

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

**IN THE MATTER OF THE APPLICATION)
BY DAKOTA RANGE I, LLC AND)
DAKOTA RANGE II, LLC FOR A PERMIT)
OF A WIND ENERGY FACILITY IN)
GRANT COUNTY AND CODINGTON)
COUNTY, SOUTH DAKOTA, FOR THE)
DAKOTA RANGE WIND PROJECT)**

**STAFF’S RESPONSE TO
APPLICANTS’ MOTION AND
MOTION FOR JUDICIAL
NOTICE

EL18-003**

COMES NOW Staff of the South Dakota Public Utilities Commission (Commission) and hereby files this response to the Applicants’ Motion to Exclude filed on May 15, 2018. Staff does not object to the prefiled written testimony of Teresa Kaaz or Kristi Mogen. However, Staff does share the evidentiary concerns raised by the Applicant with respect to some of the exhibits. Staff supports providing the intervenors with an opportunity to refile in accordance with the rules of evidence. Therefore, Staff will attempt to clearly explain the objections for the benefit of all participants.

Teresa Kaaz’s Exhibits

Staff does not object to the photographs Ms. Kaaz offers as exhibits to her prefiled testimony. Foundation for these photographs was properly established in the prefiled testimony when Ms. Kaaz testified that she took the pictures herself.

Exhibit 3 EL18-003 through Exhibit 6 EL18-003 and 473 are improper hearsay evidence. This is because they are documents created by another person and are being offered to prove the truth of their contents. See SDCL 19-19-801(c). In order for these exhibits to be admissible on direct, they would need to be offered through the testimony of their author or offered through the testimony of an expert in the field who relied upon them in order to form his or her opinion. See

SDCL 19-19-703. Further, Staff notes that Exhibit 3 EL18-003 and Exhibit 6 EL18-003 appear to be the same document. Exhibit 3 EL18-003 through Exhibit 6 EL18-003 and 473 should be stricken as improper hearsay evidence. Staff suggests Ms. Kaaz add them to her exhibit list in case they are admissible on cross-examination.

The exhibit titled Dakota Range Wind Project Market Impact Analysis is the same document as Exhibit 1 to Prefiled Testimony of Michael MaRous filed by Applicant. Like the exhibits previously discussed, this report is hearsay. However, it will likely already be in the record by the time Ms. Kaaz testifies. Therefore, this exhibit should be stricken as an attachment to Ms. Kaaz's testimony at this time, and at the time of the hearing, she and any other party may refer to this same exhibit as offered by the Applicant as the rules of evidence permit.

Next, Ms. Kaaz submitted a copy of Ordinance-65. Rather than submitting the ordinance as an exhibit, the proper procedure would be for the Commission to take judicial notice of the ordinance. Staff requests the Commission strike the exhibit and take judicial notice of the ordinance pursuant to SDCL 19-19-201(b)(2).

Finally, Ms. Kaaz offers three exhibits which appear to be information brochures for the Vesta wind turbines. These documents have not been authenticated as required by SDCL 19-19-901. It is not possible to determine from the current record whether these documents are hearsay, as it is not clear if they are being offered to prove the truth of their contents. However, Staff would likely be willing to stipulate that the brochure is what it says it is and the brochure can speak for itself.

As to the exhibits to which Staff does not take exception, Staff requests the exhibits be renamed for clarity as follows:

- Exhibit 1 Eagle Photograph 1
- Exhibit 2 Eagle Photograph 2
- Exhibit 3 Eagle Photograph 3
- Exhibit 4 Photograph of Eagle 4
- Exhibit 5 Photograph of Eagle 5
- Exhibit 6 Construction Photograph 1
- Exhibit 7 Construction Photograph 2
- Exhibit 8 Construction Photograph 3
- Exhibit 9 Construction Photograph 4
- Exhibit 10 Basement Photograph 1
- Exhibit 11 Basement Photograph 2

Renaming the exhibits in this manner will provide ease and clarity for those utilizing the docket webpage.

