

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

**IN THE MATTER OF THE
APPLICATION OF DEUEL HARVEST
WIND ENERGY LLC FOR A PERMIT
OF A WIND ENERGY FACILITY AND
A 345-KV TRANSMISSION LINE IN
DEUEL COUNTY**

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**DEUEL HARVEST WIND ENERGY
LLC’S MOTION TO EXCLUDE
PORTIONS OF TESTIMONY AND/OR
EXHIBITS OF INTERVENORS
EL18-053**

INTRODUCTION

Deuel Harvest Wind Energy LLC (“Deuel Harvest”) submits this Motion to Exclude portions of the Testimony and/or Exhibits of Intervenors (“Motion”). As discussed further below, the some of the exhibits submitted by several intervenors are not admissible through their testimony because they are not based upon personal knowledge and/or are hearsay. In addition, Christina Kilby’s testimony quotes extensively from articles or reports authored by others. Deuel Harvest respectfully requests that the South Dakota Public Utilities Commission (“Commission”) exclude the exhibits identified below and the quotations in Ms. Kilby’s testimony from the record.

LEGAL STANDARD

Pursuant to SDCL § 1-26-19, “[i]rrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed.” Evidence may also be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair

prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹

Unless a witness qualifies as an expert witness, she must have personal knowledge of the matters to which she is offering testimony.² A lay witness may offer opinion testimony only if it is: “(a) Rationally based on the witness’s perception; (b) Helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) Not based on scientific, technical or other specialized knowledge within the scope of § 19-19-702.”³ To testify as an expert, a witness must be “qualified as an expert by knowledge, skill, experience, training, or education.”⁴ Finally, hearsay is generally not admissible.⁵

DISCUSSION

I. Exhibits.

Christina Kilby, Garrett Homan, Heath Stone, and Kevin Elwood each submitted exhibits which constitute or contain hearsay. Third parties prepared these exhibits. In addition, the witnesses not provide any information to indicate that they are qualified to offer testimony on any topic other than her personal knowledge, and the exhibits go beyond each witness’s personal knowledge. This is inadmissible hearsay, as Deuel Harvest is unable to cross-examine the

¹ SDCL § 19-19-403.

² SDCL § 19-19-602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).

³ SDCL § 19-19-701.

⁴ SDCL § 19-19-702.

⁵ SDCL § 19-19-802.

authors of the quoted statements. The Commission has excluded documents under similar circumstances in the past.⁶ As such, Deuel Harvest requests that the following be excluded:⁷

1. Kilby Exhibit 1: Morsing, et al. Wind Turbine Noise and Sleep: Pilot Studies on the Influence of Noise Characteristics (2018).
2. Kilby Exhibit 1: A Cooperative Measurement Survey and Analysis of Low Frequency and Infrasound at the Shirley Wind Farm in Brown County, Wisconsin (2012).⁸
3. Kilby Exhibit 3: Weichenberger, et al. Altered Cortical and Subcortical Connectivity Due to Infrasound Administered Near the Hearing Threshold (2017).
4. Garrett Homan Exhibit E: Application to the Ohio Power Siting Board for a Certificate of Environmental Compatibility and Public Need for the Seneca Wind Project.
5. Garrett Homan Exhibit G: Uadiale, Solomon, et al., Overview of Problems and Solutions in Fire Protection Engineering of Wind Turbines
6. Garrett Homan Exhibit H: News Articles.⁹
7. Heath Stone Exhibit 2: Dupuie, James, Ring-necked Pheasant responses to wind turbines in Iowa.
8. Heath Stone Exhibit 3: News article titled, “Wind turbine sparks grass fire.”

⁶ See Order Granting Motion to Exclude Portions of Exhibits, Docket No. EL 18-003 (May 24, 2018).

⁷ With the submission of this Motion, Deuel Harvest does not stipulate to the admissibility of any testimony or documents not identified in this Motion and reserves the right to later object to the admissibility of any such testimony or documents.

⁸ Deuel Harvest notes that Mr. David Hessler is listed as a co-author. He is a witness for Commission Staff in this proceedings and, as such, Deuel Harvest does not dispute that, under certain circumstances, this document may be used for impeachment purposes. However, Ms. Kilby does not have personal knowledge of the matters in this report, and she is not otherwise expertly qualified to testify to its contents. As such, it should not be admitted as evidence in this record.

⁹ Deuel Harvest seeks to exclude only the portion of this exhibit including news articles. Deuel Harvest does not seek to exclude the photographs taken by Mr. Homan at this time.

9. Kevin Elwood Appendix 2: Environmental Review Tribunal - Case No.: 16-036 – Proceeding.¹⁰
10. Kevin Elwood Appendix 3: Environmental Review Tribunal - Case Nos.: 16-036/13-037/16-038/16-039/16-040/16-042 Joint Witness Statement of William Duncan and Kerry Hutton.
11. Kevin Elwood Appendix 4: Canadian Owners and Pilots Association - Position Paper on Proposed Ontario Green Energy Act - Bill 150.
12. Kevin Elwood Appendix 5: Environmental Review Tribunal - Case Nos.: Case Nos.: 13-037/16-038/16-040 - Witness Statement of Charles Cormier - Aeronautical Information Consultant.
13. Kevin Elwood Appendix 6: Environmental Review Tribunal - Case Nos.: Case Nos.: Case Nos.: 16-036/13-037/16-038/16-039/16-040/16-042 - Witness Statement of Keith Edward Green.

II. Kilby Testimony.

Ms. Kilby's testimony includes multiple quotations from reports and articles prepared by third parties. Like the articles attached to Ms. Kilby's testimony, there is no evidence that she is an expert qualified to offer testimony on the subject matter of the quotations. This is inadmissible hearsay, as Deuel Harvest is unable to cross-examine the authors of the quoted statements. Accordingly, Deuel Harvest respectfully requests that the quotations be excluded. Included as Attachment A is a copy of Ms. Kilby's testimony indicating which statements Deuel Harvest is requesting be excluded.

CONCLUSION

Ms. Kilby, Mr. Garrett Homan, Mr. Heath Stone, and Mr. Elwood each submitted hearsay with their testimony, and there is no evidence in the record that any of these witnesses are qualified to testify concerning any topic outside of their personal knowledge. Deuel Harvest

¹⁰ Because he submitted written testimony, Deuel Harvest anticipates that Mr. Elwood will appear at the evidentiary hearing for cross-examination. To the extent that he is not available for cross-examination, Deuel Harvest will object to the admission of the entirety of Mr. Elwood's testimony.

respectfully requests that the exhibits and testimony identified in this Motion be excluded to allow for the evidentiary hearing to be conducted more efficiently and focused on reliable and admissible evidence.

Dated this 28th day of March 2019.

By /s/ Lisa Agrimonti

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