

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

<b>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 ) ) )</b>	<b>RESPONSE TO CHRISITINA KILBY AND GARRETT HOMAN MOTIONS TO ALLOW TELEPHONIC TESTIMONY  EL18-053</b>
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COMES NOW, Staff (“Staff”) of the South Dakota Public Utilities Commission (“Commission”) and hereby files this Response to Christina Kilby and Garrett Homan’s Motions to Allow Telephonic Testimony.

**Legal Standard**

State statute does not specifically prohibit not permit the use of telephonic testimony, but does specify three modes for taking testimony, by affidavit, deposition, and oral examination (SDCL 19-3-1) and does define oral examination as examination in the presence of the court (SDCL 19-3-4). The courts do appear to be split on whether “in the presence of the court,” as used in this statute, requires a witness to appear before the court in person, or whether testimony may be taken via an alternative method. However, telephonic testimony has been permitted in state and federal court proceedings, including in South Dakota courts and in the Federal 8<sup>th</sup> Circuit. Specifically, in 2005, the South Dakota Supreme Court issued a decision recognizing that decision to allow telephonic testimony is vested in a Trial judge in regulating the manner of examination of witnesses. *See The People of the State of South Dakota in the Interest of O.S., 2005 SD 86.*

Based on this precedent and given that in certain circumstances, a court may permit testimony be presented through affidavits and depositions, Staff supports the use of telephonic

testimony in proceedings before the Commission when 1) there is a legitimate reason the witness cannot be personally present, 2) the credibility of the witness is not at issue, and 3) the use of telephonic testimony will not cause undue prejudice to the parties.

### **Analysis**

There is a legitimate reason to allow the Intervenors to utilize telephonic testimony to all Robert Rand and Kevin Elwood to testify before the Commission. At this point, it appears there is a legitimate reason Robert Rand and Kevin Elwood cannot be personally present at the evidentiary hearing. Staff agrees that requiring Robert Rand and Kevin Elwood to travel to Pierre to provide testimony will add significant costs to the intervenors as both of these witnesses are located a significant distance from Pierre. Given the specific nature of the prefiled testimony submitted by the witnesses, there were not likely alternative witnesses the intervenors could retain in a more convenient location to Pierre. Additionally, considering that the Commission is required to issue a decision on this matter within six months of filing, and given that the Intervenors had no control over when the application was filed, granting the intervenors request to utilize telephonic testimony for two witnesses, otherwise unavailable, is a reasonable compromise. This will allow the Intervenors to present the witnesses and their full case to the Commission while allowing adequate opportunity for all parties to cross-examine the witnesses.

The credibility of the Robert Rand and Kevin Elwood is not at issue in this proceeding. To Staff's knowledge, no party has contested the credibility of either witness at this point in the process.

Utilizing telephonic testimony will not prejudice the other parties. The Commission has utilized telephonic testimony in past hearings including EL17-055 and EL19-018. To Staff's

knowledge, limited use of telephonic testimony in other proceedings before the Commission has not prejudiced any party and is appropriate in this situation. The Commission is experienced in the use of telephonic testimony and is free to give the testimony of these witnesses the appropriate weight.

Staff will note, that while video conferencing technology has been utilized in past proceedings, and while Staff is generally supportive of utilizing the technology, video conferencing is not a viable option in this proceeding. The evidentiary hearing for this proceeding is to be held off State property and it does not appear that this technology will be available at this venue.

For these reasons, Staff supports the Intervenors requests to allow Robert Rand and Kevin Elwood to provide telephonic testimony for the April 15-18, 2019 hearing on this matter.

Dated this 8th day of April 2019.

*Amanda M. Reiss*

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