

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

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

* **BRIEF IN SUPPORT OF INTERVENOR**
* **CHRISTINA KILBY’S MOTION TO**
* **DENY AND DISMISS DEUEL**
* **HARVEST WIND’S APPLICATION**
* **EL18-053**
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INTRODUCTION

I ask the Commission to deny a permit to Deuel Harvest Wind at this time. The Deuel County special exception permits granted to Deuel Harvest have been declared invalid. Deuel Harvest’s Application to the South Dakota Public Utilities Commission for Energy Facility Permits (the “Application”) contains significant errors and deficiencies. And Deuel Harvest’s past operations show a lack of compliance with applicable laws and rules, as well as a disregard for the welfare of the inhabitants of siting areas. For these reasons, and as explained below, Deuel Harvest is unable to meet its burden as required by SDCL 49-41B-22.

**I. DEUEL HARVEST IS UNABLE TO PROVE COMPLIANCE WITH
ALL APPLICABLE LAWS AND RULES**

A. The Project is not Permitted in Deuel County.

Deuel Harvest must prove that the Project will comply with all applicable laws and rules. (SDCL 49-41B-22) The Deuel County Ordinance requires a special exception permit for a wind energy system. The Deuel County Board of Adjustment granted Deuel Harvest Wind two special exception permits on March 2, 2018. However, the Honorable Judge Elshere, Third Judicial Circuit, declared the permits invalid because two Board of Adjustment members, Mike

Dahl and Kevin DeBoer, were disqualified from participating in Deuel Harvest's permit hearing based on payments they received from Deuel Harvest. (Decision, Jan. 25, 2019, Kilby Affidavit Ex. A and Decision, Feb. 22, 2019, Kilby Affidavit Ex. B) Deuel Harvest is unable to show that it will receive a special exception permit as is required in Deuel County and is therefore unable to meet its burden of showing it will comply with all applicable laws and rules.

Conflicts of interest in Deuel County are rampant. (Petitioner's Brief in Support of Petition, Kilby Affidavit Ex. C, Petitioner's Reply Brief, Kilby Affidavit Ex. D) The Zoning Officer has signed an agreement with Deuel Harvest. A County Commissioner, Lynn Pederson, had signed an agreement with Deuel Harvest prior to voting on the amendments to the WES ordinance requirements. Another County Commissioner, Gary Jaeger, has signed an agreement with another wind company. Besides the two Board members now determined to be disqualified in Deuel Harvest's permit hearing, two additional Board members, Paul Brandt and Dennis Kanengieter, have conflicts of interest.

To make matters worse, the State's Attorney, John Knight, also has a conflict of interest. He advised the County Commissioners during the WES amendments, the Board of Adjustment during Deuel Harvest's permit hearing, and also negotiated with Deuel Harvest on behalf of two of his own clients, Darold Hunt and Gregory Toben. (*Holborn et. al. v. Deuel County*, Almond Affidavit Ex. 14) According to the Project layout submitted to the PUC, these two landowners are receiving 25% of the Project turbines and the accompanying lease payments. It is unknown whether John Knight will continue to advise the Board of Adjustment regarding future permit hearings for Deuel Harvest. More importantly, it is unknown if and when the Intervenors and other citizens of Deuel County will be able to receive an impartial hearing by an impartial board in Deuel County.

Deuel Harvest cooperated in the violation of due process rights resulting from Mike Dahl and Kevin DeBoer's participation in the permit hearing. Deuel Harvest was well aware that the payments to Board members created conflicts of interest. Deuel Harvest's own lease agreements acknowledge the conflict of interest created when an official receives payment and then participates in a permit hearing:

14.13 Public Officials. Owner acknowledges that its *receipt* of monetary and other good and valuable consideration hereunder may represent a conflict of interest if owner is a government employee or otherwise serves on a governmental entity with decision-making authority (a "Public Official") as to any rights Grantee may seek, or as to any obligations that may be imposed upon Grantee in order to develop and/or operate the Project ("Development Rights"), and Owner hereby agrees to (1) recuse him/herself from all such decisions related to Grantee's Development Rights unless such recusal is prohibited by law or is not reasonably practicable considering the obligations of such Public Official's position and (2) recuse him/herself from all such decisions related to Grantee's Development Rights if such recusal is required by law. If Owner is not required pursuant to (1) or (2) above to recuse him/herself from a decision related to Grantee's Development Rights, Owner shall, in advance of any vote or other official action on the Development Rights, disclose the existence of this Agreement (but not the financial terms therein) at an open meeting of the relevant governmental entity Owner serves on as a Public Official. ..." (Invenergy Lease 14-15, Kilby Affidavit Ex. E, emphasis added)

Instead of following the requirements of their own contracts, Deuel Harvest decided to simply release the voting officials from their agreements prior to the need for recusal or public disclosure. (Kilby Affidavit Ex. C)

Additional findings and conclusions in the court's decision, specifically those regarding conflicts of interest among other Board members and additional due process violations, will likely be appealed to the Supreme Court. Given the extensive issues at the county level, it is unknown if and when Deuel Harvest will obtain a valid special exception permit for the Project.

