

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

AMBER KAY CHRISTENSON, and
ALLEN ROBISH,

Appellants,

#29334

v.

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

Appellees.

Appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota
The Honorable Carmen Means

**APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF'S
BRIEF**

Notice of Appeal was filed on May 22, 2020

R. Shawn Tornow
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109
(605) 271-9006
rst.tlo@midconetwork.com
ATTORNEY FOR APPELLANT

Miles F. Schumacher
Michael F. Nadolski
Lynn Jackson Shultz & Lebrun, P.C.
110 , Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
(605) 332-5999
mschumacher@lynnjackson.com
ATTORNEYS FOR APPELLEES
CROWNED RIDGE WIND, LLC,

Kristen N. Edwards
Amanda M. Reiss
Special Assistant Attorneys General
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
(605) 773-3201

Kristen.edwards@state.sd.us

Amanda.reiss@state.sd.us

ATTORNEYS FOR SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION
STAFF

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

PRELIMINARY STATEMENT1

JURISDICTIONAL STATEMENT1

STATEMENT OF ISSUES AND AUTHORITIES1

STATEMENT OF THE CASE AND FACTS2

ARGUMENT6

CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company
2015 S.D. 55, 866 N.W.2d 545.....4

Hall v. State ex rel South Dakota Dept. of Transportation
2006 S.D. 24, 712 N.W.2d 22.....2, 9

In re Estate of Eberle
505 N.W.2d 767 (S.D. 1993).....9

In re Otter Tail Power Co. ex rel. Big Stone II
2008 SD 5, 744 N.W.2d 594.....5

In Re Pooled Advocate Trust
2012 S.D. 24, 813 N.W.2d 130.....5

In re PSD Air Quality Permit of Hyperion
2013 S.D. 10, 826 N.W.2d 649.....6

Kreislers Inc. v. First Dakota Title Ltd. Partnership
2014 S.D. 56, 852 N.W.2d 413.....2, 9

Krsnak v. S. Dakota Dep’t of Env’t & Natural Resources
2012 S.D. 89, 824 N.W.2d 429.....5

Lagler v. Menard, Inc.
2018 S.D. 53, 915 N.W.2d 707.....2, 6

Martz v. Hills Materials
2014 S.D. 83, 857 N.W.2d 413.....5

McDowell v. Citibank
2007 S.D. 52, 734 N.W.2d 1.....7

Permann v. Department of Labor
411 N.W.2d 113 (S.D. 1987).....5

<i>Snelling v. S.D. Department of Social Services</i>	
2010 S.D. 24, 780 N.W.2d 472.....	5
<i>Sopko v. C & R Transfer Co., Inc.</i>	
1998 S.D. 8, 575 N.W.2d 225.....	5
<i>Sorensen v. Harbor Bar, LLC</i>	
2015 S.D. 88, 871 N.W.2d 851.....	7, 8
<i>State v. Guerra</i>	
2009 S.D. 74, 772 N.W.2D 907	5
<i>Williams v. South Dakota Bd. Of Pardons and Paroles</i>	
2007 S.D. 61, 736 N.W.2d 499.....	2, 7

STATUTES

SDCL Chapter 1-26	3
SDCL 1-26-36.....	6
SDCL 1-26-37.....	1, 4
SDCL 15-6-60(a)	1, 2, 6
SDCL 49-41B-2	3
SDCL 49-41B-4	3

SDCL

ADMINISTRATIVE RULES

ARSD 20:10:22:39.....	3, 9
ARSD 20:10:22:40.....	3

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29334

AMBER KAY CHRISTENSON and ALLEN ROBISH v. CROWNED RIDGE WIND,
LLC, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

PRELIMINARY STATEMENT

Throughout this brief, Appellants Amber Christenson and Allen Robish are referred to collectively as “Appellants” or “Intervenors”. Appellants’ brief is cited as “AB” followed by the appropriate page number. The Appellee, Staff of the South Dakota Public Utilities Commission, is referred to as the “Commission Staff”. Appellee, Crowned Ridge Wind, LLC, is referred to as “Crowned Ridge.” Citations to the Administrative Record are denoted “AR” followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Appellants appeal the Circuit Court’s Order dated April 20, 2020, affirming the July 26, 2019 Final Decision and Order Granting Permit to Construct Facility (Permit) of the Public Utilities Commission. This Court has jurisdiction pursuant to SDCL 15-26A-3 and SDCL 1-26-37.

STATEMENT OF ISSUES AND AUTHORITIES

**1. WHETHER THIS COURT CAN CORRECT THE CIRCUIT COURT’S
INCORRECT REFERENCE TO EL18-003**

Pursuant to SDCL § 15-6-60(a), on its own initiative, this Court can correct the incorrect reference in the Circuit Court’s Opinion from EL18-003 to EL19-003, thereby

alleviating the need to remand the case to the Circuit Court for it to correct its reference to EL18-003.

