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' BRIEF

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NOTICE OF APPEAL FILED MAY 22, 2020

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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" or "SR" followed by the applicable 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 typically be referenced, if and or when perhaps necessary by reference to "Appendix B" followed by the applicable page number(s), where necessary.

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

The appeal herein is taken pursuant to Intervenors/Appellants statutory right to appeal pursuant to SDCL 15-26A-3. Appellee Crowned Ridge Wind, LLC's Crowned Ridge Wind Farm Application to the Public Utilities Commission for a Facility Permit to Construct a 300-Megawatt Wind Facility was dated and submitted to Appellee PUC January 30, 2019. Following a public input hearing in Codington County, Waverly, South Dakota on March 20, 2019, where the public, like eventual Intervenors/Appellants, were first able to provide input and receive information related to the large planned wind farm in the area, a public hearing was held, with a hearing examiner presiding, over the course of 3-days in June 2019. *See*, Appendix C, C-18-19 and AR 6944-11404. After briefing by the parties, including Intervenors/Appellants, the PUC met on July 9, 2019, in order to consider whether to issue a facility permit for Appellee Crowned Ridge's large wind farm project. Ultimately, the PUC voted to approve and issue a Facility Permit for the project. AR 20554-20652. On July 26, 2019, the PUC issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions. (AR 20684-20714).

Based on SDCL 1-26-31, Intervenors/Appellants thereafter appealed to circuit court on August 21, 2019. AR 1. Following briefing and argument(s), the circuit court entered its Memorandum Opinion and Order affirming Appellee PUC's final decision and indicated that it sought to affirm Appellee PUC's Order Granting Permit to Construct

Facility. *See*, Appendix A. In affirming the PUC's decision, the lower court below did not enter its own findings of fact and/or conclusions of law. Appendix A-26-27.

However, it is important to note that, as part of its Order as well as its Memorandum Opinion, the circuit court clearly factually and legally erred insofar as both its decision and Order referenced its affirmance of Appellee PUC's decision in file "EL 18-003." As this Court can determine, however, the circuit court's decision erroneously related to and specifically only referenced "EL 18-003"[1] - as compared to the correct wind energy siting docket file at issue in this PUC administrative file matter, EL 19-003. As a result, Appellants note such a key jurisdictional error since, at a minimum, the above-captioned clear error by the circuit court below must therefore be reversed and remanded to correct – to whatever full extent necessary – the correct wind energy siting matter going forward. *See*, Issue 1, *infra*.

Following the circuit court's Order and Notice of Entry, on May 22, 2020, pursuant to SDCL 1-26-37, Appellants timely filed their Notice of Appeal and Docketing Statement herein.

STATEMENT OF LEGAL ISSUES

ISSUE 1

THE LOWER COURT ENTERED AN ERRORONEOUS ORDER AND DECISION AS RELATED TO EL 18-003, AND THIS COURT THEREFORE LACKS JURISDICTION TO REVIEW APPELLEE PUC'S FINAL DECISION AND ORDER IN EL 19-003, WHICH GRANTED PERMIT TO CONSTRUCT APPELLEE CRW'S WIND FARM FACILITY.

[1] EL 18-003 was and is a different, however similarly summarily approved by/for the State, PUC wind energy siting docket (wind farm) file from/in both Grant County and Codington County.

Appellants[2] as part of their timely and full Notice of Appeal herein, have elected to timely raise this jurisdictional issue on appeal. Appendix A-3-A-5.

Pennington County v. State ex rel. Unified Judicial System, 2002 SD 31, 641 NW2d 127;
City of Sioux Falls v. Missouri Basin Mun. Power Agency, 2004 SD 14, 675 NW2d 739;
SDCL 1-26-37.

ISSUE 2

THE LOWER COURT COMMITTTED PREJUDICIAL AND REVERSIBLE ERROR IN DENYING APPELLANTS THEIR RIGHT TO FULLY CHALLENGE THE UNSUPPORTED AND LEGALLY FLAWED EXPERT OPINION OF APPELLEE CROWNED RIDGE WIND'S "PROFESSIONAL ENGINEER" OR "WIND ENGINEER," JAY HALEY, SINC 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.

Appellant submits that the Circuit Court below and the PUC committed reversible error when it was wrongly determined that Appellee CRW's witness could somehow misrepresent his status within the hearing record as a "Professional Engineer" or self-claimed "Wind Engineer" with no evidentiary qualification review consequence. The lower court mistakenly found, in part, that Appellants did not assert this issue as part of its comprehensive 31-plus "Issues on Appeal" filing in conjunction with its Notice of Appeal to circuit court. *See*, Appendix A-5 through A-27.