Kristi Mogen's Exhibits

Ms. Mogen proffered a substantial number of exhibits. Staff will address these exhibits by categorizing them by objection or lack thereof in order to be as clear as possible. The two prominent objections below are hearsay and lack of foundation. Along with the exhibit, Staff will provide a brief description of what Staff believes the exhibit to be.

Hearsay is defined as a statement the declarant does not make while testifying at the current hearing which is offered in evidence to prove the truth of the matter asserted in the statement. SDCL 19-19-801(c). Simply put, if the exhibit is a statement made by someone other than the person testifying (in this case Ms. Mogen) and that statement is offered to prove what it says is true, it is hearsay and is inadmissible. Common examples of this are news articles and

other reports. The following exhibits are hearsay and should, therefore, be stricken, although some may be used on cross-examination.

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| ○ Testimony Exhibit 2 | Letter to the Editor |
| ○ Cement Exhibit 1 | Report |
| ○ Cement Exhibit 2 | Report |
| ○ Contract Exhibit 2 | Wind lease information from NDSU |
| ○ Contract Exhibit 3 | Quote |
| ○ Contract Exhibit 4 | Landowner guidelines |
| ○ Cradle to Grave Exhibit 1 | Generation opinion |
| ○ Decommission Exhibit 1 | Publication on decommissioning |
| ○ Decommission Exhibit 2 | Publication on recycling of turbines |
| ○ Health Exhibit 1 | Fact Sheet |
| ○ Health Exhibit 2 | Fact Sheet |
| ○ Health Exhibit 3 | Article on health impacts |
| ○ Liability Exhibit 1 | Article about airplane crash |
| ○ No Trespass Exhibit 1 | Drawing |
| ○ Noise Exhibit 1 | Correspondence |
| ○ Noise Exhibit 2 | NARUC publication |
| ○ Noise Exhibit 3 | Meeting record from Montreal |
| ○ Noise Exhibit 4 | Report on acoustics |
| ○ Noise Exhibit 5 | Abstract on health |
| ○ Noise Exhibit 6 | Expert's comments on zoning |
| ○ Noise Exhibit 7 | Document on wind energy conversion systems |
| ○ Noise Exhibit 8 | Report from Ontario |
| ○ Noise Exhibit 9 | Document on sensing without hearing |
| ○ Noise Exhibit 10 | Paper by Steven Cooper |
| ○ Property Values Exhibit 1 | Brenda Taylor testimony |
| ○ Property Values Exhibit 2 | Appraisal for Illinois county board |
| ○ Socioeconomic Exhibit 20 | Article from Nebraska |
| ○ Tax Exhibit 1 | Article on taxes |

The other objection is lack of foundation. Black's Law Dictionary defines foundation as "the basis on which something is supported; esp., evidence or testimony that establishes the admissibility of other evidence." Black's Law Dictionary (10th ed. 2014). This means that, for example, if the witness were to offer a photograph, there would need to be some testimony as to what it was, who took it, where, and when. Thus, the following exhibits should be stricken, but may be admissible if the witness is able to provide the requisite additional information.

- Cradle to Grave Exhibit 2 Oil leak photo
- Cradle to Grave Exhibit 3 Photo of turbine fire
- CUP Exhibit 2a Wind lease
- CUP Exhibit 2b Lease
- CUP Exhibit 2c Lease
- Lien Exhibit 1 Illinois lien
- Socioeconomic Exhibit 1A Google earth picture

Judicial notice may be taken of certain documents as previously discussed. Staff requests the Commission strike the following exhibits as exhibits but take judicial notice of the documents.