SDCL § 15-6-60(a)

2. WHETHER THE COMMISSION PROPERLY ADMITTED THE TESTIMONY OF JAY HALEY?

The Circuit Court properly concluded that Intervenors waived their argument as to the admissibility of Crowned Ridge witness Jay Haley’s testimony. Even if we assume, *arguendo*, the Intervenors did preserve their assertion regarding the admissibility of Mr. Haley’s testimony, the Commission correctly admitted the testimony, so Intervenors’ claim is without merit.

Lagler v. Menard, Inc., 2018 S.D. 53, 915 N.W.2d 707.

Williams v. South Dakota Bd. Of Pardons and Paroles, 2007 S.D. 61, 736 N.W.2d 499.

3. WHETHER THE COMMISSION PROPERLY ADMITTED THE TESTIMONY OF CROWNED RIDGE WITNESS SARAH SAPPINGTON?

The question of whether the adoption of the prefiled testimony of Kimberly Wells by Sarah Sappington was not raised before the Circuit Court, therefore, the Circuit Court did not rule on this issue.

Hall v. State ex rel South Dakota Dept. of Transportation, 2006 SD 24, 712 N.W.2d 22.

Kreislers Inc. v. First Dakota Title Ltd. Partnership, 2014 S.D. 56, 852 N.W.2d 413.

STATEMENT OF THE CASE AND FACTS

On January 30, 2019, Crowned Ridge Wind, LLC filed with the Commission an application for a permit to construct an up to 300-megawatt (MW) wind project (the Project) in Codington and Grant Counties, South Dakota. (AR-1 113-1146) The Project

will consist of up to 130 wind turbines. (AR-9 182-212, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry (Decision or Permit)).

In South Dakota, an energy facility permit from the Commission is required for wind energy facilities with a capacity of 100 MWs or more. SDCL 49-41B-2(7), (13); SDCL 49-41B-4. Where, as in this case, there are intervening parties and no global settlement is reached, the Commission holds a contested case hearing under SDCL Chapter 1-26.

Pursuant to ARSD 20:10:22:40, the Commission established an intervention deadline of April 1, 2019. Five individuals intervened as parties before the April 1, 2019 deadline, and the Commission granted party status to each intervenor who filed before the intervention deadline. (AR-1 1193-1194, 1545, 1686-1687). The Commission established a procedural schedule on April 5, 2019. (AR-1 1686-1687).

On April 9, 2019, Crowned Ridge filed written supplemental testimony¹ for five witnesses, two of whom filed jointly. (AR-1 1691-2145).

On May 10, 2019, Appellant Allen Robish submitted written testimony of Allen Robish and an affidavit from Jonathan Thompson. (AR-2 80-87). On May 10, 2019, Commission Staff submitted written direct testimony for four witnesses. (AR-2 88-1746). Crowned Ridge submitted written rebuttal testimony for ten witnesses, two of whom filed jointly, on May 24, 2019. (AR-2 1750-2837).

¹ ARSD 20:10:22:39 requires an applicant to file testimony upon the filing of an application. Pursuant to a procedural schedule, other all parties must submit written testimony of any witness they intend to call. Unless upon stipulation, no written testimony is admitted into the record without the witness appearing to testify under oath and to be subject to cross-examination at the evidentiary hearing.

The Commission held an evidentiary hearing on June 6, 11, and 12, 2019. (AR-8 2492-2604, 2632-2843, 2882-3138). At the hearing, Crowned Ridge and Commission Staff presented witness testimony. (*See id.*). Appellants called no witnesses. The Hearing Examiner presided over the hearing and each of the Commissioners was present for the entirety of the hearing.

On July 9, 2019, the Commission met to consider whether to issue a facility permit for the Project. ((AR-8 1299-1373) (Decision Tr.)). At that meeting, the Commission voted unanimously to issue a permit for the Project, subject to 45 conditions. (*See id.*).

On July 26, 2019, the Commission issued the Permit. (AR-9 182-212). The Permit includes conditions related to various aspects of the Project, including noise and shadow flicker limits, decommissioning requirements, and environmental issues. (*See id.*).

On August 19, 2019, Appellants filed a Notice of Appeal of the Commission's Order with the Third Judicial Circuit Court in Codington County. After briefing and oral argument, on April 14, 2020, Circuit Court Judge Means issued an Opinion affirming the Commission's granting of a Facility Permit to Crowned Ridge. On May 22, 2020, Appellants appealed the circuit court's decision to this Court.

