

**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**

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**DEUEL HARVEST WIND ENERGY
LLC’S RESPONSE TO INTERVENOR
CHRISTINA KILBY’S MOTION FOR
DENIAL
EL18-053**

I. INTRODUCTION

Deuel Harvest Wind Energy LLC (“Deuel Harvest”) submits this response to Intervenor Christina Kilby’s Motion for Denial (“Motion”). As discussed in more detail below, Ms. Kilby does not raise any issue warranting dismissal of the Deuel Harvest’s Application for the Deuel Harvest North Wind Farm (“Project”). Deuel Harvest respectfully requests that the South Dakota Public Utilities Commission (“Commission”) deny the Motion and allow full development of this record through the contested case process.¹

II. DISCUSSION

A. Ms. Kilby’s Arguments Are Best Addressed Through the Contested Case Process, Not Dismissal.

As an initial matter, many of the arguments Ms. Kilby makes raise issues concerning the merits of the Project and potential permit conditions. The potential existence of unresolved issues does not require dismissal; rather, these issues can be addressed through the contested case

¹ On March 14, 2019, Intervenor Heath Stone filed a “letter in Support of Motion for Denial.” The Stone filing did not raise any new arguments and for the same reasons discuss herein, Deuel Harvest respectfully requests that Mr. Stone’s request also be denied.

process. Indeed, that is the purpose of the contested case process.² Accordingly, there is no basis for dismissal.

B. Deuel Harvest Has Committed to Complying with All Applicable Local Requirements.

Ms. Kilby asserts that this proceeding should be dismissed because the Project does not currently have a Special Exception Permit (“SEP”) from Deuel County.³ She then alleges impropriety in the Deuel County’s prior process. These accusations are both irrelevant to the Commission’s proceeding and overstated.

First, Ms. Kilby speculates that “Deuel Harvest is unable to show that it will receive a [SEP] 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.”⁴ Ms. Kilby does not identify facts or legal support for this position. There is no dispute that the Project requires an SEP from Deuel County and that the Project will not be constructed unless and until it acquires all applicable approvals, including energy facility permits from the Commission and a County SEP. Deuel Harvest is in the process of reapplying for a SEP from Deuel County. South Dakota law does not require that the Project have a final SEP before it applies for a Commission permit (or vice versa). Commission Staff analyst Mr. Jon Thurber agrees with this assessment in his Direct Testimony:

² See ARSD 20:10:01:15 (Opportunity for hearing); SDCL 1-26-1(2) (defining “contested case”); SDCL 1-26-18 (“Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy.”).

³ The SEP issued by the Deuel County Board of Adjustment’s (“BOA”) for the Project was appealed to the South Dakota Circuit Court, Case No. 19CIV18-000019. In January 2019, the Circuit Court issued a decision invalidating two of the five BOA members’ votes on the Project’s SEP, but affirming the issuance of the SEP by the three remaining votes in favor. On a motion for reconsideration, the Court affirmed its decision to invalidate two BOA members’ votes, but found that a two-thirds majority (4 out of 5 votes) is required to approve an SEP, and therefore that the BOA’s decision granting the SEP was reversed.

⁴ See Kilby Brief in Support of Motion (“Kilby Brief”) at 2.

“there is no requirement to obtain a county permit prior to obtaining a state permit.”⁵ The Commission regularly conditions its permits upon an applicant receiving all applicable permits and approvals.⁶ Consistent with Mr. Thurber’s testimony, Deuel Harvest anticipates that a similar condition would be part of any permit issued for the Project. Dismissal is not warranted on this basis.

Second, Ms. Kilby makes various accusations regarding conflicts of interest in Deuel County. As an initial matter, details of the County process are not relevant in this proceeding. Further, many of Ms. Kilby’s accusations are irrelevant to this proceeding and not supported by the facts or the law and Deuel Harvest therefore will not unnecessarily complicate this record by addressing each of those accusations in turn. Notably, however, Ms. Kilby accuses States Attorney John Knight of having a “conflict of interest” because, according to her, he advised the County and represented private landowners in instances where Deuel Harvest was on the other side.⁷ This is a meritless allegation attacking an individual’s professional livelihood.⁸

⁵ Direct Testimony of Jon Thurber at 7.

