

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

IN THE MATTER OF COMMISSION)	EL20-002
STAFF’S REQUEST FOR AN ORDER TO)	
SHOW CAUSE REGARDING CROWNED)	MEMORANDUM REGARDING
RIDGE WIND, LLC)	JURISDICTION
)	

In response to the jurisdictional question posed by the Commission at the February 3 Commission meeting, Staff provides the following discussion to answer the question of whether the Commission has jurisdiction to enforce conditions of a permit when the underlying permit has been appealed on unrelated grounds.

BACKGROUND

On July 26, 2019, the Commission issued a Final Decision and Order Granting Permit to Construct Facility; Notice of Entry with Permit Conditions (Permit) to Crowned Ridge Wind, LLC (Crowned Ridge). The Permit contained 45 conditions. One of the conditions required Crowned Ridge to utilize an aircraft detection lighting system (ADLS). Pursuant to SDCL 49-41B-25.2, effective July 1, 2019, the Project was also required to be equipped with ADLS.

Intervenors appealed the Permit on August 19, 2019. The issues on appeal can be summarized as allegations regarding completeness of the sound study, shadow flicker study, and avian study.

On January 13, 2020, Staff filed a Petition for Order to Show Cause, requesting the Commission issue an order to show cause directing Crowned Ridge to explain how the Project is not in violation of the Permit and SDCL 49-41B.

At this point, if the Commission were to go forward, as Staff believes it should, the next step is to determine whether there is enough information to issue the requested order to show cause, thus setting up a process to determine whether a violation has occurred and, if so, what the appropriate penalty is.

Should the docket go forward under an order to show cause, Crowned Ridge would have the burden to convince the Commission that it is not in violation. Staff, on the other hand, would continue to make its argument that Crowned Ridge is in violation and would seek a monetary penalty pursuant to SDCL 49-41B-34. While SDCL 49-41B-33 provides for the option of revocation or suspension in certain circumstances, Staff has no intention of seeking penalties under that statute, as revocation or suspension would neither remedy the problem nor fit the violation.

The appeal has been heard by the circuit court and the parties to the appeal are awaiting a decision. The circuit court may either affirm or reverse and remand the Permit. Even if the Permit is remanded for additional proceedings, the Project would continue to exist, having already come into operation, while the Commission conducts further proceedings, limited to the three issues that were appealed. Regardless of how the circuit court rules, the matter will almost certainly be appealed to the South Dakota Supreme Court. Pursuant to SDCL 49-41B-31, the Permit is not stayed during this lengthy process.

Because the Permit is not stayed, the Permit and all conditions remain effective. The Commission has exclusive authority to seek a civil penalty pursuant to SDCL 49-41B-34. The appellate court does not have jurisdiction to assess a monetary penalty within the pending appeal.

ANALYSIS

This question has not previously come before the Commission, as the need to enforce a permit while the permit is still on appeal has not previously arisen. However, the Commission has previously exercised its authority related to permit conditions prior to the expiration of an appeal period. For example, in Docket No. EL13-028, while the permit was on appeal, the Commission approved a mitigation plan required by a permit condition. Also, in Docket EL19-003, the Commission has addressed the low noise trailing edge blades issue, which stems from Condition 2 of the Permit.

While no caselaw was found specific to enforcement of Commission-issued permit conditions while an appeal of a permit is pending, the Court has addressed jurisdiction in other areas specific to enforcement. The Court in *Reaser v. Reaser*, 688 NW2d 429, held that while an appeal was pending, the trial court retained jurisdiction to act and enforce judgments in the absence of a stay. *Reaser*, 2004 SD 116, ¶ 28, 688 NW2d 429, 437.

The *Reaser* Court, in allowing the trial court to enforce a custody order while a divorce matter was on appeal, determined that “Courts have permitted further proceedings...during appeal when the subject matter of the appeal would not be affected by such proceedings.” *Id.* (internal citations omitted). The Court went on to explain that the “trial court is restrained from entering any order that would change or modify the judgment on appeal or have the effect of interfering with the review of the judgment.” *Id.*

If one applies that holding to the current proceeding, the Commission lacks jurisdiction to enter any order that changes or modifies its decision on the permit with respect to sound studies, shadow flicker studies, and avian studies. For example, without leave from the appellate court to do so, the Commission may not take any action that would find the sound studies to be more or

less credible. However, as the Commission was free to address Crowned Ridge's request for a waiver of the requirement to have low noise trailing edge blades and exercised that right in rendering its decision on the waiver, the Commission may enforce its order in this circumstance pertaining to ADLS.