- Clarification Exhibit 1 Grant County Commission Minutes (3/20/2018)
- Contract Exhibit 1 North Dakota Law Review Article
- CUP Exhibit 2 ND PSC notice of hearing
- CUP Exhibit 3 Grant County ordinances
- CUP Exhibit 4 Codington County ordinance (same as provided by Ms. Kaaz)
- Decommission Exhibit 3 ND PSC press release
- Lighting Exhibit 1 ND PSC press release

Clarification Exhibit 3a appears to be a screenshot of testimony offered by Dakota Range. Because this has been offered in its complete form by another party, Clarification Exhibit 3a is cumulative and should be stricken.

The exhibit captioned Manual Exhibit 1 appears to be a wind turbine safety brochure. Like the Vesta brochures proffered by Ms. Kaaz, the documents need to be authenticated. The parties could stipulate to the admission of the wind turbine brochures, and Staff would be willing to do that.

Staff does not object to the following exhibits, however, for the exhibits denoted with an asterisk, their admissibility should be contingent on the author testifying at the hearing.

Exhibit	Suggested Rename
○ Clarification Exhibit 2a	Exhibit 1 – Eagle Photo
○ Clarification Exhibit 3*	Exhibit 2 – Testimony of Jon Meyer
○ Liability Exhibit 2*	Exhibit 3 – Negatives of Wind Energy
○ CUP Exhibit 2d	Exhibit 4 – Maps
○ Socioeconomic Exhibit 1 *	Exhibit 5 – Testimony of David Janes
○ Socioeconomic Exhibit 2	Exhibit 6 – Survey of Residents
○ Socioeconomic Exhibit 3	
○ Socioeconomic Exhibit 4	
○ Socioeconomic Exhibit 5	
○ Socioeconomic Exhibit 6	
○ Socioeconomic Exhibit 7	
○ Socioeconomic Exhibit 8	
○ Socioeconomic Exhibit 9	
○ Socioeconomic Exhibit 10	
○ Socioeconomic Exhibit 11	
○ Socioeconomic Exhibit 12	
○ Socioeconomic Exhibit 13	
○ Socioeconomic Exhibit 14	
○ Socioeconomic Exhibit 15	
○ Socioeconomic Exhibit 16	
○ Socioeconomic Exhibit 17	
○ Socioeconomic Exhibit 18	
○ Socioeconomic Exhibit 19	
○ Socioeconomic Exhibit 21 *	Exhibit 7 – Testimony of Ted Hartke

Staff suggests the exhibits be renamed as described above, with the socioeconomic exhibits 2-19 being combined into one document and renamed Exhibit 6.

It is Staff’s understanding that one of the exhibits proffered by Ms. Mogen is intended to be the direct prefiled testimony of Diane Redlin. Staff will reserve a position on this exhibit until clarification is made as to which exhibit is Ms. Redlin’s testimony.

Hearing Participation

Because of the limited hearing space available and the high cost of going off campus, Staff Attorney Reiss previously reached out to all intervenors to determine which were planning

to participate. Only Ms. Kaaz and Ms. Mogen responded that they planned to actively participate at the hearing.

Lay Witness Testimony

Applicant argues that Ms. Kaaz and Ms. Mogen are lay witnesses and have offered testimony outside their personal knowledge. Staff rose this issue as an objection in Docket EL17-055. While Staff generally agrees that testimony should be subject to the standards governing lay and expert witness testimony, Staff acknowledges that the Commission is afforded latitude by SDCL 1-26-19. The evidentiary precedent established in the evidentiary hearing for Docket EL17-055 should apply to this docket, as well. The Commission may then give the testimony the weight it deserves.

Conclusion

For the reasons above, Staff respectfully requests the Commission take judicial notice of certain exhibits, strike those that are hearsay or lack foundation, and rename the others for clarity. While Staff is not recommending certain exhibits be stricken, Staff does not intend for this to be a request for any exhibit to be admitted into the evidentiary record, rather Staff reserves the right to make any necessary objections at the time of the evidentiary hearing.

Dated this 16th day of May 2018.

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

Kristen N. Edwards

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