

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

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

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**INTERVENOR CHRISTINA KILBY’S
REPLY BRIEF IN SUPPORT OF
MOTION TO DENY**

EL18-053

I. INTRODUCTION

Deuel Harvest’s Application is inaccurate and premature, resulting in a waste of Commission time and resources. Deuel Harvest is attempting a bait and switch and a “we will” answer to application requirements. Too many unknowns in Deuel Harvest’s Application and Project prevent Intervenors adequate notice and meaningful participation, resulting in due process violations.

SDCL 49-41B-13 provides authority for the Commission to deny Deuel Harvest’s application for any deliberate misstatement of a material fact in the application or in accompanying statements or studies required of the applicant. 49-41B-13 also provides authority for the Commission to deny an application for failure to include the required content. Deuel Harvest’s Application should be denied for its numerous misstatements of facts and for not containing all content required by

II. DEUEL HARVEST IS UNABLE TO MEET ITS BURDEN OF PROOF

Deuel Harvest claims it is “committed” to complying with all applicable law and rules. (DH Response to Motion for Denial, at B.) SDCL 49-41B-22 specifically requires the applicant

prove that the proposed facility will comply with all applicable laws and rules.. (emphasis added)

A commitment to comply is not sufficient to satisfy this requirement. Further, this burden of proof must be met prior to receiving a permit, not simply prior to beginning construction.

One significant requirement Deuel Harvest must prove prior to receiving a permit from the commission is that the project will comply with the setbacks required by the Deuel County Ordinance (“Ordinance”). Not only is Deuel Harvest unable to prove that it will receive a special exception permit required for a wind energy system in Deuel County, but the proposed configuration in the Application violates the Deuel County setback requirements from Lake Alice. Mr. Thurber has verified that the configuration submitted by Deuel Harvest violates this setback. (Thurber Testimony, p 23).

The Ordinance states, “Distance from the Lake Park District located at Lake Cochrane 3 miles, Lake Alice 2 miles, and I mile from the Lake Park District at Bullhead Lake.”

(Application App C) A first public reading of the proposed amendments was done on May 16, 2017. The second reading of the proposed amendment was done on May 23, 2017, at which time the language was approved and adopted.¹

The Supreme Court has ruled that, “[w]hen interpreting an ordinance, we must assume that the legislative body meant what the ordinance says and give its words and phrases plain meaning and effect.” *Even v. City of Parker*, 1999 SD 72, 597 N.W.2d 670, See *Nilson v. Clay County*, 534 N.W.2d 598, 601 (S.D.1995). Here, the plain language of the Ordinance indicates that the two-mile setback is from Lake Alice, not its lake park district. Specific language indicating setbacks to be from the Park District were included for Lake Cochrane and also for

¹ An Ordinance to Amend Section 1215 Wind Energy System (WES) Deuel County https://docs.wixstatic.com/ugd/1bce45_4ea62d7301e84a0fb5b44dfaf848e220.pdf

Bullhead Lake, but was excluded for Lake Alice. The ordinance itself is clear and not ambiguous.

Deuel Harvest's Application also interpreted the setback from Lake Alice to be from the entire lake: At 9.2 "Distance from the Lake Park District located at Lake Cochrane is at least 3 miles, from Lake Alice at least 2 miles and 1 mile from the Lake Park District at Bullhead Lake." Deuel Harvest should not be allowed this bait and switch. The numerous inconsistencies contained in the Application regarding the setback from Lake Alice alone warrants a denial.

According to the Direct Testimony of Jon Thurber, filed March 14, 2019, "[t]he Zoning Officer for Deuel County indicated to Commission Staff that the setback was from the Lake Park District at Lake Alice, not from Lake Alice itself." (Thurber Testimony, p 23) Mr. Thurber stated, "Commission Staff will defer to Deuel County to interpret its Ordinance on the Lake Alice setback as the measure relates to the orderly development of the region, and the Commission has legislative direction to give due consideration to the views of governing bodies of affected local units of government pursuant to SDCL 49-41B-22(4)."