In re Otter Tail Power Co. ex rel. Big Stone II, 2008 SD 5, 744 NW2d 594;
Apland v. Butte County, 2006 SD 53, 716 NW2d 787;
Lagler v. Menard, Inc., 2018 SD 53, 915 NW2d 707;
SDCL Ch. 36-18A;
SDCL 1-26-36.

ISSUE 3

APPELLEE PUC'S APPROVAL, OVER INTERVENOR/APPELLANTS' OBJECTIONS, TO ALLOW SARAH SAPPINGTON TO 'ADOPT' KIMBERLY WELLS, PH.D, 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.

Appellant submits that the Circuit Court below and the PUC committed reversible error when it was wrongly determined that Appellee CRW's witness could, by and through hearsay, "adopt" such proposed expert testimony contrary to SDCL § 1-26-19 and SDCL § 19-19-801 and/or SDCL § 19-19-702. *See*, Appendix D.

DuBray v. South Dakota Dept. of Social Services, 2004 S.D. 130, 690 NW2d 657;

[2] Just prior to Appellants appeal herein, Appellants retained your undersigned as counsel in this appeal pursuant to SDCL § 1-26-37. *See also*, FN. 7, *infra.*

Dail v. South Dakota Real Estate Commission, 257 NW2d 709 (S.D. 1977);
Garland v. Rossknecht, 2001 S.D. 42, 624 NW2d 700;
SDCL § 1-26-19;
SDCL § 19-19-702.

STATEMENT OF THE FACTS

Appellant, Allen Robish, has been a taxpaying property owner and resided on his property at 47278 161st Street, Strandburg, South Dakota in Grant County since 1981. Appellant, Amber Christenson, has been a taxpaying property owner and resided on her property at 16217 466th Avenue, Strandburg, South Dakota in Codington County since 1994. Robish and Christenson, became Appellants herein by and through their (joint) intervention in the administrative hearing action below - along with Kristi Mogen and Patrick Lynch.[3] (with Mogen and Lynch *not* being part of this appeal). As Intervenors and Appellants, Robish and Christenson, sought and obtained intervention status in order to appropriately challenge Appellee Crowned Ridge Wind, LLC's Crowned Ridge Wind Farm Application to the Public Utilities Commission for a Facility Permit to Construct a 300-Megawatt Wind Facility, as dated and submitted January 30, 2019. *See generally*, SR 000010-000146. That is, Intervenors and Appellants – similar to and in agreement with a significant number of their neighbors and friends in northeast South Dakota – looked to challenge what they observed first-hand to be the wrongful inundation of their rural community(s) with an overwhelming and intrusive number of harmful wind turbines as part of Appellee Crowned Ridge Wind, LLC's wind farm(s)[4] in the area. As a result,

[3] However, those two prior Intervenors, Kristi Mogen and Patrick Lynch, did *not* continue in their participation as part of the post-administrative hearing appeal to circuit court nor as part of the appeal record herein as has otherwise been mistakenly noted by the circuit court/Appellees as related to this appellate record.

[4] Crowned Ridge Wind went on to subsequently pursue an additional/separate application and permit in and around this area in northeast South Dakota under the name and Application by Crowned Ridge Wind II, LLC, under a separate PUC Docket of EL 19-027. That

Intervenors and Appellants raised a number of issues related to what they sought to assert as the failed and/or deficient aspects of Appellees permit application as well as the permit decision in and as a part of the administrative hearing proceedings below.

Following their intervention and challenge(s) below, Appellants now appeal the April 20, 2020, decision/opinion and Order of the Third Judicial Circuit, Judge Carmen Means, which affirmed the South Dakota Public Utilities Commission's (that is, "the Commission" or "Commission's") Final Decision and Order Granting Permit to Construct Facility as to/for EL 18-003[5].