⁶ See, e.g., *In the Matter of the Application by Prevailing Wind Park, LLC for a Permit of a Wind Energy Facility in Bon Homme County, Charles Mix County and Hutchinson County, South Dakota, for the Prevailing Wind Park Project*, Docket No. EL18-026, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry at Attachment A, Condition 1 (November 28, 2018); *In the Matter of the Application of Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility in Grant County and Codington County, South Dakota for the Dakota Range Wind Project*, Docket No. EL18-003, Final Decision and Order Granting Permit to Construct Wind Energy Facility, Notice of Entry at Attachment A, Condition 1 (July 23, 2018); *In the Matter of the Application by Crocker Wind Farm, LLC for a Permit of a Wind Energy Facility and a 345 kV Transmission Line in Clark County, South Dakota, for Crocker Wind Farm*, Docket No. EL17-055, Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry, Attachment A at Condition 1 (June 12, 2018).

⁷ See Kilby Brief at 2.

⁸ See, e.g., S.D. R. Prof'l Conduct 1.7.

C. The Project Layout Complies with Applicable Setbacks.

Ms. Kilby asserts that Project turbine locations “[v]iolate [s]etbacks.”⁹ In support of this claim, she points to statements on page 13-27 of the Application and argues that a “two-mile setback from Lake Alice is required by the Deuel County Ordinance.”¹⁰ Ms. Kilby misunderstands the Deuel County Zoning Ordinance requirements.

With respect to Lake Alice, the Deuel County Zoning Ordinance requires a two-mile setback from the Lake Alice Lake Park District: “Distance from the Lake Park District located at Lake Cochrane 3 miles, Lake Alice 2 miles;”¹¹ “a setback from ... Lake Alice of two miles from the boundary of the Lake Park district.”¹²

A copy of the Deuel County Zoning Map is attached as Attachment 1. As shown on this map, the Lake Alice Lake Park District is not the entire shoreline of Lake Alice, but only two separate portions of the southeast side of that lake. The Project complies with these setbacks. As shown on Attachment 2, the closest Project turbine to the Lake Alice Lake Park District is more than two miles away.

Ms. Kilby also calls out statements on page 13-27 of the Application describing setbacks from lakes within the Project area. Ms. Kilby and Mr. Heath Stone are correct that there are inadvertent inaccuracies. As noted by Ms. Kilby, those statements also appear in the Draft Bird and Bat Conservation Statement (“Draft BBCS”) for the Project; a BBCS is a “living” document that is periodically updated to reflect Project changes and, after operations, the results of

⁹ See Kilby Brief at 4.

¹⁰ See Kilby Brief at 4.

¹¹ Deuel County Zoning Ordinance § 1215.03(2)(d), available at https://docs.wixstatic.com/ugd/1bce45_106a631667dd4815b4868e30e76a456c.pdf.

¹² Deuel County Commissioners Meeting Minutes (March 28, 2017), available at https://docs.wixstatic.com/ugd/1bce45_088cd8a16b4247639c4f122f95b96f5c.pdf.

monitoring.¹³ The statements on page 13-27 were included from the Draft BBCS. Unfortunately, the Draft BBCS included outdated voluntary mitigation measures, and those measures are no longer applicable to the Project. Deuel Harvest regrets that the outdated Draft BBCS measures were included in the Application. These measures are not required by any law, regulation, or agency. An update to those mitigation measures is summarized below and will be addressed further in written testimony, as recommended in Mr. Thurber's testimony:¹⁴

- All turbines will be sited away from Lake Alice; the nearest turbine will be 1.19 km (0.74 mi) from the lake.
- All turbines will be sited away from Lone Tree Lake, Lake Francis, and Rush Lake; the nearest turbine will be 0.85 km (0.53 mi), 0.41 km (0.26 mi), and 0.21 (0.13 mi), respectively.
- All turbines will be sited away from the "Avoidance Areas" identified by South Dakota Game, Fish and Parks ("SDGFP").
- All turbines will be sited away from all U.S. Fish and Wildlife Service Waterfowl Protection Areas and SDGFP Game Production Areas; the nearest turbine will be 442 m (0.27 mi), and 245 m (0.15 mi) from these areas, respectively.

