IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

AMBER KAYE CHRISTENSON, ALLEN ROBISH,
KRISTI MOGEN, AND PATRICK LYNCH
Petitioners-Appellants,

v.

CROWNED RIDGE WIND, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
Respondents-Appellees.

Appeal No. 29334

Appeal from Circuit Court, Third Judicial Circuit, Codington County, South Dakota
The Honorable Carmen A. Means, Presiding

APPELLEE CROWNED RIDGE WIND, LLC'S BRIEF

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NOTICE OF APPEAL FILED MAY 22, 2020

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal of the South Dakota Public Utilities Commission's ("Commission") July 26, 2019 Order ("Order"), issued in Docket No. EL19-003, granting a Facility Permit ("Facility Permit") to Crowned Ridge Wind, LLC ("Crowned Ridge") for an energy wind facility ("Project") and the Third Judicial Circuit Court's affirmation of the Order in its April 15, 2020 Memorandum Opinion ("Opinion").

STATEMENT OF THE ISSUES AND AUTHORITIES

Issue 1. WHETHER THE CIRCUIT COURT'S INCORRECT REFERENCE TO EL18-003 REQUIRES THE CASE TO BE REMANDED?

Pursuant to SDCL § 15-6-60(a), on its own initiative, this Court can grant leave for the Circuit Court to correct the incorrect reference in its Opinion from EL18-003 to EL19-003, thereby alleviating the need to remand the case to the Circuit Court for it to correct its typographical error in referring to EL18-003.

SDCL § 15-6-60(a)

Issue 2. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING THAT INTERVENORS WAIVED THEIR ARGUMENT ON THE ADMISSIBILITY OF CROWNED RIDGE WITNESS JAY HALEY'S TESTIMONY; AND, IF THEY DID PRESERVE THE ARGUMENT, WAS THE COMMISSION CORRECT IN ADMITTING THE TESTIMONY?

The Circuit Court properly concluded that Appellant waived its argument as to the admissibility of Crowned Ridge witness Jay Haley's testimony.

Even if, *arguendo*, the Intervenors did preserve their assertion regarding the admissibility of Mr. Haley's testimony, the Commission correctly admitted the testimony so Appellants' claim is without merit.

Domson, Inc. v. Kadrmas Lee & Jackson, 2018 S.D. 67, 918 N.W.2d 396
Kreisers Inc. v. First Dakota Title 2014 S.D. 56, 852 N.W.2d 413
Sorensen v. Harbor Bar, LLC, 2015 S.D. 88, 871 N.W.2d 851
SDCL § 1-26-31.4

Issue 3. WHETHER THE CIRCUIT COURT ERRED IN AFFIRMING THE COMMISSION'S CONCLUSION THAT THE PROJECT WILL NOT SUBSTANTIALLY IMPAIR THE HEALTH OR WELFARE OF THE INHABITANTS?

The Circuit Court properly ruled that the Commission's conclusion that the Project will not substantially impair the health or welfare of the inhabitants was supported by substantial evidence and not clearly erroneous.

Sorensen v. Harbor Bar, LLC, 2015 S.D. 88, 871 N.W.2d 851
In re Application of Svoboda, 54 N.W.2d 325 (S.D. 1952)
In re Application of Dakota Trans. of Sioux Falls, 291 N.W. 589 (S.D. 1940)
SDCL § 1-26-36

Issue 4. WHETHER INTERVENORS FAILED TO PRESERVE THEIR ASSERTION THAT THE COMMISSION ERRED BY ADMITTING MS. SARAH SAPPINGTON'S TESTIMONY; AND, IF THEY DID PRESERVE THE ARGUMENT, WAS THE COMMISSION CORRECT IN ADMITTING THE TESTIMONY?

Intervenors waived their assertion that Crowned Ridge witness Sarah Sappington's testimony constituted hearsay, because the argument was not presented in their Circuit Court brief. Even if, *arguendo*, the Intervenors did preserve their assertion regarding the admissibility of Ms. Sappington's

testimony, the Commission correctly admitted the testimony so Appellant's assertion is without merit.

Masloskie v. Century 21, 2012 S.D. 58, 818 N.W.2d 789
Kostel v. Schwartz, 2008 S.D. 85, 756 N.W.2d 363
People in Interest of C.L. 354 N.W.2d 476 (S.D. 1984)
SDCL § 15-26A-60(6)

STATEMENT OF THE CASE

On January 30, 2019, Crowned Ridge filed an Application for a Facility Permit to construct and operate the Project to be located in Grant County and Codington County, South Dakota. (AR-1 113-1146) The Commission conducted a contested case to review the Application, which included the submission of pre-filed testimony, discovery, the granting of party status to five intervenors,[1] four days of evidentiary hearings, the submission of legal briefs, oral argument, and the issuance of the July 26, 2019 Order granting a Facility Permit to Crowned Ridge. On August 19, 2019, Intervenors filed a Notice of Appeal of the Commission's Order with the Third Judicial Circuit Court in Codington County ("Circuit Court"). After briefing and oral argument, on April 15, 2020, Circuit Court Judge Means issued an Opinion affirming the Commission's granting of a Facility Permit to Crowned Ridge. On May 22, 2020, Intervenors appealed the Circuit Court's Opinion to this Court.

