

the offering party's direct case. Subject to evidentiary rules, those exhibits may be used for cross-examination. For that reason, Staff limits its recommendation to the use of the exhibits in a direct case.

I. Items in Original Motion

In addition to portions of the prefiled testimony of Christina Kilby, the Applicant moved to exclude thirteen proffered exhibits. Staff will address each separately.

1. Kilby Exhibit 1: Morsing, et al. Noise and Sleep Study

Staff agrees with Applicant that this article is hearsay. Therefore, unless the offering witness is an expert on the subject matter, it should be excluded. Because Ms. Kilby is not testifying as an expert on this topic, the study is not admissible on direct.

2. Kilby Exhibit 2: Shirley Wind Farm Noise Analysis

This exhibit is inadmissible as offered for Ms. Kilby's direct for the same reasons as Exhibit 1 discussed above.

3. Kilby Exhibit 3: Altered Cortical and Subcortical...Due to Infrasound

This exhibit is inadmissible as offered for Ms. Kilby's direct for the same reasons as Exhibit 1 discussed above.

4. G Homan Exhibit E: Application to the Ohio Power Siting Board

This application was not made by any party or witness in this docket and is, therefore, not relevant. Staff supports its exclusion.

5. G Homan Exhibit G: Problems and Solutions in Fire Protection

Staff disagrees with the motion as it relates to this exhibit. Mr. Homan has an engineering background and may be qualified to testify on certain technical issues. Applicant can voir dire the witness at the hearing to discern the extent of his expertise, and the Commission can give his testimony the weight it deems necessary. This exhibit should not be excluded at this time.

6. G Homan Exhibit H: News Articles

News articles are hearsay and should not be admitted as evidence. Staff supports excluding Exhibit H.

7. H Stone Exhibit 2: Ring-necked Pheasant Response

Mr. Stone has a background in hunting and wildlife. This exhibit, therefore, is within the realm of his knowledge and expertise. The Motion should be denied as it relates to this exhibit.

8. H Stone Exhibit 3: News article

News articles are hearsay and are not admissible as evidence. Staff supports excluding this exhibit.

9. Kevin Elwood Appendix 2: Order from Canadian Tribunal

This appears to be an order from a Canadian tribunal. Assuming first that Mr. Elwood testifies and second that he is an expert in this subject matter, this order is a document he could appropriately rely upon to inform his opinions. Staff also notes that Mr. Elwood was a party to the proceeding in Canada and is assumedly familiar with the document. This document should be allowed in if Mr. Elwood testifies, and the Commission can then give it the weight it deserves.

10. Kevin Elwood Appendix 3: Witness statement

The authors of this witness statement are unavailable for cross examination. Therefore, this is inadmissible hearsay and should be excluded.

11. Kevin Elwood Appendix 4: Canadian Owners and Pilots Association

Again, this is information Mr. Elwood could rely upon as an expert to inform his opinion. It should be admitted if Mr. Elwood testifies and given the weight it deserves.

12. Kevin Elwood Appendix 5: Witness Statement

The authors of this witness statement are unavailable for cross examination. Therefore, this is inadmissible hearsay and should be excluded.

13. Kevin Elwood Appendix 6: Witness Statement

The authors of this witness statement are unavailable for cross examination. Therefore, this is inadmissible hearsay and should be excluded.

II. Items in April 3, 2019 Letter

1. Garrett Homan Exhibit B: COPA/SMA Report

Mr. Homan has knowledge of the aviation industry and is competent to rely on this document in formulating his opinion. Staff does not support its exclusion.

2. Garrett Homan Exhibit F: Confidential Safety Manual

While this manual is from a different project with a different operator, because Applicant did not provide to Mr. Homan the best evidence, the manual for the turbines used in the Project,

it is reasonable for Mr. Homan to rely on the best evidence he was able to obtain. The Commission should allow it in for rebuttal and impeachment purposes and give it the weight the Commission believes it deserves. The parties are free to argue as to the weight.

3. Kilby Exhibit R2: William G. Acker article

Staff agrees that this is hearsay and should be excluded for use on direct by a non-expert witness.

4. Kilby Exhibit R3: Schmidt JH, Klokker M. review

Staff agrees that this is hearsay and should be excluded for use on direct by a non-expert witness.

5. Kilby Exhibit R4: Comments on the Cooper Study

Staff agrees that this is hearsay and should be excluded for use on direct by a non-expert witness.

6. Kilby Exhibit R5: Paul D. Schomer, Review

Staff agrees that this is hearsay and should be excluded for use on direct by a non-expert witness.

7. Kilby: Marcillo, O., S. Arrowsmith, P. Blom, and K. Jones

This document has not been offered into evidence or attached to testimony. The other parties and the Commission have no way of knowing how or if Ms. Kilby intends to use the document. For example, it might be used for impeachment purposes during cross-examination. The motion is premature as it relates to this document.

8. Kilby: Kenneth Hume et. Al.

This document has not been offered into evidence or attached to testimony. The other parties and the Commission have no way of knowing how or if Ms. Kilby intends to use the document. For example, it might be used for impeachment purposes during cross-examination. The motion is premature as it relates to this document.

9. John Homan: Charles R. Loesch et al.

This document has also been filed with Staff testimony. Therefore, no undue prejudice can arise from allowing Mr. Homan to rely on it, as well. While Applicant was not specific in its objection, leaving Staff to speculate as to the extent of the objection to this and other documents, one can surmise that Applicant does not believe Mr. Homan is qualified to speak to this document. SDCL 1-26-19(1) gives the Commission discretion when deciding what evidence to admit. John Homan clearly has some degree of outdoors and conservation experience, so it is appropriate for the Commission to exercise its discretion and allow Mr. Homan to rely on this document.

10. John Homan: Jill A. Shaffer and Deborah A. Buhl.

For the same reasons enumerated in the previous paragraph, Staff does not support excluding this document.

Conclusion

Staff requests the Commission issue an order excluding the portion of Ms. Kilby's testimony at issue and excluding the following:

1. Kilby 1
2. Kilby 2
3. Kilby 3
4. G. Homan E

5. G. Homan H
6. H. Stone 3
7. K. Elwood Appendix 3
8. K. Elwood Appendix 5
9. K. Elwood Appendix 6
10. Kilby Exhibit R2
11. Kilby Exhibit R4
12. Kilby Exhibit R5

Any issues of a witness's competency to testify as an expert should be left to the hearing, at which time the witness may be voir dired and a motion can be made.

Dated this 4th day of April 2019.



Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us