D. Ms. Kilby's Allegations of "Significant Errors and Deficiencies" Lack Substantive Merit.

1. Eagle Nest.

Ms. Kilby asserts that the Commission should "deny Deuel Harvest's permit at this time" because the eagle nest referenced at the public input hearing was not identified in the Application. As explained in Ms. Giampoli's Supplemental Direct Testimony, when Deuel Harvest was initially informed of the potential eagle nest, it reviewed the data it had collected regarding the Project Area. This data showed that Deuel Harvest had identified a raptor nest (not

¹³ Application Appendix O (Draft BBCS) at 5.

¹⁴ Jon Thurber Direct Testimony, at 11.

an eagle nest) in the same general area.¹⁵ At that time, it was reasonable for Deuel Harvest to conclude that the nests were one and the same. When the issue was raised again at the public input hearing, Deuel Harvest did additional diligence and is continuing to work with the resource agencies regarding this nest. As Ms. Giampoli testified, these are the types of steps that responsible developers take when resources within a project area change over time. Deuel Harvest has appropriately responded to information provided in this permitting process, and Ms. Kilby fails to identify authority for dismissing an application based on an applicant's response to new information.

2. General Description of Local Land Use Controls.

Ms. Kilby asserts that ARSD 20:10:22:19 supports dismissal of the Application, arguing that the Applicant does not address certain detailed requirements of the Deuel County Zoning Ordinance.¹⁶ This argument is contravened by the plain text of the rule, which require a “general description.” Specifically, ARSD 20:10:22:19 states, in full:

The applicant shall 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. If the proposed facility violates local land use controls, the applicant shall provide the commission with a detailed explanation of the reasons why the proposed facility should preempt the local controls. The explanation shall include a detailed description of the restrictiveness of the local controls in view of existing technology, factors of cost, economics, needs of parties, or any additional information to aid the commission in determining whether a permit may supersede or preempt a local control pursuant to SDCL 49-41B-28.¹⁷

Section 16.0 of the Application provides a “general description” of land use controls in Deuel County and, among other things, states that “Deuel Harvest has designed the Project to meet the

¹⁵ Supplemental Testimony of Andrea Giampoli, at 2-3.

¹⁶ See Kilby Brief at 6.

¹⁷ Emphasis added.

requirements contained in the Ordinance and will comply with all applicable terms and conditions of the land use permits from Deuel County.” Deuel Harvest does not ask the Commission to preempt local controls. The Application content thus complies with the rule, and Ms. Kilby’s argument should be rejected.

3. Facility Demand.

Next, Ms. Kilby argues that Deuel Harvest has not shown demand for the facility pursuant to ARSD 20:10:22:10 because the Project does not yet have an offtaker.¹⁸ Section 6.0 of the Application specifically discusses the demand for the Project. The discussion in Section 6.0 of the Application is consistent with other wind energy facility permit applications filed with the Commission.¹⁹ South Dakota law does not require a project to have an offtaker for the output of the wind farm before receiving a facility permit. The Commission has also not imposed this requirement on prior wind energy facility applications.²⁰ Accordingly, this is not a basis for dismissal.

E. Ms. Kilby’s Allegations of Invenergy’s “Past Operations” are Misleading.

¹⁸ See Kilby Brief at 6.

¹⁹ See, e.g., *In the Matter of the Application of Dakota Range III, LLC for a Permit of a Wind Energy Facility and a 345-kV Transmission Line in Grant and Roberts Counties, South Dakota*, Docket No. EL18-046, Application at Ch. 7.0; *In the Matter of the Application by Prevailing Wind Park, LLC for a Permit of a Wind Energy Facility in Bon Homme County, Charles Mix County and Hutchinson County, South Dakota, for the Prevailing Wind Park Project*, Docket No. EL18-026, Application at Ch. 6.0; *In the Matter of the Application of Dakota Range I, LLC and Dakota Range II, LLC for a Permit of a Wind Energy Facility in Grant County and Codington County, South Dakota for the Dakota Range Wind Project*, Docket No. EL18-003, Application at Ch. 7.0; *In the Matter of the Application by Crocker Wind Farm, LLC for a Permit of a Wind Energy Facility and a 345 kV Transmission Line in Clark County, South Dakota, for Crocker Wind Farm*, Docket No. EL17-055, Application at Ch. 2.0.

