

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
APPEAL NO. 29334

AMBER CHRISTENSON, and
ALLEN ROBISH,

Appellants,

vs.

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

Appellees.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

HON. CARMEN A. MEANS

Circuit Court Judge

APPELLANTS' REPLY BRIEF

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NOTICE OF APPEAL FILED MAY 22, 2020

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STATUTES CITED:

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PRELIMINARY STATEMENT

For ease of reference, Appellants, Amber Christenson and Allen Robish, will be referred to as either "Appellants", or "Intervenors/Appellants." Appellees in this matter, will be referred to as either "Appellee CRW" or "CRW", while Appellee agency S.D. Public Utilities Commission will be referred to as either "Appellee PUC" or "PUC", References to the settled record, that being the register of actions, if any, will be made by either the letters "AR", "SR" or "R-00" (for UJS' electronic file of "Record" documents) followed by the applicable volume and/or page number(s), when and where able to so

identify within the voluminous underlying record. References to the Transcript of the trial court's hearing on appeal as transpired on January 16, 2020, will again be referenced as to "Appendix B" (within Initial Brief herein) followed by applicable page number(s), where necessary.

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

As previously set forth within Appellants' Initial Brief.

STATEMENT OF LEGAL ISSUES

As previously set forth within Appellants' Initial Brief.

ARGUMENT(S)

- 1.) *IN LIGHT OF THE LOWER COURT'S ERRONEOUS ORDER AND DECISION AS RELATED TO EL 18-003, ABSENT REVERSAL AND REMAND THIS COURT PRESENTLY LACKS JURISDICTION TO REVIEW APPELLEE PUC'S FINAL DECISION AND ORDER IN AND FOR EL 19-003 GRANTING PERMIT TO CONSTRUCT APPELLEE CRW'S WIND FARM FACILITY.*

Appellants rely on their prior argument/authorities as related hereto insofar as Appellees previously incorrectly advanced their Joint Motion for Leave to Correct Clerical Error "pursuant to SDCL 15-6-60(a)." However, while this Court had no jurisdiction to consider a motion pursuant to SDCL 15-6-60(a) (that is, for matters involving "Rules of Procedure in Circuit Courts"); rather, however, this Court apparently reviewed the matter on its own initiative, pursuant to the relevant/applicable provisions of SDCL 15-26A-56 and, as such, an Order was filed during the pendency of the appeal on December 4, 2020. Thereafter, as your undersigned further investigated the underlying circuit court file, it was learned that on December 8, 2020, Appellees sought to advance their "Joint Motion" in circuit court; however, Appellees improperly sought to advance such motion, in part, based on their inexplicable failure to serve your undersigned, as opposing counsel. As such, the

record is still in error and Appellants therefore continue to object.

*STANDARD OF REVIEW, IF THIS COURT MAY REVIEW THE MERITS OF THE
CIRCUIT COURT'S ERRONEOUS ORDER AS ENTERED ON APRIL 20, 2020:*

Appellants continue to rely on their collective arguments and authorities in this regard.

- 2.) *THE LOWER COURT COMMITTTED PREJUDICIAL AND REVERSIBLE ERROR OF LAW IN DENYING APPELLANTS THEIR RIGHT TO FULLY CHALLENGE THE UNSUPPORTED AND LEGALLY FLAWED PURPORTED EXPERT OPINION OF APPELLEE CROWNED RIDGE WIND'S "PROFESSIONAL ENGINEER" OR "WIND ENGINEER," JAY HALEY, SINCE, WITHIN APPELLEES RECORD, HALEY OPENLY AND REPEATEDLY MISREPRESENTED HIS STATUS AS A CLAIMED PROFESSIONAL ENGINEER AS SUBJECT TO REVIEW UNDER SDCL § 36-18A-3 AND/OR SDCL § 36-18A-8.*

As previously pointed out and as essentially overlooked by (both) Appellees in their responsive briefs to this Court, Appellants specifically have argued that the circuit court erred as a matter of law insofar as it wrongly attempted to foreclose Appellants from directly and substantially challenging the incomplete and false responses provided to Appellee PUC and the public by Appellee CRW's primary sound and shadow flicker alleged "professional engineer" and/or "wind engineer", Jay Haley. Again, the lower court sought in large part to foreclose Appellant's noted challenge(s) to the prejudicially incomplete, unsupported and clearly erroneous sound and shadow flicker findings and purported claims because it wrongly opined that Appellants had failed to properly appeal Appellee PUC's ruling on the admissibility of Haley's testimony because his alleged expert "testimony [wa]s not an issue that was included within [Attorney Gass'] Statement of Issues and is [therefore] not subject to this appeal [pursuant to SDCL § 1-26-31.4]." *See*, [Appellants Initial Brief] Appendix A-16 (Memorandum Opinion at pg. 12).