As part of the underlying administrative hearing record below, on January 30, 2019, Crowned Ridge Wind, LLC (hereinafter "CRW") submitted its application to the Commission for a facility permit for a 300-megawatt (MW) wind energy facility to consist of up to 130 wind turbines in Codington and Grant counties ("the Project"). AR 10-9060, including SR 000010-000146. On February 6, 2019, the Commission issued the Notice of Application; Order for and Notice of Public Input Hearing; and Notice for Opportunity to Apply for Party Status. AR 1026-27. Pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application on March 20, 2019, in Waverly, S.D. AR 1026-27. At such public hearing, representations by/for Applicant were made and relied upon which were, as a part of the hearing process, later proven to be both untruthful and significantly misleading. AR 965-967; 20039-2043; 20052-20060; 20133-

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additionally burdensome wind farm EL docket is currently on appeal in circuit court by Intervenors and Appellants as well as additional Intervenors and Appellants in that case.

[5] That is/was in error as to EL 18-003, the prior Dakota Range I-II wind farm project(s); when what was to instead be addressed on appeal by the lower court was EL 19-003, again, as was more than once erroneously referenced by the circuit court/Appellees dated July 26, 2019. (*Cf.*, AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions, as shown in Appendix A.)

20134; *cf.*, Appendix B (as combined). Thereafter, a number of concerned citizens and local taxpayers, including Appellants Christenson and Robish, intervened as parties prior to the Commission's deadline and the Commission granted party status to each such Intervenor. *See*, AR 1070, 1322, 1463.

On April 9, 2019, Crowned Ridge filed written supplemental testimony for five witnesses. AR 1467-1024. Thereafter, over Appellants' immediate and timely objection, Sarah Sappington (Office Director/Project Manager/Archaeologist) was permitted by the Commission to "adopt" the direct testimony of Kimberly Wells (PhD in Fisheries and Wildlife Services, as a fully certified/expert Wetland Delineator/Wetland Biologist and also as Applicant's Environmental Services Manager. AR 1925-1944). Appellants' timely objected below to the improper, incomplete, unsupported and hearsay elements to/for any such testimony adduced from Ms. Sappington (lack of full foundational knowledge or PhD expertise) as related to any such expert testimony that she wrongly, and prejudicially, was allowed to "adopt" just prior to hearing and thereafter testify about at such hearing. At least in part, as a result of such application-related and/or hearing-related evidentiary allowances for the exclusive benefit of Appellee CRW, Intervenors/Appellants were wrongfully and prejudicially denied due process at hearing.

On April 25, 2019, Intervenors/Appellants filed a Motion to Deny and Dismiss CRW's application. AR 1957. A hearing on the Motion to Deny and Dismiss was held before Appellee CRW on May 9, 2019. AR 2055-2091, Ad Hoc Commission meeting transcript. On May 10, 2019, the Commission issued its Order Denying Motion to Deny and Dismiss and an Order to Amend Application. AR 2092-2093. Also on May 10, 2019, the Commission issued an Order for and Notice of Evidentiary Hearing scheduling an

evidentiary hearing for June 11-14, 2019, in Pierre, SD. AR 2094-2095. At the same time, on May 10, 2019, Intervenors filed the testimony of John Thompson and Allen Robish (AR 2096-2104), while Commission Staff filed the testimony of Paige Olson, David Hessler, Tom Kirschenmann and Darren Kearney. AR 2105-3505. Appellants submitted a Second Motion to Deny and Dismiss and brief in support on May 17, 2019. AR 3523-55. On May 24, 2019, Crowned Ridge submitted written rebuttal testimony, including testimony for Sarah Sappington and Jay Haley. AR 3698-4818. Appellants' second motion was heard by the Commission on June 6, 2019. AR 12245-12252, Motion Hrg. Transcript. Appellants' second motion to dismiss was denied by the Commission.

Prior to July 1, 2019, on June 6, 11-12, 2019, the Commission held a lengthy evidentiary hearing, during which Appellee Crowned Ridge presented its application, testimonies and hearing exhibits. *See*, AR 6944-11404 and AR 11928-12059, 12253-12504, 12521-12823. At hearing, Appellants elicited testimony and evidence regarding the incompleteness as well as the general unreliability of Appellee's permit application. Based on the administrative hearing and all considerations therein, the parties subsequently submitted post-hearing briefs on July 2, 2019. *See*, AR 20257-20358, Intervenors/Appellants; 20445-491, Appellee CRW; 20492-20510, Appellee PUC.