[1] The Intervenors from the underlying proceeding who comprise the Appellants-Intervenors are Amber Christenson, Allen Robish, Kristi Mogen, and Patrick Lynch.

STATEMENT OF THE FACTS

On January 30, 2019, Crowned Ridge filed an Application for a Facility Permit to construct and operate an up to 300 megawatt wind facility, *i.e.,* the Project. (AR-1 113-1146) As explained in the Application, Crowned Ridge has executed a power purchase agreement with Northern States Power Company to sell the full output of the Project. (AR-1 142) On January 30, 2019, Crowned Ridge also filed the pre-filed written direct testimony of Kimberly Wells, Mark Thompson, Jay Haley, Tyler Wilhelm, and Sam Massey. (AR-1 1025-1146)

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 in which, pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission scheduled a public input hearing on the Application for Wednesday, March 20, 2019, at 5:30 p.m., CDT, at the Waverly-South Shore School Gymnasium, 319 Mary Place, Waverly, South Dakota. (AR-1 1149-1150)

On February 22, 2019, the Commission issued an order granting party status to Amber Christenson, Allen Robish, and Kristi Mogen. (AR-1 1193-1194) On March 20, 2019, the public input hearing was held. (AR-1 1446-1530)

On March 21, 2019, the Commission issued an order granting party status to Melissa Lynch. (AR-1 1545) On April 5, 2019, the Commission issued a procedural schedule and granted party status to Patrick Lynch. (AR-1 1686-1687)

On April 9, 2019, Crowned Ridge filed the supplemental pre-filed written testimony of Chris Ollson, Jay Haley, Mark Thomson, Tyler Wilhelm, and Sam

Massey. (AR-1 1691-2145) On April 10, 2019, Sarah Sappington filed pre-filed written direct testimony adopting the withdrawn pre-filed written direct testimony of Kimberly Wells. (AR-1 2149-2165) On May 10, 2019, the Intervenors submitted the pre-filed written testimony of John Thompson and Allen Robish (AR-2 80-87), while Staff filed the pre-filed written direct testimony of Paige Olson, David Hessler, Tom Kirschenmann, and Darren Kearney. (AR-2 88-1746) On May 10, 2019, the Commission issued an Order For and Notice of Evidentiary Hearing, scheduling an evidentiary hearing for June 11-14, 2019 to be conducted in Room 413, State Capitol Building, 500 E. Capitol Ave., Pierre, South Dakota. (AR-2 77-78)

On May 24, 2019, the Applicant filed the pre-filed written rebuttal testimony of Sarah Sappington, Andrew Baker, Dr. Robert McCunney, Dr. Chris Ollson, Jay Haley, Richard Lampeter, Mark Thomson, Tyler Wilhelm, and Sam Massey. (AR-2 1750-2837)

On June 6, 11, and 12, 2019, the Commission held evidentiary hearings, during which Crowned Ridge moved into the record its application, testimonies, and hearing exhibits. (AR-8 1492-3128) On July 2, 2019, post-hearing briefs were filed by Crowned Ridge, Staff, and Intervenors. (AR-9 185) Intervenors did not move their testimony into the evidentiary record, and, therefore, it is not part of the record. (AR-9 184)

After consideration of the evidence of record, applicable law, and the briefs and oral arguments of the parties, on July 9, 2019, the Commission voted

unanimously to issue a Facility Permit for the Project, subject to certain conditions. (AR-8 3197-3271)

On July 26, 2019, the Commission issued the written Order granting the Facility Permit to Crowned Ridge. (AR-9 182-212) The Facility Permit included 45 conditions, including conditions on sound and shadow flicker thresholds and environmental and wildlife protection. (AR-9 202-212)

SUMMARY OF THE ARGUMENT

Intervenors assert that the Circuit Court's opinion incorrectly referenced Commission docket EL18-003 instead of EL19-003, which requires the case to be remanded to correct the error. However, this Court, pursuant to SDCL § 15-6-60(a), can grant leave for the Circuit Court to correct the incorrect references in the Circuit Court's Opinion from EL18-003 to EL19-003, which would alleviate the need to remand the case to the Circuit Court to correct the reference. Such a correction would render Intervenors' request for a remand moot.

Intervenors also assert that the Circuit Court erred in concluding that Intervenors had waived their right to challenge the admissibility of Crowned Ridge witness Jay Haley's testimony on sound and shadow flicker. Intervenors assert that their challenge to the admissibility of Mr. Haley's testimony also implicates whether the Commission properly concluded that the sound and shadow flicker produced from the Project would not substantially impair the health or welfare of the inhabitants. Not only did the Circuit Court correctly rule that Intervenors have waived their right to challenge admissibility of Mr. Haley's

testimony, the Circuit Court correctly concluded that the Commission's determination that the sound and shadow flicker produced from the Project would not substantially impair the health or welfare of the inhabitants was supported by substantial evidence and not clearly in error.