STANDARD OF REVIEW

The standard of review in an appeal from the circuit court's review of a contested case proceeding is governed by SDCL 1-26-37. *Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548. “[I]n reviewing the circuit court's decision under SDCL 1-26-37, we are actually making the

‘same review of the administrative tribunal’s action as did the circuit court.’ ” [citations omitted] “The agency’s findings are reviewed for clear error.” *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417. “A review of an administrative agency’s decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact. We will reverse an agency’s decision only if it is ‘clearly erroneous in light of the entire evidence in the record.’” *In Re Pooled Advocate Trust*, 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146; citing *Snelling v. S.D. Dep’t of Soc. Serv.*, 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. While statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review, “[a]n agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or *when the agency interpretation is one of long standing.*” *Krsnak v. S. Dakota Dep’t of Env’t & Natural Res.*, 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2D 907, 916. (emphasis added).

“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 SD 5, ¶ 26, 744 N.W.2d 594, 602. (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228-29). Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Labor*, 411 N.W.2d 113, 119 (S.D. 1987).

A reviewing court may reverse or modify an agency only if substantial rights of the appellants have been prejudiced because the administrative findings, conclusions, or

decision is inter alia, affected by error of law, clearly erroneous in light of the entire evidence in the record, or arbitrary or an abuse of discretion. SDCL 1-26-36; *In re PSD Air Quality Permit of Hyperion*, 2013 S.D. 10, ¶16, 826 N.W.2d 649, 654.

ARGUMENT

1. WHETHER THIS COURT CAN CORRECT THE CIRCUIT COURT'S INCORRECT REFERENCE TO EL18-003?

Commission Staff concurs with and joins in the arguments put forth by Crowned Ridge in its Appellee Brief. Specifically, SDCL 15-6-60(a) provides that leave may be granted to the Circuit Court to correct clerical errors, such as the typographic citation to Commission docket EL18-003. Granting leave to correct the error supports judicial economy.

2. WHETHER THE COMMISSION PROPERLY ADMITTED THE TESTIMONY OF JAY HALEY?

The Commission accepted the testimony of Crowned Ridge witness Jay Haley over the objection of Intervenors. The Circuit Court correctly concluded that the “Commission’s ruling on the admissibility of Haley’s testimony is not an issue that was included within the Statement of Issues and is not subject to this appeal.” (AR-9 108)

While Intervenors submitted an overly broad statement of issues that did little to inform the circuit court and parties of what issues Intervenors intended to argue, Intervenors’ Statement of Issues failed to raise any argument with respect to the admissibility of Jay Haley’s testimony.

By failing to include this issue in the Statement of Issues, Intervenors waived the issue. *Lagler v. Menard, Inc.*, 2018 S.D. 53 ¶ 42, 915 N.W.2d 707, 719 (issues not

included in the statement of issues are deemed waived). Therefore, the Circuit Court's Opinion and Commission's Order should be affirmed with respect to the testimony of Jay Haley.

Nonetheless, even if we assume *arguendo* that this issue was not waived, the Commission's order should be affirmed. The admission of Mr. Haley's testimony was well within the discretion of the Commission. This Court has stated that when it reviews an agency's evidentiary rulings, it examines whether the agency abused its discretion. *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10. "To support a reversal, the record must establish [an agency's] decision was an abuse of discretion, not merely a decision which the circuit court might have made differently if done so as the initial fact finder." *Williams v. South Dakota Bd. Of Pardons and Paroles*, 2007 S.D. 61, ¶ 11, 736 N.W.2d 499, 502.

The Commission heard and considered the arguments regarding Mr. Haley's license as a professional engineer. The Commission also heard testimony on Mr. Haley's background and credentials. (AR-8 2896-2909) It was within the sole discretion of the Commission to determine whether the testimony was reliable and should be admitted. SDCL 1-26-19 affords the Commission additional discretion, providing in relevant part "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."

It was neither arbitrary nor unreasonable for the Commission to determine that Mr. Haley's testimony was reliable, in spite of the licensing error, based upon his

extensive background in the subject matter. See *Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶¶ 20, 34, 871 N.W.2d at 856, 858 (“The Department’s decision to admit the testimony as substantive evidence was well within its discretion.”).

This Court has previously explained that the Circuit Court is not permitted to re-weigh evidence. *Williams*, 2007 S.D. 61, ¶ 10, 736 N.W.2d at 502. The Court in *Williams* found that the circuit court erred in re-weighing evidence presented to the Board of Pardons and Paroles rather than deferring to the Board. *Id.* The Court went on to state that the circuit court’s action amounted to a “second judgment on what the appropriate sanction should have been.” *Id.* In that same vein, the Commission weighed the arguments and made the determination that Mr. Haley’s testimony should be admitted. Intervenor would have the Court render a second judgment on that evidentiary determination.

Commission Staff supports and joins in the arguments made on this issue by Crowned Ridge regarding its witness. The Circuit Court’s Opinion and Commission’s Order should be affirmed.

