STATE OF SOUTH DAKOTA) : SS COUNTY OF BON HOMME)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
GREGG AND MARSHA HUBNER, Appellants, vs. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION; PREVAILING WIND PARK, LLC; SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF; PAUL AND LISA SCHOENFELDER; SHERMAN FUERNISS; KELLI PAZOUR; KAREN JENKINS; AND CHARLES MIX COUNTY, SOUTH DAKOTA; Appellees.	04CIV18-000084 **APPELLANTS' OPENING BRIEF**

Appellant-Intervenors, Gregg Hubner and Marsha Hubner ("Hubners"), through counsel, hereby submit this appeal brief requesting the Court reverse the South Dakota Public Utilities Commission's ("Commission") decision granting Prevailing Wind Park, LLC ("PWP") a permit to build a wind farm in Bon Homme County, Charles Mix County, and Hutchinson County and remand this matter for a new evidentiary hearing.

JURISDICTIONAL STATEMENT

Hubners hereby appeal from the November 28, 2018 Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry of the South Dakota Public Utilities Commission ("Final Decision"), issuing an energy facility permit to PWP. This Court has jurisdiction over this appeal from an adverse administrative decision pursuant to SDCL 49-41B-

30 and SDCL 1-26-30. Bon Homme County is an appropriate venue for this appeal pursuant to SDCL 1-26-31.1. Hubners filed their Notice of Appeal with the Court on December 26, 2018.

STATEMENT OF ISSUES

I. Whether the Hearing Examiner erred when he struck the testimony of Richard James and Jerry Punch?

The Hearing Examiner committed reversible error when he struck the testimony of Richard James and Jerry Punch.

II. Whether the Hearing Examiner erred regarding its evidentiary rulings regarding out-of-court statements made by Roland Jurgens?

The Hearing Examiner committed reversible error regarding its evidentiary rulings on Roland Jurgens's out-of-court statements.

III. Whether the Commission erred when it refused/failed to enlarge setbacks from non-participating residences?

The Commission committed reversible error when it refused and failed to enlarge setbacks from non-participating residences.

IV. Whether the Commission erred when it refused/failed to enlarge setbacks from property lines and rights-of-way?

The Commission committed reversible error when it refused and failed to enlarge setbacks from property lines and rights-of-way.

V. Whether Intervenors' due process rights were violated due to the application of SDCL 49-41B-25's six-month deadline?

Intervenors' due process rights were violated.

STATEMENT OF THE CASE

On May 30, 2018, PWP filed an Application for an Energy Facility Permit for an up to 219.6 megawatt (MW) nameplate capacity wind energy facility to be located in Hutchinson, Bon Homme, and Charles Mix Counties, known as the Prevailing Wind Park Project ("Project"). The Commission held an evidentiary hearing October 9-12, 2018 ("Evidentiary Hearing"). On

November 20, 2018, the Commission voted unanimously to issue PWP an Energy Facility Permit subject to certain conditions and entered its written decision on November 28, 2018. (App'x Att. 1.) Hubners appeal that decision and, for the reasons stated below, request the Court remand this matter back to the Commission for another evidentiary hearing.

STATEMENT OF FACTS

PWP filed its Application with the Commission on May 30, 2018. Under SDCL 49-41B-25, the Commission was required to issue a written decision within six months of receiving PWP's Application.

After receipt of the Application, the Commission scheduled a public input hearing for July 12, 2018, in Avon, SD, during which PWP would present a brief description of the Project to those persons interested therein and said persons would be permitted to present their views, comments, and questions regarding the Application. (App'x Att. 2 (AR 001212-13).) The Commission also set the deadline for party status (i.e., intervention deadline) for July 30, 2018.

After the public input hearing, the Commission received several applications for party status and considered them at its regularly scheduled meeting on August 7, 2018. (App'x Att. 3 (AR 001928-32).) The Commission granted party status to all those who sought it at its August 7 meeting, including the Hubners. (*Id.*) At that same meeting the Commission entered a procedural schedule requiring intervenors to submit pre-filed testimony[1] and disclose all lay witnesses by September 10, 2018, and scheduling the Evidentiary Hearing for October 9-12, 2018. (*Id.*)

[1] The Commission requires pre-filed testimony for any expert witness.