Intervenors further challenge the admissibility of Crowned Ridge witness Sarah Sappington's pre-filed written direct testimony as hearsay. However, Intervenors failed to raise this issue on the admissibility of Ms. Sappington's testimony in their brief before the Circuit Court, and, therefore, it was not ruled on by that Court, and, consequently, was not preserved to be raised before this Court. Furthermore, even if, *arguendo*, Intervenors had not waived their ability to challenge the admission of Ms. Sappington's testimony, Intervenors' assertion is without merit. Intervenors erroneously claim that the adoption of pre-filed written direct testimony that was withdrawn due to the unavailability of one witness by another witness is *per se* hearsay. Further, Intervenors' assertion mischaracterizes the purpose of pre-filed written testimony, and, more importantly, ignores the foundation laid at the evidentiary hearing confirming Ms. Sappington's personal knowledge of the contents of the pre-filed written direct testimony. Intervenors also availed themselves of the opportunity to cross-examine Ms. Sappington after the Commission moved her pre-filed written direct testimony into the record.

In sum, Intervenors' assertions are without merit, and the Circuit Court's Opinion and Commission's Order should be affirmed in all respects.

STANDARD OF REVIEW

The Supreme Court affords great weight to the Commission's findings and the inferences drawn by the Commission on questions of fact. *See* SDCL § 1-26-36; *In Re Prevention of Significant Deterioration,* 2013 S.D. 10, ¶¶ 16, 48, 826 N.W.2d 649, 654, 662 ("We 'give great weight to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire record.'") (quoting *Williams v. South Dakota Dep't of Agric.*, 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400). Questions of law are reviewed *de novo*. *See Anderson v. South Dakota Retirement System,* 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.,* 2015 S.D. 55, ¶ 11, 866 N.W.2d 545); *State v. Geise,* 2020 S.D. 161, ¶ 10, 656 N.W.2d 30, 36. The Supreme Court will afford a well-reasoned and fully informed Commission decision with "due regard", unless there is a clear error of judgment or conclusion not supported in fact. *In re Application of Otter Tail Power Co*., 2008 S.D. 5, ¶ 29, 744 N.W.2d 594, 603.

In addition, the Supreme Court does not weigh the evidence or substitute its judgment for that of the Commission, but, rather, its function is to determine whether there was substantial evidence in support of the Commission's conclusion or finding. *See In re Application of Svoboda*, 54 N.W.2d 325, 328 (S.D. 1952); *In re Application of Dakota Transp., Inc.,* 291 N.W. 589, 593, 595-96 (S.D. 1940). Under SDCL § 1-26-1(9), substantial evidence is defined as "relevant and competent evidence as a reasonable mind might accept as being sufficiently

adequate to support the conclusion." The Court only reverses the Commission's factual determinations when it is "left with a definite and firm conviction that a mistake has been committed." *In re Application of Midwest Motor Express*, 431 N.W.2d 160, 162-163 (S.D. 1988). In addition, for the Court to find an abuse of discretion, the agency's action must be "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." *Sorensen v. Harbor Bar*, LLC, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856. Even if the court finds the Commission abused its discretion, for the Court to overturn the Commission's decision it must also conclude that the abuse of discretion had a prejudicial effect. *Id*. at ¶ 20, 871 N.W.2d at 856.

ARGUMENT

I. The Court can Grant Leave for the Circuit Court to Correct the Incorrect Reference to EL18-003 Instead of EL19-003.

Intervenors assert that the case must be remanded because the Circuit Court's Opinion inadvertently cited to Commission docket EL18-003, instead of EL19-003. Intervenors Br. at 12-13. However, this Court, pursuant to SDCL § 15-6-60(a), can grant leave to the Circuit Court to correct the typographic citation to Commission docket EL18-003 and replace it with EL19-003. Because it is a straightforward correction of the docket reference, Crowned Ridge respectfully requests that the Court grant leave so that the Circuit Court can make such correction. With leave and the Circuit Court's correction, there is no need for any further action or briefing on this issue.

II. Witness Haley's Testimony was Properly Admitted.

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) (citing SDCL § 1-26-31.4). Strikingly, not only did Intervenors fail to include the assertion regarding the admissibility of Mr. Haley's testimony in their Statement of Issues, they also failed to raise the issue in their brief before the Circuit Court. Intervenors' Circuit Court brief, on the one hand, makes reference to Mr. Haley as not being a professional engineer, without a specific request for relief regarding the admissibility of Mr. Haley's testimony; on the other hand, the brief also references Mr. Haley as an "expert" who had "lauded credentials". (AR-9 at 11-12) Tellingly, Intervenors' Circuit Court brief is devoid of any assertion the Commission erred in admitting Mr. Haley's testimony and studies. Therefore, not only did the Circuit Court correctly conclude that Intervenors did not identify the admissibility of Mr. Haley's testimony in their Statement of Issues, Intervenors also failed to preserve the right to raise the admissibility of Mr. Haley's testimony and associated studies before this Court because they did not present it to the Circuit Court. *See Domson, Inc. v. Kadrmas Lee & Jackson*, 2018 S.D. 67, ¶ 11, 918 N.W.2d 396, 401 ("Because Domson failed to assert this argument to the circuit court, we will not address it for the first time on appeal."); *cf. 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); *Black Hills Truck & Trailer v. South Dakota Dept. of Revenue*, 2016 S.D. 47 ¶ 10 n.3, 881 N.W.2d 669, 672 n.3 (issues not briefed are deemed waived) (quoting *Daily v. City of Sioux Falls*, 2001 S.D. 48, ¶ 10 n.6, 802 N.W.2d 905, 910 n.6); *Kreisers Inc. v. First Dakota Title*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425 (Court declined to rule on tax benefit rule claim, because appellant's failed to fully present argument before the Circuit Court).