3. WHETHER THE COMMISSION PROPERLY ADMITTED THE TESTIMONY OF CROWNED RIDGE WITNESS SARAH SAPPINGTON?

Intervenor failed to raise the question of whether the testimony of Sarah Sappington constituted impermissible hearsay. Crowned Ridge witness Sarah Sappington provided oral testimony at the evidentiary hearing. (AR 12308-12361) At the evidentiary hearing, Intervenor’s trial lawyer objected to Ms. Sappington’s testimony as hearsay. (AR 12300) The objection was overruled, and Ms. Sappington was permitted to testify.

The issue was not raised before the Circuit Court in briefs or in oral argument and was, therefore, not ruled upon by the Circuit Court. This Court has “consistently stated that [it] will not address issues raised for the first time on appeal not raised before the lower court.” *Kreisers Inc. v. First Dakota Title Ltd. Partnership*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425 (quoting *Hall v. S.D. Dep’t of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26–27).

Because the Circuit Court did not have an opportunity to address the hearsay allegation, it is proper for the Court to decline to address it on appeal.

However, even if we assume *arguendo* that Intervenors had not waived this issue, the Commission properly ruled that Ms. Sappington’s testimony was not hearsay. Ms. Sappington’s qualifications were thoroughly vetted at the evidentiary hearing, and all parties had the opportunity to cross-examine the witness.

ARSD 20:10:22:39 requires an applicant to submit pre-filed written testimony upon the filing of an application. Simply submitting this testimony in written form does not make the documents “testimony”. The basic rules of evidence and civil procedure still apply. In order to constitute “testimony”, the witness’s statements must be given under oath and be subject to cross-examination. See *In re Estate of Eberle*, 505 N.W.2d 767, 771 (S.D. 1993) (“Affidavits are unsatisfactory as forms of evidence; they are not subject to cross-examination”). Pre-filed written testimony is not an end-run around the rules of evidence. It is merely a permissible tool for promoting judicial efficiency. The dialogue became testimony when it was offered on the witness stand, under oath by Sarah Sappington as her own testimony.

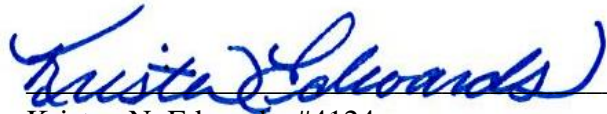
Intervenors' assertions are without merit, and the Circuit Court's Opinion and Commission's Order should be affirmed.

VI. CONCLUSION

Based on the foregoing, Commission Staff respectfully requests the Court affirm the circuit court's Order Affirming Decision of South Dakota Public Utilities Commission.

Dated this 18th day of November 2020.

SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION STAFF



Kristen N. Edwards, #4124
Special Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Ph. (605) 773-3201
Kristen.Edwards@state.sd.us

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

AMBER KAY CHRISTENSON, and
ALLEN ROBISH,

#29334

Appellants,

v.

CERTIFICATE OF COMPLIANCE

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

Appellees

Kristen N. Edwards, staff attorney for Appellee South Dakota Public Utilities Commission Staff, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface described in SDCL 15-26A-66(b) as follows:

- a. The typeface of the brief is in Times New Roman 12 point; and
- b. The brief contains 2,406 words, according to the word counting system in Microsoft Office 2010 for Windows used by the undersigned.



Kristen N. Edwards, #4124

Special Assistant Attorney General

500 East Capitol Avenue

Pierre, SD 57501-5070

Ph. (605) 773-3201

Kristen.Edwards@state.sd.us

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

AMBER KAY CHRISTENSON, and
ALLEN ROBISH,

#29334

Appellants,

v.

CERTIFICATE OF SERVICE

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

Appellees

The undersigned hereby certifies that true and correct copies of Appellee South Dakota Public Utility Commission's Brief in the above-referenced case were served upon the following persons by electronic mail at the addresses listed below:

Miles F. Schumacher
Michael F. Nadolski
Lynn Jackson Shultz & Lebrun, P.C.
110 , Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
(605) 332-5999
mschumacher@lynnjackson.com

R. Shawn Tornow
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, South Dakota 57109-0748
Rst.tlo@midconetwork.com

And the original and 2 copies were hand delivered to the South Dakota Supreme Court, 500 East Capitol Ave., Pierre, South Dakota 57501, as well as filing by electronic service in to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@state.sd.us on the 18th day of November 2020.

A handwritten signature in black ink that reads "Kristen Edwards". The signature is written in a cursive style with a large initial 'K' and 'E'. A horizontal line is drawn across the page just below the signature.

Kristen N. Edwards, #4124

Special Assistant Attorney General

500 East Capitol Avenue

Pierre, SD 57501-5070

Ph. (605) 773-3201

Kristen.Edwards@state.sd.us