Thereafter, on July 9, 2019, Appellee PUC met to consider whether to issue a facility permit for the project based on the June administrative hearing record. AR 20565-20652. After consideration, the Commission voted to issue a Facility Permit for the Project, subject to certain conditions. AR 20554-20652. As a result, on July 26, 2019, Appellee PUC issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions. The Commission's Facility Permit included some

45 conditions, including sound and shadow flicker thresholds and purportedly for prospective avian monitoring and protection. Appellants timely and properly appealed the Commission's Final Decision to the circuit court below and, ultimately, outlined 31-plus Issues on Appeal. AR 9-15. As noted below, the circuit court, Judge Means, ultimately affirmed Appellee PUC's administrative decision in the matter. Appendix A.

Prior to its decision, the lower court held a hearing by and through oral argument on January 16, 2020 (*see*, Appendix B), and, following such hearing/argument, the Court below entered its Memorandum Decision on April 15, 2020, and, thereafter, filed its corresponding Order on April 20, 2020. Appellee then prepared and served its Notice of Entry herein on Appellants on April 23, 2020. Appendix A. Once again, pursuant to SDCL 1-26-37, Appellants present appeal was timely filed herein as a matter of right on May 22, 2020. *See*, AR 147.

ARGUMENT(S)

1.) *IN LIGHT OF THE LOWER COURT'S ERRORONEOUS 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.*

This Court has long held that jurisdictional issues may be raised at any time. Moreover, questions of jurisdiction are reviewed de novo. *See*, *Pennington County v. State ex rel. Unified Judicial System*, 2002 S.D. 31, ¶ 9, 641 NW2d 127, 130; *Elliot v. Board of County Comm'rs of Lake Co.*, 2005 S.D. 92, ¶ 15, 703 NW2d 361, 367-368; *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 10, 675 NW2d 739, 742 (As related to subject matter jurisdiction which this Court held "is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void." ... and, "[i]t is

'conferred solely by constitutional or statutory provisions ... [a]nd can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ.'" internal citations omitted); *see also generally, Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 12, 914 NW2d 550, 555 ("When the Legislature provides for appeal to circuit court from an administrative agency, the circuit court's appellate jurisdiction depends on compliance with conditions precedent set by the Legislature." citing, *Schreifels v. Kottke Trucking*, 2001 S.D. 90, ¶ 9, 631 NW2d 186, 188.).

As highlighted within the Jurisdictional Statement, *supra*, in the instant case the lower court, erroneously prepared ***both*** its Decision and subsequent Order affirming Appellee PUC's decision as to the Dakota Range I-II wind farm project in this area of northeast South Dakota (that is, EL 18-003, as referenced in both the court's Memorandum Decision and corresponding Order. Intervenors/Appellants, however, undertook no action to cause the resulting jurisdictional based error. Instead, Appellants herein simply appealed the circuit court's erroneous decision below and, initially, note the court's significant jurisdictional error herein knowing that – absent reversal and remand for the necessary correction(s) to the terms of the lower court's decision(s) and order – any resulting decision by this Court on such an appeal would, unfortunately, be viewed as a nullity. As a result, Intervenors/Appellants respectfully request that the circuit court's erroneous order be reversed and remanded insofar as said Decision and Order provide this Court with no jurisdiction to properly and fully review Appellee PUC's Final Decision and Order Granting Permit to Construct [Wind] Facility, EL 19-003, as was previously timely and properly appealed to circuit court and thereafter appealed to this Honorable Court.

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

If this Court may otherwise look to consider the merits in this matter, as the Court is aware, SDCL § 49-41B-30 outlines that any aggrieved party to a permit issued by the South Dakota Public Utilities Commission thereunder is permitted to seek and obtain judicial review first by and through a notice of appeal in circuit court and, thereafter if necessary, pursuant to SDCL § 1-26-37, by and through an appeal of the circuit court's final order and judgment to this Honorable Court. SDCL § 1-26-37 specifically provides that "[t]he Supreme Court shall give the same deference to the [affirmed] findings of fact, conclusions of law, and final judgment of the circuit court [in and for the correct file matters] as it does to other appeals from the circuit court." *See also/cf.*, SDCL § 1-26-36.[6] The PUC's findings of fact are reviewed under the clearly erroneous standard, while its conclusions of law are reviewed de novo. '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 NW2d 594, 602; *see also*, *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, ¶ 7, 575 NW2d 225, 228-229.

