

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION)	STAFF’S RESPONSE TO MOTION
BY CROWNED RIDGE WIND II, LLC FOR)	TO REVOKE
A PERMIT OF A WIND ENERGY)	
FACILITY IN DEUEL, GRANT AND)	EL19-003
CODINGTON COUNTIES)	
)	

Staff of the South Dakota Public Utilities Commission (Commission) hereby files this Response to Motion to Revoke filed on February 2, 2020. It is worth noting that the Motion was unsigned.¹

The Commission should deny or otherwise decline to take action on the Motion for lack of jurisdiction. While the filing was unclear² in its request for relief, several times throughout the document, Movants cite to SDCL 49-41B-33, therefore we address this as a Motion to Revoke Permit based upon the following complaint allegations³:

1. Shadow flicker – Movants allege misstatements by Crowned Ridge with respect to the shadow flicker studies in the Application and throughout the evidentiary process. *See* Motion, page 3.
2. 2.3 MW wind turbines – Movants allege Crowned Ridge utilized turbines that were different from those described in the Application. *See* Motion, page 4.
3. Low Noise Trailing Edge (LNTE) blades – Movants allege Crowned Ridge did not utilize LNTE. *See* Motion, page 8.

¹ ARSD 20:10:01:02.03(3) requires a signature on any pleading filed with the Commission. This requirement can also be found in SDCL 15-6-11(a).

² The title of the Motion was Motion to Revoke Docket EL19-003; the first sentence “request[s]” a Motion to Revoke the Order Granting Permit to Construct a Facility.

³ This list of allegations is based upon Staff’s understanding of the Motion.

4. Sound studies – Movants allege the sound modeling studies were inaccurate and unreliable. *See* Motion, page 10.
5. Hub heights – Movants allege Crowned Ridge “changed the hub heights on [four] turbines...from 80 meters to ninety meters. *See* Motion, page 13.
6. Turbine locations – Movants allege that Crowned Ridge changed the location of certain turbines. *See* Motion, page 15.
7. Aircraft Detection Lighting System (ADLS) – Movants allege that Crowned Ridge is out of compliance for failing to utilize ADLS. *See* Motion, page 17.
8. Lek Mitigation – Movants allege that Crowned Ridge did not comply with the requirement to have a lek mitigation plan, because Crowned Ridge sought, and was granted, a waiver. *See* Motion, page 18.
9. Deferral of 100MW – Movants allege that by deferring the construction of 100 MW of the Project, Crowned Ridge is in violation of the Permit. *See* Motion, page 18.

The requested relief for each of the alleged violations appears to be revocation of the Permit pursuant to SDCL 49-41B-33.

LACK OF JURISDICTION AND RES JUDICATA

In spite of the fact that Crowned Ridge has not argued lack of jurisdiction to hear the Motion, subject matter jurisdiction is not a defense that can be waived. “One cannot confer subject matter jurisdiction by agreement, consent, or waiver.” *Matter of Guardianship of Sasse*, 363 N.W.2d 209, 212 (SD 1985) (citations omitted).

The Permit was appealed to the circuit court on or about August 19, 2019.⁴ The circuit court has not ruled on the appeal. The issues on appeal challenge the accuracy and reliability of the sound, shadow flicker, and avian use studies. Of the above issues, 1, 3, and 4 go to the heart of the appeal. Therefore, the Commission is without jurisdiction to rule on those issues. The Court has held that “[a]n appeal from a judgment or order strips ... jurisdiction over the subject matter of the judgment or order except as to certain trivial matters....including enforcement in the absence of a stay.” *O’Neill v. O’Neill* 2016 SD 15, ¶ 34, 876 NW2d 486, 499 (quoting *Reaser v. Reaser*, 2004 S.D. 116, ¶ 28, 688 N.W.2d 429, 437)

Issues 1, 3, and 4 are essentially the subject matter of the appeal. **Issues 1, 2, 4, 5⁵, 6, and 9** go to the underlying application and studies, not limited to enforcement of the Permit or its conditions.

Issues 3 and 8 have already been ruled on by the Commission and are, therefore, res judicata. “[T]he doctrine of res judicata is equally applicable to contested administrative hearings as it is to judicial proceedings.” *Schmidt v. Zellmer*, 298 N.W.2d 178, 180 (S.D.1980). Res judicata “prevents relitigation of an issue of ultimate fact actually litigated or which could have been properly raised and determined therein.” *Gottschalk v. South Dakota State Real Estate Commission*, 264 N.W.2d 905, 908–909 (SD 1978).

The remaining issue, **Issue 7**, is the same as the issue raised in Docket No. EL20-002. The difference appears to be the relief sought. In filing the Motion for Order to Show Cause in Docket No. EL20-002, Staff did not request revocation of the Permit. However, Movants clearly state that revocation is the remedy which they seek. Revocation goes beyond enforcement and

⁴ See Civ19-290.

⁵ With respect to the hub heights, Movants see penalties and suspension or, in the alternative, revocation. More information on this issue may be needed to determine jurisdiction if revocation is not sought.

enters into the area in which the Commission lacks jurisdiction due to the pending appeal. In addition, the matter is already docketed and should not be litigated simultaneously in this docket for judicial efficiency purposes.

DOCKET No. EL20-002

The obvious question is why Staff argues the Commission has jurisdiction in Docket No. EL20-002 (Show Cause Docket), but no jurisdiction with respect to this Motion. The Show Cause docket is not a Motion to Revoke and does not seek revocation. It is purely an enforcement docket. Rather, the Show Cause Docket is much more akin to the LNTE waiver request that was made and granted in EL19-003.

As discussed above, the Commission retains enforcement jurisdiction. Staff's Motion for Order to Show Cause simply requests the Commission enforce its order by issuing an Order to Show Cause. The remedy sought is not revocation, nor is that remedy available if the Order to Show Cause is issued pursuant to SDCL 49-41B-34. Staff would agree that a show cause order, if issued, should not be issued pursuant to SDCL 49-41B-33.

CONCLUSION

Due to the pending appeal of the Permit issued in docket EL19-003, the Commission lacks jurisdiction to hear issues 1, 2, 4, 5, 6, and 9 in Motion to Revoke. Issues 3 and 8 were already ruled on by the Commission and, therefore, are res judicata and should not be heard again by the Commission. Issue 7 is the same issue raised in docket EL20-002. For the reasons above, the Motion to Revoke should be dismissed for lack of jurisdiction and on the doctrine of res judicata.

Dated this 24th day of February 2020.

A handwritten signature in blue ink that reads "Kristen Edwards". The signature is written in a cursive style and is positioned above a solid horizontal line.

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