In addition, even if Intervenors' failures to preserve their assertion regarding the admission of Mr. Haley's testimony and studies could be overcome, which they cannot, Intervenors' claim that the Commission committed error in admitting Mr. Haley's testimony and studies over their objection is without merit. It is well-settled that an appellate court will defer to the trier of fact, here the Commission, on the determination on the admission of evidence unless there is a finding that the Commission abused its discretion. *See Sorensen*, 2015 S.D. 88, ¶¶ 20, 34, 871 N.W.2d at 856, 858 ("Excluding the testimony at that point would only have hindered the truth-seeking process. The Department's decision to admit the testimony as substantive evidence was well within its discretion."); *State v. Condon*, 2007 S.D. 124, ¶ 15, 724 N.W.2d 861, 866 ("We apply the abuse of discretion standard to the trial court's determination of whether to admit hearsay evidence."); *Hjermstad v. Petroleum Carriers*, 53 N.W.2d 839, 843 (S.D. 1952) ("In reviewing the trial court's ruling on the admission of this type of testimony,

this court defers to the determination of the trial court of the preliminary facts bearing upon the propriety of receiving the testimony").

In the instant case, Intervenors' objection to the admission of Mr. Haley's testimony and studies turns on Mr. Haley's inadvertent misunderstanding that he could refer to himself as a professional engineer although he had decided to stop paying his North Dakota professional engineer license dues because he was retiring soon. (AR-8 2898) As the record demonstrates, the Commission undertook a careful and thorough consideration of Intervenors' objection to Mr. Haley's testimony and studies, which included testimony that: (1) Mr. Haley unintentionally indicated that he could continue to indicate he was a professional engineer; (2) there is no nexus nor requirement that one be a professional engineer to conduct and present sound and shadow flicker testimony and studies; and (3) Mr. Haley was well-qualified to present testimony and studies on sound and shadow flicker as he had conducted such studies over a 30-year period, is a technical advisor for the U.S. national committee for standards on wind project assessments, and trained over 200 individuals to use a software program to conduct wind project sound and shadow flicker studies. (AR-1 1026-1027; AR-8 2897-2909) Given this record, the Commission's admission of Mr. Haley's testimony and studies had a well thought-out and reasonable basis, and, therefore, its admission was well within the Commission's discretion.

The reasonableness of the Commission's decision to admit Mr. Haley's evidence is reinforced by the holding in *Sorensen*, 2015 S.D. 88, ¶¶ 32-35, 871

N.W.2d at 858. In *Sorensen*, this Court was presented with the South Dakota Department of Labor's decision to admit the testimony of an undisclosed rebuttal witness over the objection of appellants. In that case, the Court held that the Department of Labor's decision to include the testimony was well within its discretion, because the truth-finding process would have been stifled without the testimony and there was no finding that bad faith played a role in the lack of disclosure of the witness. *Id.* Similar to *Sorensen*, the Commission's decision to admit Mr. Haley's testimony and sound and shadow flicker studies addressing the Project's compliance with the relevant sound and shadow flicker thresholds directly supports the Commission's truth-finding process to determine whether the Project would not substantially impair the health and welfare of inhabitants, as required by SDCL § 49-41B-22(c). (AR-9 195-196) Also, similar to *Sorensen*, there was no showing of bad faith on behalf of Mr. Haley, because the record clearly demonstrates that he unintentionally misunderstood that he could refer to himself as a professional engineer, and, also, once he learned he could not do so, he ceased referring to himself as a professional engineer; the record, further, shows that there is no relationship between being a professional engineer and the studies he performed. (*See, e.g.,* AR-8 2907) Thus, as was the case with the Department of Labor's decision to admit testimony in *Sorensen*, the Commission was well within its discretion to admit Mr. Haley's testimony, which is amply supported by the Commission's thorough consideration of Intervenors' objection. (AR-8 2908-2909)

Furthermore, even if the Court were to find the Commission erred in admitting the testimony of Mr. Haley on sound and shadow flicker, as the Circuit Court concluded, Intervenors failed to show any prejudicial effect from the Commission's determinations on sound and shadow flicker:

> The record shows that the modeled sound level at 50 feet away from the residence of each of the Appellants is substantially below the 45 dBA non-participant threshold set forth in Condition 26. The sound produced from the Project has been modeled to be less than the sound experienced from a whisper at 3 feet for Christenson and Lynch, and less than the sound of a library for Mogen and Robish. (AR 184). The sound is below the 45 dBA threshold imposed by the Commission. Appellants have failed to demonstrate any prejudicial effect, and their appeal on this issue should be denied.
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> * * *
>
> Appellants do not even argue that they are prejudiced. Any threat of prejudice is eradicated by the fact that the sound and shadow flicker conditions placed on the permit by the Commission account for actual, not modeled, sound and shadow flicker (AR 20708-20710, Condition 26). Additionally, each intervenor is well below the 30-hour annual compliance threshold for shadow flicker. As such, Appellants' arguments regarding shadow flicker are denied.