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[6] SDCL § 1-26-36 providing: The court may reverse or modify the decision [below] if substantial rights of the appellant[s] have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the [PUC];
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the [PUC's] record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In addition, as related to a portion of the argument(s) advanced by Appellants herein, it is further noted that it is long-established by this Court that "[q]uestions of law are reviewed de novo with no deference given to the conclusions of law of the circuit court." *Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund*, 2004 S.D. 120, ¶ 15, 689 NW2d 196, 201; *Apland v. Butte County*, 2006 S.D. 53, ¶ 14, 716 NW2d 787, 791 (In reversing and remanding the lower court's decision, this Court's review of the agency's decision below found that the decision was clearly erroneous in its methodology and that the defect in such methodology failed to produce the constitutionally required equal or uniform result as part of such administrative review.) In addition, it is also well-established that, "this Court's review of the administrative agency's decision is unaided by any presumption that the circuit court's review of the [PUC's] decision was correct." *Id.*, *see also*, *Interstate Tel. Co-op., Inc. v. PUC*, 518 NW2d 749, 751 (S.D. 1994).

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.*

In the case at bar at the administrative hearing and circuit court appeal proceedings below, Intervenors and Appellants, through their hearing counsel and circuit court appellate counsel[7] sought to appropriately discredit and challenge Appellee CRW's

[7] Hearing counsel for Appellants was not your undersigned counsel as part of this appeal. Instead, Appellants counsel at hearing was David Ganje; while Appellants counsel in their subsequent appeal to circuit court subsequently was Jared Gass. *See*, Attorney Gass' Notice of Appeal and Issues on Appeal. AR pg. 1, pgs. 9-15 (31-plus denoted Issues on Appeal as broadly noticed to the Circuit Court below).

primary sound study and shadow flicker study purported expert, Jay Haley, by first challenging his (falsely) represented professional credentials as well as the prejudicially incomplete nature of his claimed wind farm study information in the area surrounding and directly (adversely) affecting Intervenor/Appellants. Appendix C, C-1 through C-17; and C-20-C-21; *see/cf.*, PUC hearing questioning/testimony at SR 12539-12546; *see also*, Appendix B.

Initially, Appellants submit that, with all due respect, the circuit court erred[8] 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"[9], Jay Haley. *See*, Appendix A-16 (Memorandum Opinion at pg. 12.) That is, 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]."

Appellants, however, submit that interestingly and somewhat ironically the lower court went on to essentially discount or, arguably, refute such a claim as related to

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[8] That is, EL 19-003, <u>not</u>, EL 18-003 as incorrectly referenced by the circuit court/Appellees dated July 26, 2019. (*Please see*, AR 20684-714, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry with Permit Conditions, as shown in Appendix.)

[9] Intervenors/Appellants are not aware of any designation under state statute for a person, such as Jay Haley, to claim to hold a professional title as a so-called and/or self-described "Wind Engineer." *See*, Appendix C-2, AR 00966; *cf.*, SDCL § 36-18A-3.

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, when 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.] Once again, in the instant case, Appellants counsel timely and appropriately filed a statement of issues, 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.[10]

That is to say, 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, it is important to note 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*

[10] Intervenors/Appellants have argued that Jay Haley's purported sound and flicker studies were, in fact, incomplete and unacceptably misleading, including based on the fact that Haley unlawfully held himself out to both the PUC and to the public as being a "Professional Engineer [PE]" as well as a self-claimed or self-described "Wind Engineer." *See*, Appendix C, including Appendix C-2 and C-4 through C-16 and C-20-C-21; *cf.*, SDCL § 36-18A-3; SDCL § 36-18A-8.

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.]

In this case, however, Jay Haley specifically falsely misrepresented – as part of the totality of facts represented related to Appellee CRW's application here, including at a public input hearing in Waverly, S.D., to both Appellee PUC as well as to approximately 100-plus citizens in the adversely affected wind farm area – that he was a "professional engineer" and further went on to further (mis)represent in an answer from a public/interested participant that "yes, I am a professional engineer." Appendix C, including C-20-C-21. Appellee's lone witness in this regard, made these (mis)representations before Appellee PUC and the public to the extent that it served to prejudice Appellants in their review of this case insofar as thinking that a certified/licensed professional engineer had made the claimed determinations – only to learn just prior to hearing that such was not, in fact, true. Moreover, Appellants submit that there was/is prejudice to their oppositional position herein since other members of the public (at the PUC's Waverly public input hearing) were likely dissuaded from joining in as non-participant intervenors in said action.

Appellants therefore submit that such misrepresentation(s), including the additional misrepresentations as well as conflicting and incomplete study-related representations within the administrative hearing record must necessarily be taken into full account – rather than impermissibly and wrongfully ignored – by both the reviewing court and the agency below in shining the light on the mistakes made and the potential incompetency of the proposed reports associated with such misrepresentations, especially when also considering the uncertainty and incompleteness of the engineering report(s) in question.

