

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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<p>AMBER CHRISTENSON, LINDA LINDGREN, and TIMOTHY LINDGREN,</p> <p style="text-align: center;">Complainants,</p> <p>v.</p> <p>CROWNED RIDGE WIND, LLC</p> <p style="text-align: center;">Respondents.</p>	<p style="text-align: right;">Docket No. CE22-001</p> <p style="text-align: center;"><b>MOTION IN LIMINE</b></p>
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Respondent, Crowned Ridge Wind, LLC, (“Crowned Ridge”), by and through its attorneys of record, and pursuant to SDCL § 1-26-19(1) and SDCL § 19-19-701, respectfully moves the Commission to exclude, as set forth herein, Amber Christenson’s direct, rebuttal, and oral testimony and associated exhibits. In support of its Motion in Limine, Crowned Ridge submits as follows:

**I. Introduction**

1. On June 30, 2023, Ms. Christenson filed direct testimony and exhibits, and on September 6, 2023, Ms. Christenson filed rebuttal testimony and no exhibits. In both the direct and rebuttal testimonies, Ms. Christenson reserves the right to supplement her testimony and exhibits. Ms. Christenson also asserts that she would present testimony and exhibits at the formal hearings in October 2023.

2. In its April 19, 2023 Order, the Commission scheduled evidentiary hearings in the above captioned proceeding for October 11 and 12, 2023.
3. As demonstrated herein, much of Ms. Christenson’s pre-filed testimony and exhibits contravene the cardinal rule of evidence prohibiting a lay witness from testifying on scientific or technical subjects or subjects requiring another type of specialized knowledge. Therefore, as shown herein, much of Ms. Christenson’s pre-filed testimony and exhibits should be excluded from being entered into evidence.

## **II. Argument**

4. Under South Dakota law, lay witness testimony is limited by the rules of evidence:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that 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.

SDCL § 19-19-701

5. Therefore, under South Dakota law, a lay witness is limited to testimony that is either rationally based on the witness’s perception or helpful to clearly understand the witness’s testimony or determine a factual issue. *See* SDCL § 19-19-701 (a)(c) (“Rule 701”). A lay witness, however, cannot testify on

scientific, technical or other specialized knowledge. See SDCL § 19-19-701

(b).

6. SDCL 1-26-19(1) requires the Commission to follow the rules of evidence as those rules are applied in statute and trial of civil cases.
7. Case law confirms that a plain language reading of Rule 701 is controlling. On this point, the South Dakota Supreme Court ruled:

**In 2011, we amended SDCL 19-19-701 relating to lay witnesses by unambiguously stating that lay witness testimony may “[n]ot [be] based on scientific, technical or other specialized knowledge within the scope of [SDCL 19-19-702].” SDCL 19-19-701(c).** The reference to SDCL 19-19-702 relates, of course, to our rule of evidence concerning expert witnesses. **Both SDCL 19- 19-701 and SDCL 19-19-702 are modeled after corresponding Federal Rules of Evidence, and, in fact, Rule 701 of the federal rules was, itself, similarly amended in 2000.** [footnote omitted] (emphasis added)

*Weber v. Rains*, 2019 SD 53, ¶ 33, 933 N.W.2d 471, 480. Consistent with *Weber*, the Federal District Court of South Dakota, concluded:

“an essential difference is that Rule 701 **requires direct personal knowledge of the factual matter at issue.** Only then does it allow introduction of a limited degree of opinion testimony to help convey that information and only if the court finds that it would be helpful to the trier of fact.” (emphasis added)

*Cobb v. Knode*, 2010 WL 3608814, at \*8 (D.S.D. Sept. 9, 2010), quoting, *M.O.C.H.A. Society v. City of Buffalo*, 2008 WL 4412093 (W.D.N.Y. Sept. 23, 2008)).

The court also concluded that that an:

Additional distinction between lay and expert testimony was made in *United States v. Frantz*, 2004 WL 5642909 (C.D. Cal.). “Lay opinion testimony most often takes the form of a summary of first

hand observations . . . it is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.” *Id.* at \*12.

*Id.*

Instructively and consistent with the South Dakota courts, the Federal Tenth Circuit concluded:

“A person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person.” *United States v. Yeley-Davis*, 632 F.3d 673, 684 (10th Cir. 2011) (brackets omitted) (quoting *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004)). Lay testimony is “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701(c). “[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.” Fed. R. Evid. 701 advisory committee’s note to 2000 amendment (quotation marks omitted). “[P]rototypical examples of [lay testimony include] . . . the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, [and] distance . . . .” *Id.* (quotation marks and brackets omitted).