Striking of Expert Testimony of Richard James and Jerry Punch

Hubners submitted pre-filed testimony for three expert witnesses: Richard James, Dr. Jerry Punch, and Mariana Alves-Pereira (Alves-Pereira's testimony was later withdrawn). (App'x Atts. 7, 8, 9, 10.) James is an acoustician, and Punch is an audiologist. In their pre-filed testimony and in their live testimony, James and Punch provided various opinions concerning how the sound generated by the Project could affect those persons living in and around the Project footprint and also how the sound should be regulated by the Commission. (*Id.*; App'x Att. 12.) For both James and Punch, the Hearing Examiner admitted their pre-filed testimony in its entirety and also permitted them to offer various expert opinions during direct examination. Then, during cross examination, PWP moved to strike any testimony provided by James and Punch concerning health effects. The Hearing Examiner granted PWP's motion to strike, concluding that both James and Punch lacked the qualifications to offer expert opinions regarding health effects and struck significant portions of their pre-filed and live testimony.[2] (App'x Att. 4 (Evid. HT at 834, 911).)

Out-of-Court Statements of Roland Jurgens

During the Evidentiary Hearing, intervenors attempted to illicit testimony regarding out-of-court statements made by Roland Jurgens. Jurgens was very much involved with the Project. In the Project's early stages, Jurgens approached people living in the project area, tried to convince people to sign up for the project, negotiated with potential participants, and made various representations while doing so. (App'x Att. 4 (Evid. HT at 954).) Jurgens also

[2] The excluded portions of Richard James's prefiled testimony is found at AR 018018 – 018030, which is Attachment 7 to the Appendix. The excluded portions of Dr. Jerry Punch's prefiled testimony is found at AR 018031 – 018045, which is Attachment 9 to the Appendix. The excluded portions of live testimony is found at AR 018078 – 018110, which is attachment 12 to the Appendix.

communicated with county commissioners and other entities on behalf of the Project, purporting to be the project manager and developer for the Project. (App'x Att. 4 (Evid. HT at 676-77); AR 000381-82.) As recently as January 16, 2019, the Yankton Daily newspaper quoted Jurgens as the "project manager" for an assortment of information about the Project. (App'x Att. 15.) Despite Jurgens's involvement with the Project, the Hearing Examiner precluded any out-of-court statements made by Jurgens to be allowed during the Evidentiary Hearing, ruling that such statements are hearsay.

Setbacks from Non-Participating Residences and from Property Lines and Rights-of-Way

With any wind project, a major point of contention in this proceeding dealt with setbacks. Two different setbacks were at issue. First, there was the setback that existed for non-participating residences, which is the closest distance in which a wind turbine can be built to the residence of a non-participating landowner. Second, there was the setback that existed for property lines and rights-of-way, which is the closest distance in which a wind turbine can be built to the property line or right-of-way.

As noted above, the Project is to be built in three counties—Bon Homme, Hutchinson, and Charles Mix. Hutchinson County and Charles Mix County do not have zoning ordinances specific to wind farms and thus do not have setbacks concerning wind turbines. (AR 000067.) Bon Homme County, on the other hand, has wind-specific zoning ordinances. In adopting its wind ordinances, Bon Homme County relied heavily on what it called the "state standard," which was merely a model ordinance prepared by the Commission several years ago.[3] (App'x Att. 4 (Evid. HT at 669-689); App'x Att. 18 (AR 017497-017505).) Bon Homme County's setback for non-participating residences is 1,000 feet, and its setback for property lines and

[3] Since then, the Commission has represented that said model ordinance is no longer valuable and outdated. (App'x Att. 17.)

rights-of-way is 500 feet or 1.1 times the system height, whichever is greater. (AR 000067.) Further, SDCL 43-13-24 provides in relevant part: "Each wind turbine tower of a large wind energy system shall be set back at least five hundred feet or 1.1 times the height of the tower, which distance is greater, from any surrounding property line."