However, the Commission should not rely on the Zoning Officer's interpretation of the ordinance pertaining to the setbacks from Lake Alice. Besides the Zoning Officer's interpretation being at odds with the plain reading of the text, the Zoning Officer, Ms. Jodi Theisen, is not a "governing body" for purposes of SDCL 49-41B-22(4). More importantly, Ms. Theisen has a significant conflict of interest regarding the Project because she has signed an agreement with Deuel Harvest. (Theisen Agreement with Invenergy, Att. 1; Aff. Of Almond, Deuel County Answers, at 14, Holborn v. Deuel County Board of Adjustment) Unless shown otherwise, it is safe to assume Ms. Theisen's agreement contains the same requirement contained in the Invenergy lease given to John Homan (Kilby Affidavit, Ex E 06) That lease requires:

Owner shall assist and fully cooperate with Grantee, at no out-of-pocket expense to Owner in complying with or obtaining any land use permits and approvals, building permits... or any other permits and approvals required for the ...construction, installation...of Windpower Facilities, including but not limited to, execution of applications and documents reasonably necessary for such approvals and permits, and participating in any appeals or regulatory proceedings respecting the Windpower Facilities.

Ms. Theisen's mistaken interpretation of a plainly written ordinance in a manner to benefit Deuel Harvest's project, while she is required by contract to do so, is just one example of the extensive conflicts of interest intervenors are having to deal with in Deuel County. Because of her conflict of interest Ms. Theisen should be recused from any duties relating to the Project. Additionally, any decision of the Deuel County Zoning Officer is appealable to the Board of Adjustment, and then to the courts. (Deuel County Ordinance, Article VI.² The interpretation of an ordinance presents a question of law reviewable de novo. *Even v. City of Parker*, 1999 SD 72, ¶8, 597 NW2d 670, 673 (citations omitted).

Any potential issues regarding the interpretation of the Ordinance must follow proper procedures at the county level.³ It is for this reason that Deuel Harvest must first obtain the required special exception permit required by Deuel County. As it stands, Deuel Harvest is unable to prove the Project will comply with the county setbacks, and therefore does not meet its burden of proof required by SDCL 49-41B-22.

Deuel Harvest claims the statement that States Attorney John Knight has a conflict of interest is "meritless." Deuel Harvest is well aware of the facts supporting this statement. Deuel Harvest and/or its attorneys attended Deuel County hearings and meetings where John Knight

² https://docs.wixstatic.com/ugd/1bce45_aa74143ecd604f67965091665ce47f99.pdf

³ "Deuel Harvest does not ask the Commission to preempt local controls." (DH Response to Motion, D.2.)

advised the Board of Adjustment and/or County Commission on issues related to the Project. And according to Deuel Harvest's Answers to Petitioners' Interrogatories signed by Ms. Agrimonti on Sept. 4, 2018, "...Deuel Harvest Wind understands that Mr. Knight represented Darold Hunt and Gregory Toben on Wind Leases with Invenergy." (Att. 2, Deuel Harvest's Answers, Interrogatory #6) Further, the Board of Adjustment admitted John Knight advised the Board and that the Board relied on his advice regarding the Deuel Harvest Project.:

16. Admit that John Knight provided advice to the BOARD related to the PROJECT.

RESPONSE: Admit.

17. Admit that the BOARD relied on John Knight's advice related to the PROJECT.

RESPONSE: Admit.

18. Admit that John Knight provided advice to the BOARD regarding the process to be used at the HEARING.

RESPONSE: Admit.

19. Admit that the BOARD relied on John Knight's advice regarding the process to be used at the HEARING.

RESPONSE: Admit.

(Deuel County Board of Adjustment Objection and Responses, Affidavit of Almond, Ex. 16, Holborn v. Deuel County Board of Adjustment, Case No. 19CIV18-000019.

III. DEUEL HARVEST'S PREMATURE AND INCOMPLETE APPLICATION REQUIRES A DENIAL.

Deuel Harvest's Application is premature and incomplete in many aspects. ARSD 20:10:22:05 lists the required information that an application for a permit for a facility must contain. Deuel Harvest's Application fails to provide all required information, violating intervenors' due process rights: "Due process requires adequate notice and an opportunity for meaningful participation." *Grant County Concerned Citizens v. Grant County*, 2015 S.D. 54, ¶

30, citing *Osloond v. Farrier*, 2003 S.D. 28, ¶ 16, (citations omitted.) The vague, incorrect and incomplete application precludes intervenors' adequate notice and meaningful participation. The many steps in this process are meaningless if information in the Application is inaccurate, incomplete, and misleading.

Deuel Harvest has admitted "inaccuracies." What is so shocking is the magnitude of these inaccuracies. When multiple locations in an Application state drastically different setbacks, and the submitted configuration violates all of them, there is obviously an extreme lack of diligence, or an attempted "bait and switch.." Deuel Harvest's failure to accurately report an eagle's nest that it had been informed of rises to the level of deceit. At the very least, Deuel Harvest should have included the information it had received regarding a possible eagle's nest.