²⁰ See, e.g., *In the Matter of the Application of Dakota Range III, LLC for a Permit of a Wind Energy Facility and a 345-kV Transmission Line in Grant and Roberts Counties, South Dakota*, Docket No. EL18-046, Application at 2-3; *In the Matter of the Application by Crocker Wind Farm, LLC for a Permit of a Wind Energy Facility and a 345 kV Transmission Line in Clark County, South Dakota, for Crocker Wind Farm*, Docket No. EL17-055, Application at 13.

Ms. Kilby refers to court cases in in Oregon and New York and asserts that the Commission should dismiss this proceeding because of the mere existence of those cases.²¹ This argument fails for at least two reasons. First, Ms. Kilby cites no legal authority for her argument that an applicant may not seek a permit because its parent company is involved in litigation on an unrelated project.

Second, Ms. Kilby selectively quotes from the Oregon court’s decision out of context. In that case, the court was deciding the defendant’s motion to exclude expert testimony and its motion for partial summary judgment. The statements quoted by Ms. Kilby are the court’s analysis of the defendant’s motion for summary judgment, where the court was required to view the evidence “in a light most favorable to [the plaintiff.]”²² The court was not making factual findings. The case was later dismissed when the parties reached a settlement.²³

F. This Permitting Process Comports with the Due Process Clause.

Ms. Kilby asserts a violation of intervenors’ due process rights.²⁴ She fails to cite any legal authority for this position. Due process requires notice and an opportunity to be heard.²⁵ In this proceeding, intervenors have had or will have the opportunity to:

- Speak at the public input hearing;
- Submit comments;
- Participate with full party status;
- Serve discovery requests – Ms. Kilby has already served more than 80 discovery requests upon Deuel Harvest;

²¹ See Kilby Brief at 7.

²² *Williams v. Invenergy, LLC*, 2016 WL 1275990, at *20 (D. Oregon, April 28, 2016).

²³ See *Williams v. Invenergy, LLC*, Docket 2:13-CV-01391-AC (D. Oregon).

²⁴ See Kilby Brief at 8-9.

²⁵ *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 28, 891 N.W.2d 377, 387.

- Respond to discovery requests;
- Submit pre-filed testimony;
- Testify at the evidentiary hearing;
- Present witnesses at the evidentiary hearing;
- Cross-examine Deuel Harvest’s witnesses at the evidentiary hearing;
- Cross-examine Staff’s witnesses at the evidentiary hearing;
- Submit post-hearing briefing; and
- Present their arguments to the Commission.

South Dakota courts have consistently held that far less is required to satisfy the requirements of the Due Process Clause.²⁶ Accordingly, consistent with this existing South Dakota Supreme Court precedent, Deuel Harvest respectfully requests that the Commission reject this argument and deny the Motion.

III. CONCLUSION

Ms. Kilby’s Motion does not raise issues warranting dismissal of the Application. Deuel Harvest looks forward to the Commission’s contested case process and respectfully requests that the Commission deny the Motion.

²⁶ See, e.g., *Dail v. S.D. Real Estate Comm’n*, 257 N.W.2d 709, 713 (S.D. 1977) (no due process violation in revocation of real estate license where individual “was given the right to hear the witnesses against him, and to fully cross-examine them and to present his own testimony and that of his witnesses”); *Matter of Zar*, 434 N.W.2d at 601 (holding that violation of due process occurred where appellants were not allowed to present briefs and oral argument to agency in violation of statute); *Schroeder v. Dep’t of Social Servs.*, 1996 S.D. 34, ¶ 14, 545 N.W.2d 223, 229 (finding no due process violation where agency followed statutory process and held two-day hearing, and individual submitted testimony on her behalf); *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160-61 (finding no due process violation where opponents were given five minutes to speak at a county meeting and failed to “actually articulate any such allegedly suppressed information, let alone assert that the exclusion of such information prevented GCCC from participating in any meaningful way”); *Hollander v. Douglas Cnty.*, 2000 S.D. 159, ¶ 18, 620 N.W.2d 181, 186 (finding no due process violation where individual received notice of the hearing, appeared with an attorney, and had the opportunity to cross examine witnesses and present his own evidence).

Dated this 20th day of March 2019.

By */s/ Lisa Agrimonti* _____

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