

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

AMBER KAY CHRISTENSON, and
ALLEN ROBISH,
Appellants,

14CIV19-000290

vs.

**APPELLANTS'
DOCKETING STATEMENT**

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

SECTION A
TRIAL COURT

- 1. The circuit court from which the appeal is taken: Third Judicial Circuit
- 2. The county in which the action is venued at the time of appeal: Codington County
- 3. The name of the trial judge who entered the decision appealed: Carmen A. Means, Circuit Court Judge

PARTIES AND ATTORNEYS

- 4. Identify each party presently of record and the name, address, and phone number of the attorney for each party. (May be continued on an attached appendix.)

Amber Christenson, and
Allen Robish,
Intervenors/Appellants

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S.D. Public Utilities Commission,
Appellee

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SECTION B
TIMELINESS OF APPEAL

(If Section B is completed by an appellee filing a notice of review pursuant to SDCL 15-26A-22, the following questions are to be answered as they may apply to the decision the appellee is seeking to have reviewed.)

1. The date the judgment of order appealed from was signed and filed by the trial court: April 20, 2020
2. The date the Circuit Court's order was served on Appellant(s): April 23, 2020
3. State whether either of the following motions was made:
 - a. Motion for judgment n.o.v., SDCL 15-6-50(b): Yes X No
 - b. Motion for new trial: SDCL 15-6-59: Yes X No

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

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 (with Mogen and Lynch *not* being part of this appeal). As Intervenors and Appellants, Robish and Christenson, raised a number of issues related to 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.

As a result, Appellants now appeal the decision of the Third Judicial Circuit, Judge Carmen Means, which affirmed the South Dakota Public Utilities Commission's (hereinafter, "the Commission" or "Commission's") Final Decision and Order Granting Permit to Construct Facility in *EL 19-003 [*that is, EL 19-003, *not*, 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 attached hereto).

As part of the underlying administrative hearing record below, on January 30, 2019, Crowned Ridge Wind, LLC (hereinafter "Crowned Ridge") 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). 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. 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' 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 1925-44). Appellants' timely objected below to the improper, incomplete, unsupported and hearsay elements to/for any such testimony adduced from Ms. Sappington (no foundational knowledge or PhD expertise) as related to any such expert testimony that she wrongly, and inexplicably, was allowed to "adopt" and testify about at hearing. At least in part, as a result of such application-related and/or hearing-related allowances for Appellee Crowned Ridge, Intervenor/Appellants were wrongfully and prejudicially denied due process at hearing.

On April 25, 2019, Intervenor/Appellants filed a Motion to Deny and Dismiss the application. (AR 1957). A hearing on the Motion to Deny and Dismiss was held before the Commission on May 9, 2019. (AR 2055-91, Transcript of Ad Hoc Commission Meeting). On May 10, 2019, the Commission issued its Order Denying Motion to Deny and Dismiss and an Order to Amend Application. (AR 2092-93). 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 2094-95). At the same time, on May 10, 2019, Intervenor 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). Intervenor 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 12245-52, 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. (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. (AR 20257-20358, Intervenor/Appellants; 20445-491, Crowned Ridge; 20492-20510, Commission Staff).

Thereafter, on July 9, 2019, the Commission 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, the Commission issued its Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions. The Commission's Facility Permit included 45 conditions, including sound and shadow flicker thresholds and avian monitoring and protection. Appellants timely and properly appealed the Commission's Final Decision to circuit court, below. As noted below, the circuit court, Judge Means, ultimately affirmed the administrative decision in this matter.

Prior to its decision, the lower court held a hearing by and through oral argument on January 16, 2020, 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. The present appeal is timely filed herein as a matter of right.

5. Appeals of right may be taken only from final, appealable orders. See, SDCL 15-26A-3 and 15-26A-4.

a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims?

Yes No

b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)?

N/A

6. State each issue intended to be presented for review.
(Parties will not be bound by these statements.)

- 1.) Whether the PUC decision below was clearly erroneous and unsupported by substantial evidence insofar as it wrongfully allowed consideration of an incomplete, inaccurate and/or misleading permit application by Appellee Crowned Ridge and such incomplete application was sought to be improperly bolstered by Appellee by and through post-hearing submissions of evidence/testimony by Applicant/Appellee.
- 2.) Reversible and prejudicial error was committed below when the PUC denied Appellants due process by improperly accepting and relying upon incomplete, unreliable and impermissible hearsay testimony from an Applicant witness (Sarah Sappington, Office Director/Project Manager/Archaeologist) and it was both prejudicial to Intervenor/Appellants and an abuse of discretion for the PUC to accept, over Intervenor/Appellants' objection, such unsupported and/or incomplete testimony by allowing the witness to somehow "adopt" the testimony of or "substitute for" the proposed testimony of a different Applicant witness (i.e., Kimberly Wells,

PhD in Fisheries and Wildlife Services, as a Certified Wetland Delineator and Certified Wildlife Biologist and also as Applicant's Environmental Services Manager).

- 3.) Reversible and prejudicial error was committed below when the PUC, over Intervenor/Appellants' objections, accepted and relied upon unsupported, unreliable and falsely claimed as licensed "professional engineer" testimony from an Applicant witness (Jay Haley) and, such error was erroneously compounded by the trial court below in its finding of such testimony amounting to "substantial evidence" when the reviewing court failed to consider Intervenor's preserved objection(s) to such unsupported and falsely-claimed opinion testimony to be addressed as an issue within any of Intervenor's 31-plus broadly-outlined issues on appeal from the administrative decision below.
- 4.) Whether the PUC as well as the trial court below committed reversible error in erroneously reviewing Applicant's permit, as heard and considered at hearing in June 2019, under the wrong legal standard(s) under SDCL § 49-41B-22, after July 1, 2019.

Dated: May 22, 2020.

/s/ R. Shawn Tornow

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*Trial Court's April 15, 2020, Memorandum Decision, as well as Appellees July 26, 2019, Final Decision and Order Granting Permit to Construct (Wind) Facility, EL 19-003, are appropriately attached hereto and incorporated herewith by this reference.