B. Turbine Locations Violate Setbacks.

Deuel Harvest either intentionally misled or grossly erred in its Application and Presentation. The Application states:

- All turbines will be sited away from Like Alice; the nearest turbine will be 2.41.6 km (1.0 mi) from the lake;
- All turbines will be sited away from Long (Lone) Tree Lake, Lake Francis, and Rush Lake; the nearest turbine will be 0.80 km (0.50 mi) from each lake...

(Application, Effect on Terrestrial Ecosystems, 13-27) These setbacks are also stated in Deuel Harvest North Wind Farm Bird and Bat Conservation Strategy, p 37. However, Deuel Harvest's Presentation at the Public Input Hearing and filed Jan. 28, 2019 claim setbacks of at least two-miles from Lake Alice.

According to the project layout, the following turbines are in violation of these setbacks. Turbines 18, 19, 20 21, 30, 31, 32, 33, 34, 42, 43, and 44 are all less than two-miles from Lake Alice. Turbines 35, 36, 37, 38, 39, 40, and 41 are all less than one mile from Lake Alice. Turbines 94 and 102 are less than .5 miles from Rush Lake. And turbines 100, 101, 105, 111, 112, 113, and 114 are all less than .5 miles from Lake Francis. (Affidavit of Heath Stone, Kilby Affidavit Ex F)

The two-mile setback from Lake Alice is also required by the Deuel County Ordinance. (Application, Appendix C) As the Application shows, the Project will not meet the required setbacks in Deuel County. In order to comply with the setbacks, numerous turbines will need to be moved. New noise and flicker analysis will need to be conducted utilizing a corrected layout. Deuel Harvest has failed to meet its burdens. These significant errors in the project layout and Application as a whole necessitate a denial of Deuel Harvest's Application.

C. Significant Errors and Deficiencies Require Denial.

ARSD 20:10:22:04 (5) requires that the truth and accuracy of the Application shall be verified by the applicant. In addition to significant errors in turbine layout and contradicting setbacks listed, another example that Deuel Harvest's Application is deficient is an eagle's nest that was not disclosed in the Application. Deuel Harvest was made aware of a possible eagle's nest north of Lake Alice in February of 2018: "In February 2018, the USFWS shared with us that a landowner had brought to their attention that there may be an eagle nest north of Lake Alice." (Giampoli Pre-Filed Supplemental, Exhibit A10) Deuel Harvest reacted to that information by looking again at reports it received from 2016 and its own surveys from 2016 and 2017. From that outdated information, Deuel Harvest determined no further due diligence was required. They did not include this information in the 62 page Bird and Bat Conservation Strategy dated November 2018 submitted with the Application. What good is this 62 page report - or any reports Deuel Harvest has submitted - if they fail to conduct due diligence and include relevant information?

It was not until members of the public raised concerns at the Public Input Hearing about the Application not including an eagle's nest, that Invenergy responded to this information it had been informed of previously. Deuel Harvest is only now conducting eagle flight path mapping, and it will not be complete until July 2019, after the Commission is required to make a decision. (Giampoli Pre-Filed Supplemental, Exhibit A10 p5) This information should have been gathered prior to Deuel Harvest submitting its application. More importantly, this shows that Deuel Harvest cannot be trusted to provide accurate surveys, studies, or reports. This is just one more reason the Commission should deny Deuel Harvest's permit at this time.

ARSD 20:10:22:19 requires the applicant to provide a general description of local land use controls and the manner in which the proposed facility will comply with the local land use zoning or building rules, regulations or ordinances. Deuel Harvest's Application failed to include all of the requirements a Wind Energy System must meet prior to receiving a special exception permit in Deuel County. In addition to the requirements contained in Ordinance Section 1215 included in the Application, Section 504 includes additional requirements that all special exceptions must be meet prior to the Board of Adjustment granting a permit. The Application also failed to include the requirements of Ordinance Section 1105, the Aquifer Protection Overlay District, that the Project must meet before it can be approved in Deuel County. Deuel Harvest failed to provide the land use requirements for Deuel County and has not shown how the Project would comply.

ARSD 20:10:22:10 requires the applicant show demand for the facility. Deuel Harvest has failed to show a demand because as stated in Application 2.4, there is no purchase or off-take agreement for the Project. The Application states "The electricity generated by the Project would be used *as needed* on the MISO." (Application 6-1, emphasis added) No evidence of need is provided. As such, Deuel Harvest has also failed to describe the customers to be directly served by the proposed facility and their estimated future energy needs. (Application 6.0)

It is inexcusable for the Application to contain extensive errors and deficiencies. Deuel Harvest had an unlimited amount of time to prepare its Application prior to submitting to the Commission. Deuel Harvest should not be allowed to push through an application containing this multitude of misrepresentations. From the issues above, Deuel Harvest has shown either a lack of diligence or outright falsification. Either way, the Application should be denied.