The Court also addressed retained jurisdiction in *Strong v. Gant*, 2014 SD 8, 843 NW2d 357. The *Strong* Court, in holding that the lower court retained jurisdiction to hear a motion related to attorneys' fees, held that the lower court retained "jurisdiction to address matters collateral to the subject matter of the appeal, matters that would not change or modify the judgment or appeal or have the effect of interfering with [the Court's] review of the judgment on appeal." *Id.* at ¶ 21.

In this docket, Staff asks the Commission to determine whether Crowned Ridge violated SDCL 49-41B-25.2 and whether Crowned Ridge violated Conditions 2 and 33 of its Permit by Crowned Ridge's failure to have the Project equipped with ADLS. If it is determined that a violation occurred, Staff will recommend an appropriate monetary penalty to be deposited into the permanent school fund in order to incentivize installation and utilization of an ADLS.

The issues on appeal are limited and are unrelated to ADLS. The issues on appeal are as follows:

1. Did the Commission abuse its discretion as it considered the information related to sound studies?
2. Did the Commission abuse its discretion in granting an Energy Facility Permit based, in part, on the record evidence regarding sound and shadow flicker?
3. Did the Commission abuse its discretion when it approved the permit without a complete avian use study?

The appellate court is not reviewing the requirement for ADLS and is without jurisdiction to effect or alter that portion of the Permit.

Am. Jur. Appellate § 359 states in relevant part that a “judgment may generally be enforced by the trial court, or executed upon by the party who won the judgment, and a trial court is free to aid execution while an un-superseded judgment is on appeal.” (internal citations omitted)

SDCL 49-41B-31 provides that an order or permit issued by the Commission is not stayed by an appeal. Therefore, the Permit and all conditions attached thereto remain in full force and the Commission is vested with the authority to enforce those conditions.

Guidance can be found in caselaw from other states, as well. The Court of Appeals of Minnesota has held that while a “trial court’s jurisdiction to modify or set aside its order on the merits is suspended pending appeal, it retains jurisdiction over collateral matters, such as enforcement.” *David N. Volkmann Const., Inc. v. Isaacs*, 428 NW2d 875, 876 (Minn.App. 1988). In the Minnesota case, the trial court declined to enforce an injunction, believing it lacked jurisdiction pending appeal. The appellate court reversed, finding that the trial court retained jurisdiction over such enforcement matters.

Based on a review of caselaw it seems that many, if not most, states allow enforcement of an order while an appeal is pending, Staff notes that one state does take a much more narrow view of enforcement jurisdiction. California has a specific statute prohibiting enforcement in certain circumstances. *See* CA Civ. Pro. § 916. Because of its specific statute, California courts look to whether the postjudgment proceedings would “have any effect on the effectiveness of the appeal.” *Varian Medical Systems, Inc. v. Delfino*, 106 P3d 958, 964 (Cal. 2005) (internal

citations omitted). The Supreme Court of California has held that “[t]he fact that the postjudgment or postorder proceeding may render the appeal moot is not, by itself, enough to establish that the proceeding effects the effectiveness of the appeal” *Id.* The California Court went on to hold that “[a] trial court’s proceeding also affects the effectiveness of an appeal if the possible outcomes on appeal and the actual or possible results of the proceeding are irreconcilable.” *Id.* at 964. In holding that ancillary or collateral proceedings are not stayed by an appeal, that court clarified that a postorder proceeding is “ancillary or collateral to the appeal despite its potential effect on the appeal, if the proceeding could or would have occurred regardless of the outcome of the appeal.” *Id.*

While California’s more narrow view appears to be in the minority, Staff nonetheless includes it to acknowledge the narrower interpretation. However, it is distinguishable from other states as it is based on a specific law providing for such an interpretation.

CONCLUSION

The need to retain enforcement jurisdiction, whether it be tied to an agency permit or court order, is a matter of practicality. Appeals take several months, even years, to wind through the judicial system. In the meantime, it is imperative for the protection of the community for conditions to be enforced.

Precedent as well as public policy dictate that the Commission retain enforcement jurisdiction, particularly when the underlying order is not stayed pending appeal.

Dated this 12th day of February 2020.



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