See, Appendix B, B-1 through B-12 (with Appellants' same articulated arguments hereby adopted and fully incorporated herein); *see generally and cf.*, *In re Klein*, 2003 S.D. 119, ¶¶ 12-13, 670 NW2d 367, 370-371 (By analogy, as related to upholding a part of the administrative finding that the cumulative effect of the professional [appraiser vs. engineer] errors, including misleading information represented by the professional [appraiser], resulted in an incompetent appraisal/report).[11]

In sum, based on the provisions of SDCL § 1-26-36 as applicable herein, Appellants submit and urge that the underlying administrative decision was the result of error(s) of law in allowing Appellee CRW's witness to misrepresent himself and his incomplete and erroneous information to be unlawfully presented contrary to SDCL Ch. 36-18A to the extent that it directly prejudiced Appellants and lead, in part, to mistake(s) having been made below – such as accepting the incomplete and flawed sound and shadow flicker studies to try to comply with the statutorily mandated and required criteria within SDCL § 49-41B-22(1)-(4).[12] *See generally*, *Anderson v. South Dakota Retirement System*, 2019

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[11] Intervenors/Appellants submit that *Klein*, while obviously an administrative licensure case for such a person holding himself out as a professional within the state, offers at least a closer and more applicable analogy to the key sound and shadow flicker "professional engineer" witness than the weak analogy proposed by Appellee PUC, by and through one of the obvious proponent PUC commissioners, when he sought to strangely analogize that Haley's false claim(s) to being a "professional engineer" or "wind engineer" – directly contrary to the requirements of both SDCL § 36-18A-3; SDCL § 36-18A-8 – was somehow acceptable to the Appellee PUC because he had "been licensed in a number of different ways and let mine go [lapse] too and from that standpoint I don't represent that I'm a licensed auctioneer or appraiser … anymore. But I don't find that in your testimony that that you did that either." AR 012549. Contrary to that general excuse-based comment, however, within the record advanced by Appellee CRW before Appellee PUC, the facts bear out that Haley *repeatedly* misrepresented himself to be a "PE"/"Professional Engineer." *See*, Appendix C.

[12] Appellants also note that, should the Court consider any issues beyond the circuit court's jurisdictional-flaw below, since Appellee PUC's fact-finding hearing took place prior to (the most recent legislative change on) July 1, 2019, Appellee CRW was and is not entitled by the court or the PUC to any presumptions insofar as being required to comply with SDCL § 49-41B-22(2)-(4). To the extent that Appellees appear to, in part, have relied on any such

S.D. 11, ¶ 10, 924 NW2d 146, 148-149.

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.*

In the instant case, over Intervenor/Appellants specific and timely objections, Appellee PUC permitted a proposed expert for Appellee CRW, Kimberly Wells, Ph.D, to essentially be permitted – by and through openly requested and indicated hearsay – to testify at hearing by and through another witness, Sarah Sappington. *See*, Ex. A-30, Appendix D-AR 10027; Appendix D-1-D-6 AR 12300-12304, 007271; AR 977-993; *cf.*, Ex. A-25 ("Direct Testimony of Kimberly Wells, Ph.D. "adopted by" Sarah Sappington" as "adopted" on April 10, 2019, within only a matter of weeks of the then-pending early June hearing before the PUC).

To be clear, Appellee CRW's Applicant-based doctoral testimony of Kimberly Wells was gathered and authored by her in Houston, Texas, under her education and experience as a "Ph.D in Fisheries and Wildlife Sciences from the University of Missouri in 2005, [with] a M.S. in Fisheries and Wildlife Sciences from Oklahoma State University in 2000, and a B.S. in Renewable Natural Resources with an emphasis in Wildlife Ecology from the University of Arizona in 1998. In addition, [she was/is] a Certified Wildlife

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presumptions below before the PUC or within or as a part of the circuit court's erroneous decision below - any and all such findings were and are contrary to law, clearly erroneous and ultimately served to be directly prejudicial to Appellants interests in not having their collective health safety and welfare substantially and adversely affected by Appellee CRW's disruptive and intrusive numerous wind turbines as well as the clear and direct adverse impact(s) associated with having such wind farm operations including, but not limited to, excessive, costly and/or unrepaired damage to roads and infrastructure in and around their local community(s). *See/cf.*, Appendix A, AR 20554-20652.

