

**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**

* **DEUEL HARVEST WIND ENERGY**
* **LLC’S MOTION TO EXCLUDE**
* **TESTIMONY RELATED TO**
* **LOCAL LAND USE DECISIONS**

* **EL18-053**
*
*

INTRODUCTION

Deuel Harvest Wind Energy LLC (“Deuel Harvest”) submits this Motion to Exclude Lay Testimony (“Motion”). As discussed in further detail below, testimony at the evidentiary hearing concerning local land use decision-making processes should be excluded to ensure that the contested case proceeding focuses on admissible evidence that is probative of the material issues before the South Dakota Public Utilities Commission (“Commission”) in this docket. Neither the development of zoning ordinances nor Deuel County’s permitting process generally or for the Deuel Harvest North Wind Farm (“Project”) specifically is relevant to the criteria for a facility permit under SDCL Chapter 49-41B. Therefore, any testimony at the evidentiary hearing about local zoning development and permitting should be excluded as irrelevant and immaterial.

To the extent this Motion is denied, Deuel Harvest intends to subpoena one or more Deuel County officials to testify at the evidentiary hearing.

BACKGROUND

On March 2, 2018, Deuel County’s Board of Adjustment (“Board”) unanimously issued a Special Exception Permit (“SEP”) for the Project. The Board’s issuance of the SEP was appealed to the Circuit Court by 12 individuals, including Intervenors John Homan, Heath Stone

and William Stone, Case No. 19CIV18-000019 (the “Circuit Court Appeal”).¹ On March 27, 2019, Judge Dawn M. Elshere issued Findings of Fact and Conclusions of Law invalidating the SEP granted for the Project. *Holborn et al. v. Deuel County Board of Adjustment et al.*, Case No. 19CIV18-000019, Findings of Fact and Conclusions of Law at 17 (S.D. Third Jud. Cir. March 27, 2019) (hereinafter “Circuit Court Findings”). Judge Elshere concluded that two Board members, Kevin DeBoer and Mike Dahl, were disqualified from voting on the SEPs because they previously had lease agreements with the Deuel Harvest entities and each received lease payments in accordance with the terms of the leases prior to the lease terminations.² *Id.* at 10.

Judge Elshere did not accept Deuel Harvest’s argument that the question of whether a conflict existed was controlled by SDCL § 6-1-17 (the “Conflicts Statute”). *Id.* Enacted in 2005, the Conflicts Statute provides:

No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in a discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:

(1) The official *has a direct pecuniary interest in the matter before the governing body*; or

¹ The appellants are represented by Reece Almond of the Davenport, Evans, Hurwitz & Smith law firm and Intervenor Christina Kilby who was admitted pro hac vice. George Holborn and Rudy Holborn are also parties to the appeal; they withdrew their party status in this docket.

² January, 2016, Deuel Harvest entered into an agreement with Board member Mike Dahl. On November 17, 2016, Deuel Harvest terminated the lease because it was unable to secure sufficient land rights in the vicinity to build facilities due to low landowner interest. In June 2016, prior to the time he joined the Board, Mr. DeBoer signed two wind easements. In late 2017, he asked to be released from the easements because he wanted to be able to participate in the Board’s decision on the Project. Deuel Harvest terminated his lease on December 14, 2017.

(2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.

If an official with a direct pecuniary interest participates in a discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

(Emphases added.)

Judge Elshere also reviewed and rejected claims that Chairman Dennis Kanengieter and Paul Brandt had disqualifying interests. Circuit Court Findings at 11-12. The appellants had argued the Chairman Kanengieter was disqualified because his employer had a wind lease agreement with Deuel Harvest, he had a transmission line agreement with another developer, Flying Cow Wind, and because he was advocating generally for wind development in the county. The appellants claimed Board member Brandt should be disqualified because he has an interest in a company that has a 12-year old agreement with another energy developer. The appellants also argued that his interest in a company that provides fiberglass to companies, including one that makes wind turbine blades, created a disqualifying interest. Judge Elshere did not find any of the allegations against Chairman Kanengieter and Board member Brandt persuasive. Circuit Court Findings at 11-12. This left a vote of 3-0 in favor of issuing the SEP (still a majority). *Id.* at 17. South Dakota, however, requires a vote of two-thirds of the Board, or four votes, to issue an SEP.³ As such, the Project's SEP was invalidated. *Id.* at 17.

The Court also reviewed and rejected appellants' claims of due process violations. *Id.* at 13-14, 17.

As argued below, the first SEP approval and related litigation are not relevant to this proceeding. However, Ms. Kilby previously filed the appellants' briefing in that case in this

³ SDCL § 11-2-59.

docket and to ensure the Commission has a more complete picture of the litigation, a copy of additional briefing from Deuel Harvest in that matter, as well as Judge Elshere's Findings of Fact and Conclusions of Law, are included in Attachment 1.

Deuel Harvest will submit a new SEP application to Deuel County for the Project and will go through the County's SEP process.⁴

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." SDCL § 19-19-403.

DISCUSSION

I. Testimony Related to Local Land Use Decisions is Not Relevant.

An applicant for a facility permit has a statutorily dictated burden of proof as set forth in SDCL 49-41B-22. The fourth factor requires the Commission to consider the views of governing bodies of affected local units of government.⁵ Deuel County previously issued a permit for the Project; although that permit has been invalidated by the Circuit Court, Deuel Harvest will submit a new SEP application for the Project to Deuel County and understands that the Board will appoint alternates for Board members DeBoer and Dahl, consistent with the

⁴ Deuel Harvest also intends to appeal the Circuit Court's decision.

⁵ SDCL § 49-41B-22(4).

Circuit Court's decision.⁶ As such, there will be an entirely new and separate County permitting process, and any testimony at the evidentiary hearing concerning the County's permitting process in 2018 is irrelevant.

II. Relief Requested.

Deuel Harvest requests that testimony at the evidentiary hearing concerning Deuel County's permitting processes and the Circuit Court Appeal not be allowed. Deuel Harvest understands that certain intervenors also included written testimony on these topics. To avoid confusion and for administrative efficiency for the Commission, Deuel Harvest is not seeking to exclude that written testimony but asks that no additional testimony or evidence concerning Deuel County's permitting processes and the Circuit Court Appeal be introduced or the subject of cross-examination at the evidentiary hearing.

CONCLUSION

Testimony regarding local land use decisions is not relevant to the Commission's decision on the Project, and allowing such testimony at the evidentiary hearing will unduly extend the hearing without providing the Commission with probative and relevant evidence. Accordingly, Deuel Harvest respectfully requests that the Commission grant this Motion. If the Commission denies the Motion, Deuel Harvest will subpoena one or more Deuel County officials to appear and testify at the evidentiary hearing to provide a more complete and objective view of Deuel County's zoning and permitting processes.

⁶ Deuel Harvest maintains its position that the Board members should not be disqualified based solely on their prior lease agreements. This will be an issue on further appeal to the South Dakota Supreme Court.

Dated this 2nd day of April 2019.

By /s/ Lisa Agrimonti

Mollie M. Smith

Lisa M. Agrimonti

FREDRIKSON & BYRON, P.A.

Attorneys for Applicant

200 South Sixth Street, Suite 4000

Minneapolis, MN 55402

Phone: (612) 492-7000

Fax: (612) 492-7077

66349514