(footnotes omitted). (AR-9 110, 113-114)

Hence, Intervenors have failed to show the Commission's action related to sound and shadow flicker has had any prejudicial effect on them.

In addition, Intervenors' citation to *In re Klein*, 2003 S.D. 119, 670 N.W.2d 367 further demonstrates the flaw in its baseless attempt to find error in the Commission's decision to admit the testimony and studies of Mr. Haley. In *Klein*, the Court was faced with a clear legal South Dakota administrative regulation prescribing the qualifications of an appraiser and the information required to be in an appraiser's report. Unlike the facts in *Klein*, there is no South

Dakota statute or regulation that sets forth qualifications for a witness presenting sound and shadow flicker studies before the Commission or what information must be included in the studies. For the same reasons, Intervenors' reference to SDCL § 36-18A-8 is inapplicable as the statute speaks to a person practicing engineering in South Dakota, and as the record shows Mr. Haley's sound and shadow flicker studies are not engineering studies nor do they require that he practice as an engineer to conduct the studies. (AR-8 2898-2900; 2908-2909) Thus, Intervenors' citation to *Klein* is unavailing.

Accordingly, Intervenors' assertion regarding the admissibility if Mr. Haley's testimony should be deemed waived, or, in the alternative, the Commission's admission of Mr. Haley's testimony should be found to be within its discretion.

III. The Circuit Court Properly Affirmed the Commission's Conclusion that the Project will not Substantially Impair the Health or Welfare of the Inhabitants.

Intervenors loosely imply that Mr. Haley's unintentional representation of himself as a professional engineer somehow translates into his studies being incomplete and flawed. Intervenors Br. at 19. Intervenors' vague inference rings hollow against the weight of the Circuit Court's well-reasoned decision that rejected Intervenors' arguments that the sound and shadow flicker studies were incomplete, and affirmed that the evidence on sound and shadow flicker was substantial and supported the Commission's conclusion the Project will not substantially impair the health and welfare of the inhabitants:

Circuit Court's conclusions on sound

> . . . . the Commission's conclusion that the sound produced by the project would not substantially impair the health or welfare of the inhabitants was supported by substantial evidence in the record, was reasonable and not arbitrary…. the Commission thoroughly considered the following information regarding sound (among other things):
>
> > The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (l) no more than 45 dBA at any non-participants' residence and (2) no more than 50 dBA at any participants' residence. These sound levels were modeled using the following conservative assumptions: (1) the wind turbines were assumed to be operating at maximum sound emission levels; (2) a 2 dBA adder was applied to the wind turbines sound emission levels; (3) the wind turbines were assumed to be downwind of the receptor; and (4) the atmospheric conditions were assumed to be the most favorable for sound to be transmitted. The Project will also not result in sound above 50 dBA at any non-participants' property boundaries for those residences in Codington County. Applicant modeled sound levels with consideration of the cumulative sound impacts from Dakota Range I and Il and Crowned Ridge Wind, Il, LLC wind projects. Further, Applicant agreed to further reduce certain non-participant sound levels, consistent with the Permit Condition agreed to by Staff and Applicant. Applicant agreed to a post-construction sound protocol to be used in the event the Commission orders post-construction sound monitoring.
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> > * * *
> >
> > There is no record evidence that the Project will substantially impair human health or welfare. To the contrary, Crowned Ridge witnesses Dr. Robert McCunney and Dr. Christopher Ollson submitted evidence that demonstrates that there is no human health or welfare concern associated with the Project as designed and proposed by Applicant. Both Crowned Ridge witnesses analyzed the scientific peer-reviewed literature in the context of the proposed Project, and

> Dr. McCunney testified based on his experience and training as a medical doctor specializing in occupational health and the impact of sound on humans.

(AR 20697-20698) (footnotes citing record evidence omitted).

The Commission's analysis went above and beyond what was required by SDCL § 49-41B and ARSD 20:10:22. . . . Based on the information in the administrative record, the Project will comply with the sound thresholds imposed by the Commission's Order (AR 20708, Condition No. 26) . . . . [The] Commission's thorough and reasonable consideration of sound was within its discretion.

* * *

Appellants make a number of incorrect and incomplete factual assumptions and inferences. Appellants allege that only 17 Dakota Range turbines were included in the sound study based on a review of the Crowned Ridge isoline maps. But the maps are not intended to show all turbines included in the study – rather, they are used to graphically illustrate compliance with the sound thresholds for participants and non-participants. Crowned Ridge clearly indicated on the record that all 97 of the Dakota Range I and Il wind turbines were included in its sound studies (AR 1477, 2237). Further, the Commission's order recognized that Crowned Ridge included all the Dakota Range I and Il turbines in its sound models (AR 20697).