*United States v. Bishop*, 926 F3d 621, 627 (10<sup>th</sup> Cir. 2019).

8. Ms. Christenson is not an expert in the specialized field of conducting post construction sound studies on wind turbines, nor does she profess to be an expert. Indeed, Ms. Christenson provides no resume or other evidence demonstrating that she has the knowledge, skill, experience, training, or education to testify as an expert under Rule 702. Accordingly, Ms. Christenson

is a lay witness, and, as such, pursuant to Rule 701 she cannot testify on issues requiring scientific, technical or other specialized knowledge.

9. It is axiomatic that conducting post construction sound studies on wind turbines requires specialized knowledge, skill, experience, and training. On their face, the highly technical 2020 and 2021 sound studies submitted by Epsilon Associates, Inc. (“Epsilon”) and the studies submitted by Hessler Associates, Inc. (“Hessler”) reviewing the Epsilon studies demonstrate the high degree of scientific and technical knowledge needed to opine on the sound produced by wind turbines and whether the wind turbine sound is within the Commission’s sound thresholds. It is undisputable, therefore, that the field of post construction wind sound studies is not one a lay person can testify on with regard to the validity of the sound study, the techniques applied in the sound study and the results of the sound study, for example.
10. Consequently, a straightforward application of Rule 701 to the direct testimony and exhibits, and rebuttal testimony of Ms. Christenson requires the exclusion of all but a small portion of said testimony and exhibits, because Ms. Christenson testimony and exhibits fail to conform to the evidence that can be submitted by a lay person. The application of Rule 701 at the evidentiary hearing also requires that Ms. Christenson be instructed that she cannot testify at the evidentiary hearings on the issues excluded from her direct testimony and exhibits and rebuttal testimony.
11. Specifically with respect to Ms. Christenson’s direct testimony, the only portions consistent with Rule 701 are:

- a. Page 1, paragraphs 1-3.
- b. Page 2, the following sentences: “I have provided a picture of the equipment sited on my property showing leaved trees in my shelterbelt, and you can see the shadow of the tree the equipment is placed next to and that shadow is of a fully leaved birch tree, leaves that caused much leaf rustle. Epsilon Associates included a picture in their report of another section of my shelterbelt, a section of the trees to the west, which are also leaved.”
- c. Page 4, the following sentence: “The Mitigation Plan offered by Crowned Ridge Wind was approved by the Commission at the April 1, 2021, Commission meeting.” Also, the following sentence: “During the April 1, 2021 Commission meeting, according to the Order of April 9, 2021, “*After considering comments received orally during the Commission meeting and in writing prior to the meeting, the Commission voted unanimously to approve Crowned Ridge Wind’s Mitigation Plan . . .*” (emphasis in original)
- d. Page 5, the following partial sentence: “As a property owner/taxpayer and South Dakota voter I’m deeply concerned and, as elected representatives of South Dakota citizens, this Commission should be as well,”.
- e. Page 6, the following partial sentence: “I was out making personal observations and gathering data”. Also, the following partial sentence:

“I made many personal observations and noted the turbines were louder than the background noise”.

- f. Page 7, the following sentence: “Lastly, I want to stress to the Commission that we have always wanted a winter study and we stress the Commission the importance of such a study.” Also, the following sentences “The majority of the noise issues at my property occur and are compounded in the winter. Our winters are long and we endure nearly intolerable wind farm excessive noise pollution especially during those months.” Also, full paragraphs 3-5, which start with “I’m providing exhibits supporting my testimony and will supplement my testimony and exhibits as discovery and further information becomes available.” through “In addition to and in conjunction with all that’s noted and outlined in my Complaint, at present, the foregoing constitutes my pre-filed testimony.”

The remaining portions of Ms. Christenson’s direct testimony fall within subjects, information, inferences, and conclusions which require an “expert’s scientific, technical, or other specialized knowledge [to] help the trier of fact to understand the evidence or to determine a fact in issue” (Rule 702), and, therefore, should be excluded. For example, Ms. Christenson’s direct testimony addresses the following subjects, none of which fall within Rule 701, because none of these subjects, information, inferences, and conclusions go direct personal knowledge of the factual matter at issue (*Cobb*) or to the appearance of persons or things, identity, the manner of conduct, competency of a person,

