

**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**

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**APPLICANTS’ MOTION TO
EXCLUDE PORTIONS OF
TESTIMONY AND/OR EXHIBITS
OF INTERVENORS TERESA
KAAZ AND KRISTI MOGEN
AND REQUEST REGARDING
HEARING PARTICIPATION**

EL18-003

INTRODUCTION

Dakota Range I, LLC, and Dakota Range II, LLC (“Applicants”), submit this Motion to Exclude portions of the Testimony and/or Exhibits of Intervenor Teresa Kaaz and Kristi Mogen (“Motion”). As discussed further below, certain exhibits submitted by Ms. Kaaz and Ms. Mogen are inadmissible because they are not based upon personal knowledge and/or are hearsay. Applicants respectfully request that the South Dakota Public Utilities Commission (“Commission”) exclude these exhibits. In addition, Applicants request that certain references to third parties in Ms. Mogen’s testimony be excluded. Granting this Motion will help ensure that the record contains probative evidence, allow the other parties’ responses to the Intervenor’s prefiled testimony to be appropriately focused, and better enable all parties to prepare for the upcoming evidentiary hearing. To the extent the Commission denies this Motion, in whole or in part, Applicants request an extension of time to respond to Intervenor’s testimony and exhibits. Since the evidentiary hearing is scheduled to begin on June 12, 2018, Applicants respectfully request that the Commission make a determination regarding this motion on an expeditious basis.

In addition, Applicants respectfully request that the Commission ask each of the remaining Intervenors to inform the Commission and parties whether he/she plans to participate in the evidentiary hearing in this matter.

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

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.

ANALYSIS

I. Motion to Exclude Testimony and/or Exhibits.

A. Teresa Kaaz.

Applicants request that the following exhibits submitted by Ms. Kaaz be excluded:

1. Exhibit 3 – Article on “Wind Turbine Noise, Sleep and Health” by third party
2. Exhibit 4 – “The ‘How To’ Guide to Siting Wind Turbines to Prevent Health Risks From Sound” by third party
3. Exhibit 5 – “Harm from Wind Turbines” PowerPoint by third party
4. Exhibit 6 – Duplicate of Exhibit 3
5. Vestas “4 MW Platform” Brochure Exhibit
6. “Commentary” and “Adverse health effects of industrial wind turbines” articles by third parties
7. Attachment 1: Wind Turbine Safety Considerations Exhibit (filed twice)

Third parties prepared all of the above-listed exhibits, and some exhibits appear to be a compilation of multiple uncited sources (*see* exhibit titled “Vestas-Nordex”). In addition, Ms. Kaaz does not provide any information that would indicate that she is qualified to offer testimony on any topic other than her personal knowledge, and her exhibits go beyond her stated personal knowledge. Some of the exhibits also contain hearsay, meaning that they contain statements made by third parties who are not witnesses in this proceeding and will not be subject to cross-examination. For these reasons, Applicants request that the above-listed exhibits submitted by Ms. Kaaz be excluded. Applicants also reserve the right to object to Ms. Kaaz’s remaining exhibits and testimony at the evidentiary hearing.

B. Kristi Mogen.

Applicants request that the following exhibits submitted by Ms. Kaaz be excluded:

1. Testimony Exhibit 2 – “Lock up your wind rights” by third party
2. Cement Exhibit 1 – “Cracks in onshore wind power foundations: Causes and consequences” by third party
3. Cement Exhibit 2 – “Cracks in onshore wind turbine foundations” by third party

4. Clarification Exhibit 3 – Letter from third party
5. Contract Exhibit 1 – “North Dakota Century Code Section 17-04-06: The First Step Toward a Level Playing Field for Wind Projects and Rural Landowners” by third party
6. Contract Exhibit 2 – “Wind Turbine Lease Considerations for Landowners” by third party
7. Contract Exhibit 3 – Statement by third party (from Malone, Wisconsin)
8. Contract Exhibit 4 – “Landowner Guidelines for Evaluating Wind Energy Production Contracts” by third party
9. Cradle to Grave Exhibit 1 – Photo and statement by third party
10. Cradle to Grave Exhibit 2 – Photo from third party
11. Cradle to Grave Exhibit 3 – Photo from third party
12. Decommissioning Exhibit One – “EVA’s Decommissioning Estimate for Pleasant Ridge Wind Farm” by third party
13. Decommissioning Exhibit Two – “Recycling of wind turbines” by third party
14. Decommissioning Exhibit Three – “PSC Approves Rule Changes Related to Wind Projects” by third party
15. Health Exhibit 1 – “Facts about Industrial Wind Turbine Noise” by third party
16. Health Exhibit 2 – “100% proof of ill effects is not needed” by third party
17. Health Exhibit 3 – “Nebraska wind farm projects cause controversy and heartache” by third party
18. Liability Exhibit 1 – “Widow Sues FAA for Wind Turbine Airplane Crash” by third party
19. Liability Exhibit 2 – “30 Negatives of WIND energy (Many of which don’t need peer-reviewed study.)” by third party
20. Lien Exhibit 1 – “Notice of Subcontractors Claim and Illinois Mechanic’s Lien Claim- Leasehold Improvement”
21. Lighting Exhibit 1 – “PSC Approves Rule Changes Related to Wind Projects” Press Release
22. Manual Exhibit 1 – Vestas-Nordex Exhibit
23. No Trespass Exhibit 1 – Figure of “Trespass Zoning” from unidentified source
24. Noise Exhibit 1 – Letter by third party
25. Noise Exhibit 2 – “Assessing Sound Emissions from Proposed Wind Farms & Measuring the Performance of Completed Projects” by third party
26. Noise Exhibit 3 – “Criteria for wind-turbine noise immissions” by third party