Circuit Court's conclusions on shadow flicker

Appellants' factual assumption that Crowned Ridge did not analyze the impact of shadow flicker on residents of Stockholm and Waverly is incorrect and not supported by the record. Appellants fail to recognize that the sounds isoline map in Exhibit A56 and the shadow flicker map in Exhibit A43-l clearly show that all residences in Stockholm and Waverly are well below the sound threshold for nonparticipating residents of 45 dBA and the 30-hour shadow flicker annual threshold for all residents. (AR 17225-17231, 17821-17834). Exhibit A43-1 is a map detailing shadow flicker isolines for the entire project area (AR 17225-17231). This map demonstrates that each town is well below the shadow flicker limit in the Final Order. . . . With respect to the impact of the Project's shadow flicker on inhabitants, the Commission concluded:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants, with the understanding that there is one participant (CRI-CI 0-P) who is at 36:57 hours of shadow flicker. Applicant modeled the cumulative impacts of shadow flicker from Dakota Range I and II and Crowned Ridge Wind, II, LLC wind projects when calculating its total shadow flicker hours. Applicant also used conservative assumptions, such as greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.

(AR 20698) (footnotes citing record evidence omitted).

> As with sound, the Commission cited the testimony of Drs. Ollson and McCunney showing no health or welfare impact from 30 hours of annual shadow flicker per year, and also imposed a compliance threshold that shadow flicker at a residence shall not exceed 30 hours of shadow flicker annually, unless waived. (AR 20698-2071 1). Therefore, similar to the Commission's rationale on sound, a reasonable mind might accept as sufficiently adequate the evidence submitted by Crowned Ridge (including conservative shadow flicker modeling assumptions and testimony of a medical doctor specializing in the field of occupational health) as supporting the findings and conclusion that the shadow flicker produced by the Project will not substantially impair the health or welfare of the inhabitants. See SDCL 1-26-1 (9). Also, the Commission's findings, conclusions, and imposition of the shadow flicker thresholds in Condition No. 34 were within the range of permissible choices given the record, and therefore were reasonable and not arbitrary. The Commission's factual findings regarding the sound produced from the Project were not clearly erroneous and were supported by substantial evidence.
>
> (AR-9 104-114)

In reaching the above conclusions, the Circuit Court did so with the understanding that a court affords great deference to the Commission's findings pursuant to SDCL § 1-26-36, and a court does not substitute its judgment for that

of the agency when there is ample evidence in the record to support the agency's finding. (AR-9 109) citing *Sorensen*, 2015 S.D. 88, ¶ 24, 871 N.W.2d at 856; *In re Application of Svoboda*, 54 N.W.2d at 328 (reversing the circuit court and directing it to affirm a Commission order that was based on substantial evidence, concluding that ". . . the court's only function with respect to this issue is to determine whether there is any substantial evidence in support of the Commission's finding. The court will not weigh the evidence or substitute its judgment for that of the Commission."); *In re Application of Dakota Transportation*, 291 N.W. 589, 593-96 (reversing circuit court and directing it to affirm a Commission order that was based on substantial evidence, was reasonable and was not arbitrary, concluding that "the ultimate question is whether there was substantial evidence to support the order of the Commission.")

Clearly, Intervenors' vague assertion regarding the incompleteness and validity of Mr. Haley's studies fatally wanes against the weight of Circuit Court's well-reasoned Opinion rejecting Intervenors' assertion and confirming that the Commission's Order conclusions on sound and shadow flicker were supported by substantial evidence and not clearly erroneous. Accordingly, the Commission's conclusion that the Project will not substantially impair the health and welfare of should be affirmed.

IV. Witness Sappington's Testimony was Properly Admitted.

Intervenors assert that Sarah Sappington's pre-filed written direct testimony was *per se* impermissible hearsay, because she adopted the pre-filed written direct testimony of Kimberly Wells, Ph.D who had to withdraw her testimony due to her unavailability. Intervenors also assert that they had a due process right to cross-examine Ms. Wells. Intervenors' assertions, however, are not properly before this Court, and, furthermore, the assertions are without merit.