II. INVENERGY'S PAST OPERATIONS WARRANT A DENIAL.

Invenergy's¹ Willow Creek Project has been found to violate Oregon's noise standards. (*Williams v. Invenergy*, US District Ct., Portland Division, Opinion and Order, April 28, 2016, Case No. 2:13-CV-01391-AC.) In addition, according to Judge Acosta's Opinion and Order in that case, "evidence demonstrates that Willow-Creek representatives misrepresented the applicable standards in an attempt to convince them to drop their complaints against Willow Creek." (*Id.*) "[O]ther emails between the consultant and Defendants' representatives tend to support the proposition that Defendants or their consultants manipulated reporting of sound-test data." (*Id.*) "This email suggests that some sound-measurements were collected and analyzed, but Defendants or their agents chose not to report that data because, by their own admission, it was 'going to give [them] heartburn.'" (*Williams v. Invenergy*, US District Ct., Portland Division, Opinion and Order, April 28, 2016, Case No. 2:13-CV-01391-AC.) Willow Creek continued to operate despite knowledge that there were noise exceedances. (*Id.*)

In another case, fifty-seven plaintiffs filed a complaint against Invenergy for problems caused by its Alle-Catt Project in New York. (*Andre et. al v. Invenergy LLC*, filed August 5, 2014, Wyoming County.) There petitioners allege Invenergy has again violated on a regular basis the town noise ordinances and have refused to abate the nuisance or engage in any mitigating measures. (Complaint 46912, Kilby Affidavit Ex. G)

These cases and findings indicate that Invenergy does not abide by regulations imposed, makes misleading statements to avoid enforcement, and manipulates data for their desired

¹ The Application states Deuel Harvest is an affiliate of Invenergy. It is unclear what portion of Deuel Harvest is owned by Invenergy.

outcome. And instead of solving the problem, Invenergy forces the affected landowners to pay for and endure years of litigation.

III. ALLOWING THE APPLICATION TO PROCEED VIOLATES INTERVENORS' DUE PROCESS RIGHTS.

Deuel Harvest's Application does not meet the requirements of SDCL 49:41B-22 or the Application Requirements of 20:10:22:05. Deuel Harvest should not be allowed to modify its Application at this time. Allowing such a drastic modification of the project layout at this time, four months after the Application was submitted, does not provide Intervenors the required notice of project components and time for meaningful participation.

As the Commission is aware, Intervenors are already at a significant disadvantage to Deuel Harvest during this process. Because of the time requirements imposed on the Commission by SDCL 49-41B-25, Intervenors do not have enough time to adequately prepare a case.² There are many complex issues and not enough time for Intervenors to even adequately review the application and accompanying testimonies, let alone secure witnesses, respond to and conduct adequate discovery, or prepare their own testimony. Some intervenors have limited internet access and limited experience with submitting documents electronically. Deuel Harvest on the other hand had an unlimited amount of time to conduct studies, prepare its application, acquire witnesses and testimony. This is the business they are in. Deuel Harvest no doubt has teams of employees working on these exact types of applications every day. Intervenors are having to take time away from their own jobs and families, and incur costs to participate in this

² In *Hubner v. South Dakota Public Utilities Commission et.al*, the plaintiffs are appealing, among other things, the issue of whether the application of SDCL 49-41B-25, imposing a six month time limit imposed on the commission results in the Intervenors' due process rights being violated.

process - not because they want to. Deuel Harvest should not have submitted an Application before it was accurate and complete.

In addition to the issues in this proceeding, Intervenors are having to deal with conflicts of interest at the county level, possible appeals, and another permit hearing for Deuel Harvest. Deuel Harvest's incomplete and erroneous application creates an undue burden on Intervenors, exacerbating the risk of due process violations.

CONCLUSION

Deuel Harvest claims it is "committed to responsible wind energy development." (Giampoli Pre-Filed Supplemental, Exhibit A10 p5) Its record shows otherwise. Deuel Harvest has shown it is not trustworthy in its previous operations and in this Application. They have shown not only a lack of diligence but actual intent to deceive. Deuel Harvest is unable to show that it meets the burdens set forth in SDCL 49-41B-22.

For these reasons, I ask that the Commission deny the permit and dismiss the Application without prejudice until such time as Deuel Harvest can correct its Application, complete necessary studies, and show the Project can meet the Applicant's burdens.

Dated: March 8, 2019

/S/ Christina Kilby

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