27. Noise Exhibit 4 – “Cooperative Measurement Survey and Analysis of Low Frequency and Infrasound at the Shirley Wind Farm in Brown County, Wisconsin” by third party
28. Noise Exhibit 5 – “Wind Turbine Noise and Human Health: a Four-Decade History of Evidence that Wind Turbines Pose Risks” by third party
29. Noise Exhibit 6 – Comments on Recommended Amendments to Shiawassee County Zoning Ordinance by third party
30. Noise Exhibit 7 – Excerpt from Sweetwater County Zoning Ordinance
31. Noise Exhibit 8 – “Response to Wind Turbine Noise Complaints by the Ontario Ministry of the Environment and Climate Change” by third party
32. Noise Exhibit 9 – “Sensing but Not Hearing: The Problem of Wind Turbine Noise (Interview with acoustician Steven Cooper)” by third party
33. Noise Exhibit 10 – “Subjective perception of wind turbine noise – the stereo approach” by third party
34. Property Values Exhibit 2 – Letter by third party
35. Socioeconomic Exhibit 1 – Letter by third party
36. Socioeconomic Exhibit 1a – Map with markings
37. Socioeconomic Exhibit 2 – “Toronto Area Interviews”
38. Socioeconomic Exhibits 3 – 17 – Summaries of Interviews
39. Socioeconomic Exhibit 18 – Summary of results of Interviews
40. Socioeconomic Exhibit 19 – Conclusions from Interviews
41. Socioeconomic Exhibit 20 – “Nebraska wind farm projects cause controversy and heartache”
42. Socioeconomic Exhibit 21 – Notes from Boone County Zoning Meeting
43. Tax Exhibit 1 – “Is South Dakota ‘open for business’ for wind developers?” by third party

Like Ms. Kaaz, Ms. Mogen does not provide any information indicating she is qualified to offer testimony on any topic other than her personal knowledge and her exhibits go beyond her stated personal knowledge. In addition, the exhibits were prepared by third parties and/or contain hearsay, meaning that they contain statements made by third parties who are not witnesses in this proceeding and will not be subject to cross-examination. For these reasons, Applicants request that the above-listed exhibits submitted by Ms. Mogen be excluded. In addition, Applicants request that references to statements made by third parties in Ms. Mogen’s

testimony be excluded (e.g., references to “Vicki May, Ted Hartke, David Janes” and “Richard James” and the phrase “. . . testimony from Diane Redlin and Jon Meyer about other concerns . . .”). Applicants reserve the right to object to Ms. Mogen’s remaining exhibits and testimony at the evidentiary hearing.

II. Request For Clarification Regarding Intervenor Hearing Participation.

Applicants also respectfully request that the Commission ask each of the Intervenors to inform the Commission and parties whether he/she plans to participate in the evidentiary hearing scheduled to begin June, 12, 2018. Only Ms. Kaaz and Ms. Mogen filed prefiled testimony, so per the Commission’s April 6, 2018 Order Granting Party Status and Establishing Procedural Schedule, only Ms. Kaaz and Ms. Mogen may testify at the evidentiary hearing. Further, at the Commission’s May 15, 2018 meeting, four other Intervenors (Dan Seurer, Christian Reimche, Paul Nelson, and Derek Nelson) were allowed to withdraw as parties. However, Applicants are not certain whether the remaining Intervenors plan to cross-examine witnesses or otherwise participate in the evidentiary hearing.

CONCLUSION

Ms. Kaaz and Ms. Mogen are lay witnesses. As such, they may only offer testimony that is within their personal knowledge. However, the majority of the exhibits submitted by Ms. Kaaz and Ms. Mogen do not appear to be within their personal knowledge. In addition, many of the exhibits were prepared by third parties and contain inadmissible hearsay. Therefore, Applicants respectfully request that the Commission exclude the above-listed exhibits. In addition, Applicants request that the noted references in Ms. Mogen’s testimony to third parties be excluded. Granting this Motion will help ensure that the record contains probative evidence, allow the other parties’ responses to the Intervenors’ prefiled testimony to be appropriately focused, and better enable all parties to prepare for the upcoming evidentiary hearing. To the

extent the Commission denies this Motion, in whole or in part, Applicants request an extension of the deadline to submit rebuttal testimony in response to Intervenors' testimony. Applicants respectfully request that the Commission make a determination regarding this motion on an expeditious basis.

Additionally, Applicants request that the Commission ask the other Intervenors to inform the Commission and parties of their plans for participation in the evidentiary hearing.

Dated this 15th day of May, 2018.

By /s/ Mollie M. Smith
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