Intervenors flatly failed to preserve the right to present the issue of whether Ms. Sappington's testimony constitutes impermissible hearsay before this Court, and by implication, also failed to preserve their due process argument because they did not present the issue in their brief before the Circuit Court. (AR-9 5-13) *See Domson*, 2018 S.D. 67, ¶ 11, 918 N.W.2d at 401; *Black Hills Truck & Trailer*, 2016 S.D. 47 ¶ 10 n.3, 881 N.W.2d at 672 n.3; *Masloskie v. Century 21*, 2012 S.D. 58 ¶15, 818 N.W.2d 789, 803 ("Baldwin did not raise this hearsay objection before the Circuit Court. Therefore, that objection is waived."); *Kreisers Inc.*, 2014 S.D. 56, ¶ 46, 852 N.W.2d at 425. Intervenors also failed in the brief before this Court to provide any supporting authority that pre-filed written testimony is *per se* hearsay simply because the witness who originally submitted the testimony was unavailable and the pre-filed written testimony was adopted by another witness. Such failure is fatal to their argument. *See Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363, 377 ("Failure to cite relevant supporting authority is a violation of SDCL § 15-26A-60(6) and is deemed a waiver.") (citing *State v.*

Boston, 2003 S.D. 71, ¶ 27, 665 N.W.2d 100, 109); *State v. Lykken*, 484 N.W.2d 869, 879 (S.D. 1992) ("We have repeatedly held failure to cite authority supporting an argument violates SDCL 15-26A-60(6) (1984) and constitutes a waiver of that issue."). Hence, Intervenors' assertions related to the admissibility of Ms. Sappington's testimony and by implication their right to cross-exam Ms. Wells have been waived.

Even if, *arguendo*, the Intervenors had not waived their right to raise the assertions at hand, Intervenors mischaracterize the purpose of pre-filed written testimony before the Commission, and, therefore, incorrectly imply that the mere fact that one witness adopts the pre-filed written testimony of another unavailable witness is *per se* inadmissible hearsay. In the underlying Commission proceeding, pre-flied written testimony is not testimonial record evidence until it is moved and entered into the evidentiary record at the evidentiary hearing. *See, e.g.*, ARSD 20:10:01:22.06. The purpose of a witness pre-filing written direct testimony is to place the parties on notice of the witness's position in advance of the evidentiary hearings, so parties can conduct discovery on the positions, submit responsive testimony, and prepare cross-examination. Due to the unavailability of Ms. Wells, Ms. Sappington adopted her pre-filed written direct testimony on April 10, 2019, two months prior to the evidentiary hearing, which provided Intervenors ample time to serve discovery, file responsive testimony, and prepare for cross-examination. (AR-1 2149-2165) While Intervenors submitted discovery on Ms.

Sappington's testimony, Intervenors did not move any responsive testimony into the record.

Ms. Sappington's April 10, 2019 pre-filed written direct testimony included a declaration that she had personal knowledge of the testimony she was adopting. (AR-1 2150) Further, at the June 11, 2019 evidentiary hearing, Crowned Ridge's attorney, during direct examination, laid the foundation for Ms. Sappington's personal knowledge of and the qualifications to present the pre-filed written direct testimony as her direct testimony in the proceeding, including that she directly worked with Ms. Wells "hand in hand" on the environmental permitting and associated studies, helped prepare the testimony, and personally participated in or conducted the studies, surveys, and assessments that were the subject of the testimony. (AR-8 2686-2687, 2690) The Commission thoroughly and carefully considered Intervenors' hearsay objection as well as the testimony of Ms. Sappington in the context of her personal knowledge, qualifications, and experience and found the testimony was admissible. (AR-8 2677-2691) For example, Commissioner Nelson explained his ruling as follows:

> . . . my reasoning is this: It is not impossible for two people to have the same opinions. And what I am understanding is that she has come here and she is saying, I have the same opinion as Ms. Wells and I am willing to defend that. And if that is what she is coming her for, and she's going to swear under oath that that's what she's doing, I find that to be acceptable.

(AR-8 2683)

Also, in addition to the direct examination of Ms. Sappington by the Crowned Ridge attorney, her personal knowledge was further confirmed through questions by Chairman Hanson.

> Chairman Hanson: Did you conduct investigations on the information that you're presenting here?
>
> Ms. Sappington: Yes.
>
> Chairman Hanson: And you – with that amount of investigation that you personally did, you arrived at the same conclusions [as Ms. Wells]?
>
> Ms. Sappington: Yes.

(AR-8 2684-2685)

After the Commission admitted Ms. Sappington's pre-filed written direct testimony, as well as her pre-filed written rebuttal and exhibits into the record, Intervenors cross-examined Ms. Sappington.

The record clearly shows that Ms. Sappington had personal and hands-on knowledge of her pre-filed written direct testimony. (AR-8 2677-2691) It is axiomatic that a witness's testimony based on her personal knowledge is not hearsay. *See People in Interest of C.L.* 354 N.W.2d 476, 480 (S.D. 1984) ("The decision to terminate did not rely on 'uncorroborated hearsay'. It was based in part upon personal observations of the social work . . . ."); *United States v. Trevino Chavez*, No. 18-50981, 2020 WL 5998167, at *3 (5th Cir. Oct. 9, 2020) ("[t]estimony 'based on the witnesses' personal knowledge and observations' does not include hearsay.") (quoting *United States v. Potwin*, 136 Fed. App'x 609, 611

(5th Cir. 2005)); *United States v. Kolodesh*, 787 F.3d 224, 234 (3rd Cir. 2015) ("'Testimony that conveys a witness's personal knowledge about a matter is not hearsay.'") (quoting *United States v. Vosburgh*, 602 F.3d 512, 539 n.27 (3rd Cir. 2010)).[2] Given the record demonstrates that Ms. Sappington had personal knowledge of her pre-filed written direct testimony, it was not hearsay, and, therefore, the Commission was well within its discretion when admitting Ms. Sappington's testimony into the record.