Appellants, however, reiterate that it's either interesting or telling the lower court went on to try to refute such a claim as related to Appellants overall shadow flicker expert testimony concerns in general when it cited to the specific and limited holding in *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 42, 915 NW2d 707, 719, within which this Court made a key point of distinction and limitation of its finding of potential argument waiver(s) pursuant to SDCL § 1-26-31.4 when it found that, “[w]hile the failure to specify a decision, ruling, or action in a notice of appeal ... results in a lack of jurisdiction to review the same, *the failure to file a statement of issues results in a waiver of argument.*” [Emphasis added.] In stark contrast, however, Appellants counsel (below) timely and appropriately filed a statement of issues for Appellants, including broadly outlining some 31-plus issue(s) subject to being addressed on appeal. *See*, AR pgs. 9-15, including, but not limited to, the applicable issues noted by Appellants under issue(s) Nos. 3, 7 and/or 11. Of course, *unaddressed by Appellees*, those stated and appropriately noticed issues by Appellants to and for the circuit court provided, in part, as follows:

3.) Whether the PUC denied [] Appellants constitutional rights to due process by considering incomplete and misleading information in arriving at its Final Decision and Order Granting Permit to Construct Facility[;]

7.) Whether the PUC acted arbitrarily and capriciously when it relied on unreliable Applicant witness testimony regarding the substance of the application and the construction of the proposed facility related to shadow flicker and infrasound on property owned by [Appellants] and others within Codrington and Grant counties. *See*, Appellants Initial Brief at pg. 17, FN No. 10; *see also*, Statement of Issues No. 11, and/or No. 22 (“...PUC violated [Appellants] due process rights and acted arbitrarily and capriciously *by considering false and misleading evidence and testimony* in entering its Final Order...”); *see also*, [Appellants Initial Brief] Appendix B, including B-8-B-9 (Appeal Hearing before Judge Means).

Once again, that is to say that both Appellees failed in either or both of their respective briefs to this Court to address in any manner or extent the foregoing plain statement of (Intervenor/Appellants) issues below insofar as the appellate specified issue(s) by Appellants herein.

In addition to properly “noticing” such issues, in their brief to the circuit court below Appellants not only followed-up on their previously properly noticed issue(s) in this regard, but they even more clearly sought to outline and articulate the issue to the circuit court as part of their brief, in part, as shown in the following snippet (circuit court brief at UJS-“R-09” at pgs. 10-11):

Issue 1: Whether the PUC abused its discretion when it approved the Application using incomplete and inaccurate information related to sound studies.

Issue 2: Whether the PUC abused its discretion when it approved the Application without sound and shadow flicker studies at all occupied residences within the siting area.

Issue 3: Whether the PUC abused its discretion when it approved the Application without a complete avian use study.

ANALYSIS

Issue 1: The PUC abused its discretion when it approved the application using incomplete and inaccurate information related to sound studies.

Crowned Ridge Wind's footprint is 53,186 acres. In the geographic area of Crowned Ridge are other industrial wind developments known as Dakota Range I, Dakota Range II (PUC Docket EL18-003), and Dakota Range III (PUC Docket EL18-046). Dakota Range I and Dakota Range II wind facilities were granted permits to construct facility by the PUC on July 23, 2018. (PUC Docket EL 18-003). Dakota Range III was granted a permit to construct facility by the PUC on February 22, 2019. A review of the Dakota Range I and II maps show that Dakota Range consist of 72 turbines, all within a 25-mile radius of all-non-participating landowner residences in the Crowned Ridge foot print. A review of the Dakota Range III map shows that Dakota Range III consist of 42 turbines, all within a 25-mile radius of many non-participating landowner residences in the Crowned Ridge foot print.

Applicant relied solely on Jay Haley to provide reports and testimony related sound studies in an effort to establish that the proposed Crowned Ridge facility would not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants and expected inhabitants of the siting area and that the facility would not substantially impair the health, safety and welfare of the inhabitants. Haley is not a registered engineer has never been a licensed professional engineer in South Dakota. (AR 12539-12540) Nonetheless, Haley appended the initials "P.E." to his sound study report submitted with the Application (AR 394). By appending the initials P.E. to his signature, he represented that he is an engineer and is able to practice engineering in South Dakota. However, Mr.