degrees of light or darkness, sound, size, weight, distance (*United States v. Bishop*): (1) whether the sound studies showed Crowned Ridge failed to comply with the Commission's sound thresholds; (2) whether the executed Welder waiver is in legal effect; (3) whether the Crowned Ridge sound studies complied with the approved Mitigation Plan; (4) whether the Crowned Ridge sound studies complied with protocols; (5) the purpose and use of winter icing operation mode ("WIOM") and its impact on wind turbine sound; (6) the impact of atmospheric weather conditions on wind turbine sound; (7) Crowned Ridge's compliance with Commission sound study orders; (8) the practice and process associated with operation, maintenance, curtailment, and shutdown of wind turbines; (9) the manner in which sound studies are conducted, including whether there is sufficient information to determine compliance, as well as the number of days and time of year for sound studies; (10) the meaning and application of ANSI standards; (11) the use, positioning, and operation of sound equipment; (12) the interpretation of sound study results, including how background sound is addressed in sound studies and how the results show compliance with the Commission's sound thresholds; and (13) the validity of the sound studies conducted by Epsilon and Hessler.

12. Further, with respect to Ms. Christenson's direct testimony exhibits, the only portions consistent with Rule 701 are: (1) Exhibit AC-1 (Complaint), PDF page 4; page 6, the second half of the page, starting with "Crowned Ridge Wind, LLC" through page 9; page 13, the following sentence: "As part of data gathering of study location 6, on the morning of November 11<sup>th</sup>, Amber



Christenson documented the turbines being louder than the background sound of Location 6.” Also, the following partial sentence “as Ms. Christenson was outside making personal observations and recording the data, the turbines were suddenly turned off”; and page 22; (2) Exhibit AC-8 (photo); (3) Exhibit AC-9 (PUC Order); (4) Exhibit AC-13 (PUC Order); (5) Exhibit AC-14 (PUC meeting minutes link); and (6) AC-20, Motion of Amber Christenson, PDF page 2, with the exception of the phrase “trees affect the outcome of the study, the equipment should have been placed on either the west or east end”, pages 3 and 4 photographs, except text on page 3 that “tree noise skewed the results of the study considerably”.

With the exception of the above noted lay person statements and photographs, the remainder of Ms. Christenson’s exhibits can only come in through an expert qualified under Rule 702 and in compliance with other rules of evidence, and, therefore, the remaining exhibits which are highly technical documents should be excluded from evidence.

13. With respect to Ms. Christenson’s rebuttal testimony, the only portions consistent with Rule 701 are: PDF page 1, first paragraph; page 3, the sentence “I do not assert CR manipulated the sound study in my testimony.”; page 9, the last 3 paragraphs.

The remaining portions of Ms. Christenson’s rebuttal testimony fall within subjects, information, inferences, and conclusions which require an “expert’s scientific, technical, or other specialized knowledge [to] help the trier of fact to understand the evidence or to determine a fact in issue” (Rule 702), and,

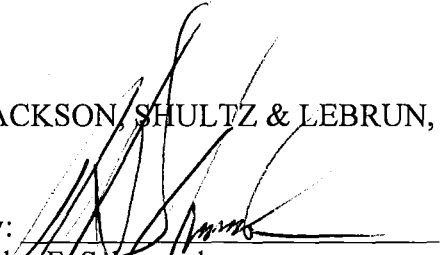
therefore, should be excluded. For example, Ms. Christenson's rebuttal testimony addresses the following subjects, none of which fall within Rule 701: (1) the job functions and qualifications of Crowned Ridge witness Martinsen and his experience as an operator of wind farms, as well as the qualifications and motivations of Crowned Ridge witness Lampeter; (2) the purpose and use of WIOM and its impact on wind turbine sound; (3) the purpose and use of low trailing edge blades; (4) whether the Crowned Ridge sound studies showed compliance with the Commission's sound thresholds; (5) the practice and process associated with operation, maintenance, curtailment, and shutdown of wind turbines; (6) the sound radius of wind turbines; (7) the validity of the sound studies conducted by Epsilon and Hessler; (8) the use, positioning, and operation of sound equipment; (9) Crowned Ridge's compliance with the Commission approved Mitigation Plan; (10) Crowned Ridge's compliance with Commission sound study orders; (11) whether the executed Welder waiver is in legal effect; (12) the meaning and application of ANSI standards; and (13) the manner in which sound studies are conducted, including whether there is sufficient information to determine compliance, as well as the number of days required to conduct and time of year for sound studies.

### **III. Conclusion**

14. For the forgoing reasons, Crowned Ridge requests that the Commission grant its Motion in Limine.

Dated this 18 day of September, 2023.

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