Intervenors advocated for increased setbacks from both non-participating residences and from property lines and rights-of-way. (*See, e.g.*, App'x Att. 6 (AR 18266-86.) As support for increased setbacks, intervenors relied on, among other things, research articles and testimony from both expert and lay witnesses. (*Id.*)

During deliberations, commissioners recognized Bon Homme County's setbacks and the state statute concerning setbacks are outdated and insufficient. (App'x Att. 5 (11-20-18 HT at 97).) However, commissioners refused to entertain a motion to enlarge setbacks due to the belief that they lacked the legal authority to enlarge the setbacks. (*Id.* (11-20-18 HT at 94-95; 98-99).) Ultimately, the Commission granted PWP a permit subject to certain conditions. (App'x Att. 1 (Final Decision).)

For the sake of brevity, additional pertinent facts are discussed within the Argument section below.

STANDARD OF REVIEW

The Commission's factual findings and credibility determinations are reviewed under the clearly erroneous standard. *In re Otter Trail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602. Conclusions of law, however, are reviewed de novo. *Id.* Mixed questions of law and fact are also fully reviewable. *Kuhle v. Lecy Chiropractic*, 2006 S.D. 16, ¶ 16, 711 N.W.2d 244, 247.

Evidentiary issues are subject to the abuse of discretion standard of review. *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10. "Furthermore, an evidentiary ruling will not be overturned unless error is demonstrated and shown to be prejudicial error." *Id.* "Error is prejudicial when, in all probability it produced some effect upon the final result and affected some rights of the party assigning it." *Id.*

ARGUMENT

I. The Hearing Examiner Erred When He Excluded Expert Testimony of Richard James and Jerry Punch.

The Hearing Examiner excluded portions of the pre-filed testimony and portions of the live testimony of Richard James and Dr. Jerry Punch. Specifically, the Hearing Examiner determined that both Punch and Mr. James lacked the qualifications to offer expert opinions regarding "health effects or rendering any expert opinion regarding medical causation[.]" (App'x Att. 4 (Evid. HT at 834, 911).) The Commission's Final Decision, based upon the Hearing Examiner's ruling, stated as follows:

> Mr. James and Dr. Punch were precluded from testifying regarding health effects because neither has the education, training, nor experience to provide expert testimony on health effects. Neither Mr. James nor Dr. Punch is a medical doctor, nor did either of them perform medical evaluations on any of the people that provided complaints to them. Further, neither Mr. James nor Dr. Punch provided credible literature supporting their assertions regarding health-related effects.

(App'x Att. 1 (Final Decision ¶ 70).) Because James and Punch are both qualified to give opinions regarding the health effects caused by sound, the Hearing Examiner erred when he excluded those portions of both Punch and James's testimony and his rulings should be reversed by this Court.

The standard of review for the admissibility of expert testimony is the abuse of discretion standard. *Nickels v. Schild*, 2000 S.D. 659, ¶ 7, 617 N.W.2d 659, 661 (citation omitted). The trial court has broad discretion concerning the admissibility of expert testimony. *Id.* The trial court's determination may be reversed if there is a clear abuse of discretion. *Id.*

In an administrative proceeding, numerous courts have recognized that the technical application of the rules of evidence is not required. *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 29, 802 N.W.2d 905, 917 (citations omitted). The rules only need to be applied in a fair and even-handed manner. *Id.*

The admission of expert opinions is governed by SDCL 19-19-702. A witness is qualified to testify as an expert by knowledge, skill, experience, training, or education. SDCL 19-19-702. Under this statute, the hearing examiner must decide the threshold question of whether the expert opinion will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 21, 769 N.W.2d 440, 449. The hearing examiner fulfills "a gatekeeping function, ensuring that the opinion meets the prerequisites of relevance and reliability before admission[;]" it is not a fact-finding requirement. *Garland v. Rossknecht*, 2001 S.D. 42, ¶ 10, 624 N.W.2d 700, 702 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993)). To be reliable, the expert opinion must be based on sound methods and scientifically valid procedures. *Wells v. Howe Heating & Plumbing, Inc.*, 2004 S.D. 37, ¶ 16, 677 N.W.2d 586, 592.

A. Richard James Is Qualified to Give Opinions that Sound Emitted by Wind Turbines Has the Ability to Cause Negative Health Effects.