Biologist and Certified Wetland Delineator [and has] 19 years of professional experience with environmental permitting, wildlife ecology and natural resource management … [with involvement] with permitting wind energy projects for the last 13 years." AR 977-978. However, Appellants note herein that, by way of stark contrast, Sarah Sappington – as related to her hearsay "adoption" of Ms. Wells Ph.D-informed testimony – instead only "received [her] M.A. and B.A. in Anthropology with an emphasis in archaeology from Brigham Young University in 2003 and 2001, respectively… [She was/is] a registered professional archaeologist and work[s] in the West and Midwest as a federal and state-permitted archaeologist … who has 16 years of experience in environmental consulting and manage all aspects of energy development projects in the Midwest, including environmental permitting and cultural and natural resource management." AR 9936-9937. That is, the proposed "adoption of expert testimony" as allowed, over objection(s) by Appellee PUC, could *not* factually and reasonably be claimed to be the same testimony from the same qualified expert(s) as part of the same work/study process. In fact, by its very nature the "adoption of expert testimony" process would appear by any reasonable review to be the improper approval of incompetent, inadmissible and directly prejudicial hearsay testimony – to the clear and direct detriment to Intervenor/Appellants. *See*, SDCL § 1-26-19, Rules of evidence in contested cases, as transpired in the instant case below ("…[I]ncompetent evidence *shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state*, or as may be provided in statutes relating to the specific agency, *shall be followed*.); *cf.*, SDCL § 19-19-801 (Inadmissibility of hearsay, when offered by another to prove the truth of the matter asserted in such statement.).

As a result, notwithstanding that Appellants had and have (ongoing) concerns as to the overall incompleteness[13] of the statutorily required testimony that Kimberly Wells sought to present - for Appellee/Applicant CRW - to Appellee PUC below as related to the (November 2018) Avian Use Survey Report (AR 7266-7292), consistent with Appellants timely and continued objection(s), such testimony should have been deemed inadmissible. Absent such testimony of course, Appellee CRW could not have met its threshold burden of proof by not being able to comply with the statutorily required showing under SDCL § 49-41B-22. *See also*, FN. 13.

Appellants point out that this Court has previously held that the improper admission of hearsay evidence served to impermissibly deny a person in an administrative hearing proceeding served to deprive such person with a "fundamental right to a meaningful due process hearing" and to such denial of due process was unlawfully prejudicial – as Appellants specifically urge here. *See*, *DuBray v. South Dakota Dept. of Social Services*, 2004 S.D. 130, ¶¶ 5, 9, 25, 690 NW2d 657, 665-666 ("DuBray [as the party challenging the administrative proceeding/action] was substantially prejudiced by the admission of hearsay because it completely deprived her of the ability to confront and cross-examine the witnesses against her. We agree with the trial court that the admission of such evidence deprived DuBray of her fundamental right to a meaningful due process hearing. She was therefore prejudiced."]; *see also*, *Dail v. South Dakota Real Estate Commission*, 257 NW2d 709, 712 (S.D. 1977); *cf.*, *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶¶ 15,

[13] *See*, Appendix D-6, outlined information within the Avian Use Survey Report (Table/Figure 1, at 7271) which clearly showed that nearly all of Grant County was arbitrarily *excluded* from Applicant/Appellee's necessary review and reporting as to the potential threat of serious injury to the environment, in part, pursuant to SDCL § 49-41B-22 (2)-(3). *Cf.*, Questioned/incomplete hearing testimony at AR 12308-12327; Appendix B, and Appendix D-6;

18, 802 NW2d 905, 911-912 ("One 'purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him [or her] fairly[.]'").

Much like in *Dubray*, Appellants and their administrative hearing counsel were not fairly dealt with insofar as they were not allowed to cross-examine the actual author (Kim Wells, Ph.D) of the expert opinion-formulated Avian Use Survey Report; but rather, were unilaterally only allowed to question an obvious and strikingly less-qualified person who impermissibly was allowed by Appellees to somehow "adopt" the testimony (and, to some extent, if possible, the purported expertise) of Ms. Wells - that is, testimony that still was allowed to remain in the underlying hearing record as well. *See/cf.*, AR 977-993.