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Appellants therefore submit herein that such failure by Appellees to address this issue in both their respective briefs should foreclose their opposition to, at a minimum, the necessary remand to and for the circuit court to address the (still) pending (objected-to) unsupported Haley testimony issue. *See generally, Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶ 11, 850 NW2d 840, 842-843. Once again, Appellants submit that not only did they, through hearing counsel, specifically object at hearing before the PUC to Jay Haley’s misleading, prejudicial and falsely claimed expertise as a “professional engineer” (*see*, AR 12539-12546), they also properly filed their all-encompassing Issues on Appeal to so incorporate their statutorily-driven objections to Haley’s misleading and prejudicial claims. In that regard, Appellants reiterate that SDCL § 36-18A-8 specifically provides that, “[n]o person or business entity may practice or offer to practice [as a professional engineer], or use in connection with that person’s ... name or otherwise assume, use or advertise any title or description that may falsely convey the impression that the person is duly licensed under the provisions of this chapter unless the person is so licensed.” [Emphasis added.]

As such, this issue was properly preserved before the administrative agency (PUC) and the circuit court below – since such decision was, in fact, clearly erroneous in this regard and the issue is most properly before this Court on appeal. Therefore, Appellants once again submit that Appellee CRW’s misrepresentation(s), including incomplete, conflicting and inaccurate information, by and through Jay Haley’s properly challenged evidence and testimony, as impermissibly ignored – by both the reviewing court and the agency – should have been addressed insofar as such challenges appropriately shined the light on the mistakes made and the incompetency and related prejudice of the proposed

reports associated with such misrepresentations, especially when also considering the uncertainty, incompleteness and incompetency of the engineering report(s) in question. *See*, Appendix B, B-1 through B-12 (with Appellants' same articulated arguments outlined); again, *cf.*, *In re Klein*, 2003 S.D. 119, ¶¶ 12-13, 670 NW2d 367, 370-371; *see also*, *International Union of Operating Engineers Local No. 49, on behalf of Maack v. Aberdeen School Dist. No. 6-1*, 463 NW2d 843, 844 (S.D. 1990) (Just as notices of appeal should be liberally construed in favor of their sufficiency, so too should appellants broadly outlined "notice" as to his, her or their statement of issues on appeal from an administrative agency decision, as this Court has previously noted its agreement that: 'In considering the sufficiency of the content of the notice [of appeal,]... if the intent of the appellant[s] to appeal from a judgment may be inferred from the text of the notice and if the appellee [w]as not ... misled ... the [notice] will be entertained. *This more liberal rule of construction is consistent with our oft repeated preference for disposition of cases on the merits and not on mere technicalities.*', citing to, *Blink v. McNabb*, 287 NW2d 596, 598-599 (Iowa 1980)).

3.) *APPELLEE PUC'S APPROVAL, OVER INTERVENOR/APPELLANTS' OBJECTIONS, TO ALLOW SARAH SAPPINGTON TO 'ADOPT' KIMBERLY WELLS, PH.D-BASED, INCOMPLETE TESTIMONY ON BEHALF OF APPLICANT/APPELLEE CROWNED RIDGE WIND WRONGFULLY ALLOWED FOR THE AGENCY'S CONSIDERATION OF IMPROPER HEARSAY TESTIMONY AND THEREBY VIOLATED APPELLANTS RIGHTS TO DUE PROCESS.*

As to such issue, Appellants rely on their Initial Brief, pgs. 20-25. *Generally see also/cf.*, *Matter of S.D. Water Management Bd. Approving Water Permit No. 1791-2*, 351 NW2d 119, 122-123 (S.D. 1984) ("...[W]e will consider only those issues on appeal which appellants raised before Board [administrative agency] at the hearing[.]".)

~ CONCLUSION and REQUEST FOR ORAL ARGUMENT ~

As a result, Appellants continue to respectfully request that this Court accordingly reverse and remand this matter. Appellants also respectfully note their request to further outline, articulate and argue their meritorious arguments and related authorities herein at a forthcoming oral argument session before this Honorable Court.

CERTIFICATE OF COMPLIANCE:

Pursuant to SDCL 15-25A-66, R. Shawn Tornow, Appellants attorney herein, submits the following:

The foregoing brief, not including the signature page herein, is 11 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Said brief has been reviewed and referenced as containing 2,290 words and 13,574 characters.

Respectfully submitted this 19th day of December, 2020, at Sioux Falls, S.D.

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CERTIFICATE OF SERVICE:

This is to certify that on this 19th day of December, 2020, your undersigned's office timely e-mailed a copy of Appellants Reply Brief as well as mailing an original and two (2) copies to the Court and, if requested and if necessary, is prepared to mail by first-class United States mail, a true and correct copy of Appellants Reply Brief to Amanda M. Reiss, one of the attorneys for Appellee PUC, at amanda.reiss@state.sd.us; Miles F. Schumacher, one of the attorneys for Appellee CRW, at mschumacher@lynnjackson.com

/s/ R. Shawn Tornow

R. Shawn Tornow