Further, even if the Commission had abused its discretion, Intervenors have failed to show any prejudicial effect, because they: (1) cross-examined Ms. Sappington, the Crowned Ridge witness on environmental and wildlife issues; and (2) have failed to show any prejudicial effect from the Commission's ultimate conclusion, pursuant to SDCL § 49-41B 22(b), that the Project will not pose a threat of serious injury to the environment. *See Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856.

In addition, Intervenors' citation to *Dubray v. South Dakota Dept. of Social Servs.*, 2004 S.D. 130, 690 N.W.2d 657, when read in the context of the facts of the instant case, is not supportive of Intervenors' claim they were entitled as a right to cross-examine Ms. Wells. In *Dubray*, the South Dakota Department of

[2] This Court routinely looks to federal court decisions for analytical assistance to interpret a state rule of civil procedure that is the equivalent of a federal rule, which in the instant case South Dakota and the federal rules of evidence on hearsay (SDCL § 19-19-801 and Federal Rule of Evidence 801) are essentially identical, except for (d)(1)(B)(ii) included in the Federal Rules). *See Jacquot v. Rozum*, 2010 S.D. 84, ¶ 15, 790 N.W.2d 498, 503.

Social Service sought to submit hearsay evidence under a recognized exception, which is inapposite to the instant case, because Ms. Sappington's pre-filed written direct testimony was not hearsay. Also, unlike *Dubray*, the Commission, pursuant to SDCL § 1-26-19(2), afforded Intervenors the opportunity and Intervenors did cross-examine Ms. Sappington, Crowned Ridge's witness on environmental and wildlife issues. Furthermore, there is no reading of SDCL § 1-26-19(2) that affords Intervenors the right to cross-examine any person of their choosing.

Tellingly, Intervenors base their assertion on the need to cross-examine Ms. Wells, in part, on an incorrect factual predicate that she authored the Avian Use Survey Report ("Report") submitted in this proceeding. Intervenors Br. at 23. The Report on its face unambiguously identifies that the Report was authored by SWCA Environmental Consultants, the company for which Ms. Sappington is a Director. (AR-1 453-480) Also, in direct contradiction to Intervenors' extrapolation that Crowned Ridge somehow did not meet its burden of proof because Intervenors did not cross-examine Ms. Wells on the Report, the Circuit Court thoroughly and squarely rejected Intervenors' burden of proof assertions related to the Report and the impact of the Project on avian species. (AR-9 114-118)

Intervenors' reliance on *Dubray* is further misplaced because, unlike that case, in which the Department's hearsay documentation was the sole evidence against a mother placed on the Registry of Child Abuse and Neglect, the direct written pre-filed testimony of Ms. Sappington was not the only evidence on the

record demonstrating that the Project will not pose a threat of serious injury to the environment, as required by SDCL § 49-41B-22(b). (AR-9 180-193) Indeed, any reasonable reading of the Commission's Order shows that the Commission's conclusions on environmental and wildlife issues were supported by ample substantial evidence not subject to Intervenors' misguided hearsay assertion, including: (1) Ms. Sappington's rebuttal testimony and exhibits and her oral testimony at the evidentiary hearing; (2) Crowned Ridge witness Thompson's direct testimony; (3) Mr. Wilhelm's supplemental testimony; (4) Crowned Ridge witness Massey's supplemental testimony; (4) Commission Staff witness Kirschenmann's direct testimony and oral testimony at the evidentiary hearing;[3] (5) Commission Staff witness Kearney's direct testimony; and (6) Crowned Ridge's Application and its Appendices. *Id*. Intervenors similarly overlook that the Commission's conclusion that the Project will not pose a threat of serious injury to the environment was supported by the numerous imposed conditions on environmental and wildlife issues. (AR-9 200, 202-212) *See Presell v. Mont. Dakota Utils., Co.*, 2015 S.D. 81¶ 8, 871 N.W.2d 649, 652 (Commission did not abuse its discretion when it granted a permit subject to conditions, rather than requiring re-submittal of the application to consider additional information). Thus, Intervenors' reliance on *Dubray* is specious and unavailing.

[3] While Mr. Kirschenmann was sponsored by the Commission Staff, he is an employee of the South Dakota Game Fish & Parks.

Accordingly, Intervenors' assertion regarding the admissibility if Ms. Sappington's testimony should be deemed waived, or, in the alternative, the Commission's admission of Ms. Sappington's testimony should be found to be within its discretion.

CONCLUSION

For the foregoing reasons, Crowned Ridge respectfully submits that the Commission's Order issuing a Facility Permit to Crowned Ridge should be affirmed in all respects.

Respectfully submitted this 19th day of November 2020.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman l3 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellee Crowned Ridge Wind, LLC's Brief contains 6,777 words as counted by Microsoft Word.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Miles F. Schumacher
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CERTIFICATE OF SERVICE

Miles F. Schumacher, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 19th day of November 2020, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of the foregoing in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

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