In addition, and perhaps as important in Appellants due process/inadmissible hearing testimony challenge herein, Appellants also note that they did not see evidence in the voluminous record in this matter that – as to this pivotal (and, again, incomplete) Avian Use Survey Report sought to be used and relied-on by Appellee CRW as Applicant and by Appellee CRW in ruling-on the required burden of proof statutory criteria under SDCL § 49-41B-22 (1)-(4) – Appellee PUC and its internally-designated and selected "hearing examiner" ever properly reviewed or weighed the proposed expert opinions of any of Appellee CRW's purported expert witnesses as outlined under SDCL § 19-19-702. That is, whether as to Wells, Sappington, or even arguably Haley for CRW as Applicant, whether such person(s) are deemed qualified to testify as an expert by knowledge, skill experience, training or education. As the Court is well aware, under such statute, the hearing examiner must decide the threshold question of whether the proposed expert opinion (or, as here, the proposed 'adopted' expert opinion of another) will appropriately "assist the trier of fact to understand the evidence or to determine a [necessary] fact in

issue. *See, Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 21, 769 NW2d 440, 449. In so doing, Appellee's hearing examiner fulfills "a gatekeeping function, ensuring that the opinion[s] meet[] the prerequisites of relevance and reliability *before* admission[;]" it is not, however, a fact-finding requirement. *See, Garland v. Rossknecht*, 2001 S.D. 42, ¶ 10, 624 NW2d 700, 702 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993)). As has also been long held to be the standard even in administrative proceedings, to be reliable, the (proposed) expert opinion(s) must be based on sound methods and scientifically valid procedures. *See, Wells v. Howe Heating and Plumbing,* 2004 S.D. 37, ¶ 16, 677 NW2d 586, 592. Unfortunately, and in directly prejudicing Appellants as lay Intervenors in this matter as directly affecting their local community, the foregoing gatekeeping function appears to have specifically failed to occur[14] and, upon a reasonable review/appearance of the hearing record, any such evidentiary review for relevance and/or reliability based on established "sound methods and scientifically valid procedures" failed to be undertaken by Appellee PUC. AR 12300-12309.

As a result, Appellants submit that it cannot be reasonably claimed or argued that Appellees complied with long-established evidentiary requirements for the allowance of any and all such "adopted" hearsay expert testimony. Testimony that Appellee CRW was required to advance at hearing by a preponderance of the evidence in order to satisfy the

[14] Instead, Appellants point out that the Hearing Examiner in this matter, when faced with Appellants timely and appropriate objection as to hearsay and or the unreliability of any such "adopted" expert testimony, merely responded by stating that "...*I will say that we frequently allow expert witnesses to adopt the testimony of others*." AR 12302, response to counsel's objection during Appellants administrative hearing. As if the Hearing Examiner, without more, knows what and/or how "we" (presumably, the duly elected and purportedly independent fact-finding PUC Commissioners) Appellee PUC will consider, review and/or weigh any and all such proposed expert testimony. Suffice it to say, Appellants submit that how the Hearing Examiner may view such proposed expert opinion(s) in other - non-related - cases for the "we" that is apparently the PUC does *not* amount to sufficiently or adequately performing the critically important required gate-keeping function under SDCL § 19-19-702.

minimum requirements outlined under SDCL § 49-41B-22. Analogous to *Dubray*, Appellants and their administrative hearing counsel were not fairly dealt with at hearing and, as such, were wrongfully denied their fundamental right to a meaningful due process hearing which, in turn, directly and adversely prejudiced them in opposing Appellee CRW under and as a part of the state-mandated requirements outlined within SDCL § 49-41B-22.

~ ***CONCLUSION and REQUEST FOR ORAL ARGUMENT*** ~

Appellants respectfully submit that, by and through their arguments and authorities submitted herein, they have established that there were, in fact, prejudicial errors, including errors of law, committed below which rise to the level of showing that mistakes have been made by and through the administrative hearing/contested case hearing process and appeal to circuit court. As a result, Appellants respectfully request that this Court accordingly reverse and remand this matter. Pursuant to the jurisdictional deficiencies noted in this matter as well as under the provisions of SDCL § 1-26-36, Appellants urge the subsequent granting of their requested relief herein.

Finally, to any extent necessary or as may be allowed, Appellants respectfully 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 25 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 6,315 words and 35,570 characters.

Respectfully submitted this 5th day of October, 2020, at Sioux Falls, S.D.

/s/ R. Shawn Tornow

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CERTIFICATE OF SERVICE:

This is to certify that on this 5th day of October, 2020, your undersigned's office, in conformance with the Court's most recent Order, timely e-mailed a copy of Appellants 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 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

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