Deuel Harvest did not even provide a "general" description of the local land use controls required by ARSD 20:10:22:19 because it failed to even mention two significant sections of the Deuel County Ordinance the project must comply with, Section 504, Powers and Jurisdiction Relating to Special Exceptions, and Section 1105, Aquifer Protection Overlay District. ARSD 20:10:22:19 also requires a description of the *manner* in which the proposed facility will comply with the local land use controls. Deuel Harvest's answer to this requirement is a general statement that "Deuel Harvest has designed the Project to meet the requirements contained in the Ordinance and will comply with all applicable terms and conditions of the land use permits from Deuel County." (Deuel Harvest's Response to Motion, at D. 2) This obviously fails to meet the requirements.

Mr. Dean Pawlowski testified to additional issues with Deuel Harvest's Application. (Otter Tail Testimony, filed March 14, 2019) "Deuel Harvest Wind included the Interconnection Switching Station as part of its pending Application for Facility Permits (Application) in this

proceeding, notwithstanding the fact that the Interconnection Switching Station will be designed, constructed, owned and maintained by Otter Tail as part of our networked system of transmission assets.” “Otter Tail has concerns about the location and characterization of the Interconnection Switching Station contained within the application.” (Otter Tail Testimony) According to the Application section 8.5, and Mr. Pawlowski’s Testimony, the location of the Project Substation has not been determined. “The Project Substation will be approximately 2 acres in size, located generally in the center of the Project Area...”

Deuel Harvest has not determined what turbines will be used: “Deuel Harvest requests the Commission provide flexibility for the Project to use a turbine of comparable capacity and specifications, provided it meets all applicable County and State setback requirements and specified noise and shadow flicker requirements; cultural resource impacts are avoided or mitigated in consultation with SHPO; environmental constraints are adhered to as agreed upon with the USFWS and the SDGFP; and wetland impacts are avoided. Prior to implementing the turbine adjustment, the Applicant would file in the docket an affidavit demonstrating compliance with the limitations set forth above.” (App.8.2)

Deuel Harvest has not finalized turbine locations. ARSD 20:10:22:33.02 requires the applicant provide the configuration of the wind turbines. According to Mr. Thurber’s Testimony, Deuel Harvest had indicated it would move two turbines near the previously undisclosed eagle’s nest and is also assessing whether any turbines would need to be moved because of building permits acquired by participating landowners. (Thurber Testimony, p 11) Mr. Thurber stated it is unknown if layout changes are coming yet, and if so, what they would be. Mr. Thurber also verified that turbines are located even within Deuel Harvest’s claimed setbacks. (Thurber Testimony, p 23) He recommended that the project be constructed in a

manner consistent with the Application. (Id.) However, Mr. Thurber stated he understands Deuel Harvest's intention is to simply modify the avoidance and minimization measures of the Application to correctly to accurately state the layout. (Id.)

The number of MET towers is not yet determined. "Up to four permanent MET towers may be installed as part of the Project." (App. 8.10) "The location of these MET towers will depend on the final location of the turbines and specifications of the turbine manufacturer and financing parties. Locations will be within the Project Area, on land that is under lease with Deuel Harvest, and will meet all County setbacks and requirements." (Id.)

The location of the O & M building is not yet determined: "An O&M building will be constructed adjacent to the Project Substation and Interconnection Substation, or another suitable location within the Project Area." "Deuel Harvest would purchase up to 5 acres to facilitate construction and use of the O&M building." (App. 8.8) "The Applicant requests the ability to adjust the location of the Transmission Line..." (App. 8.7) And finally, "Once applicable local, State, and federal approvals are obtained, the Applicant will complete engineering scale design of access roads, construction areas, turbine foundations, and electrical components." (App. 8.13)

It is quite clear Deuel Harvest's Application is premature. The permit should be denied until Deuel Harvest is able to finalize the important details that are necessary for an adequate review.

CONCLUSION

Because Deuel Harvest has failed to meet the content requirements of 0:10:22:05 and 20:10:22:33.02, and Deuel Harvest is unable to meet its burden of proving compliance with all applicable laws and rules required by SDCL 49-41B-22. For all the reasons discussed above and

for all reasons discussed in my previous Brief, I respectfully request the Commission exercise its authority under SDCL 49-41B-13 and deny a permit to Deuel Harvest Energy at this time.

Dated: March 26, 2019

/S/ Christina Kilby

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