considered whether attorney travel expenses – incurred in connecting with the taking of depositions, “including those taken in Denver and Minneapolis” – might be ranked as “other similar expenses and charges” within the scope of SDCL 15-17-37.

Noting that SDCL 15-17-44 provides the trial court with discretion if there is no specific statutory discretion, the *Schrader* court then reversed and remanded for further proceedings. Hence, the travel expenses of counsel attending the hearing of their motions (successful) to dismiss a complaint with prejudice would seem to be a matter of judicial discretion, having found no further reported episodes of the *Schrader* case following remand.

Plaintiffs, accordingly, submit their objections to the application for taxation of Defendant South Dakota Public Utilities Commission.

Dated at Canton, South Dakota, this 13th day of January, 2020.

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson

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Certificate of Service

Undersigned, as counsel for Plaintiffs, hereby certifies that on the date below entered, a true and correct copy of *Plaintiffs' Objections to Taxation of Costs or Disbursements*, together with this certificate, was served electronically through the Odyssey File & Serve ECF system (and also by email) upon each of the following counsel appearing in this matter:

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