James is an acoustician who has been working in the field of measurement noise and the impact of noise on people since the late 1960s. (App'x Att. 4 (Evid. HT 792-93).) He has a degree in Mechanical Engineering with an emphasis on noise control and acoustics. (App'x Att. 7 (Ex. I-1).) His academic credentials include working as an adjunct instructor at Michigan State for nearly three decades in the Speech and Communication Science Department and five years as an adjunct professor for the Department of Communication Disorders at Central Michigan University. (*Id.*)

James previously consulted as a noise subject-matter expert for corporations such as General Motors, Goodyear, and Anheuser-Busch, advising on noise complaints from employees. (Evid. HT at 793.) His professional experience has focused on how to design and operate projects so at to minimize the adverse impacts on a community and on workers. (*Id.*)

In 2006, James began studying sound produced by wind turbines. He has over ten years of experience studying sound emitted by wind turbines and the resulting human effects, including complaints of sleep disturbance, dizziness, tinnitus, headaches, pressure, and odd sensations. (*Id.* at 794.) He has provided written and oral testimony in approximately thirty cases involving wind turbine noise. (App'x Att. 8 (Ex. I-1(a)).) He has also authored or co-authored four different papers covering wind turbine noise and the risk of adverse health effects from both audible and inaudible sound emissions. (*Id.*) One such paper was introduced as an exhibit during the Evidentiary Hearing. (App'x Att. 11 (Ex. I-2(b)).) Therein, James and Dr. Punch reference a plethora of studies and articles that support the notion that sound emitted by wind turbines can cause adverse health effects, primarily sleep disturbance, headaches, dizziness, vertigo, and ear pressure. (*Id.*) James and Dr. Punch also relied on articles published by the

World Health Organization. (Evid. Hearing Exs. I-31 and I-32 (recognizing low-frequency noise can disturb rest and sleep even at low sound pressure levels and that audible noise over 30 dB can affect sleep; and that disturbed sleep can lead to fatigue, lower cognitive performance, depression, viral illness, diabetes, etc.).)

James has impeccable credentials and has been qualified to testify before courts regarding health effects caused by wind turbine noise. For example, after a *Daubert* hearing in circuit court in Michigan, James provided opinions on wind turbine noise and its impacts on people. (App'x Att. 13 (Daubert Hearing Transcript).) The Court specifically found James was qualified to render opinions that wind turbines cause health effects. (*Id.* at pp. 90-94.) In sum, James's knowledge, skill, experience, education and training qualify him to render opinions regarding sound generated by wind turbines and its effects on humans.

Nevertheless, the Hearing Examiner struck portions of James's testimony regarding the health effects noise generated by wind turbines may cause. Contrary to PWP's contentions and the findings of the Hearing Examiner, James was not offering medical opinions when discussing general health effects suffered by those near wind farms. Nor did he provide any medical diagnosis. Rather, he was providing an opinion that the sound generated by wind turbines may cause health effects. That sound affects humans is the exact type of study and research James has done for over forty years. A significant body of scientific literature, including references from the World Health Organization, support James's opinions. Simply stated, based on his education, experience, and training, James is qualified to give opinions that sound produced by wind turbines may cause adverse health effects. The Hearing Examiner's contrary conclusion is error and should be reversed.

B. Jerry Punch Is Qualified to Give Opinions that Sound Emitted by Wind Turbines Has the Ability to Cause Negative Health Effects.

Like James, Dr. Punch has a wealth of knowledge, skill, training, education, and experience qualifying him as an expert to offer opinions in this matter, specifically on the issue of health effects. Punch is an audiologist who has studied and written about the large body of literature that has developed over the last several years concerning the relationship between adverse health effects and wind turbine noise. Punch is uniquely qualified to speak to the health impacts of sound. The Hearing Examiner's contrary conclusion is error and should be reversed.

Punch's credentials are impeccable. (App'x Att. 10 (Ex. I-2(a)).) He holds a Ph.D. in audiology from Northwestern University and has held a number of professional positions in audiology over the past fifty years. (App'x Att. 4 (Evid. HT at 882).) He has extensive experience as a clinical audiologist, clinical supervisor, researcher, teacher, and administrator in academic, professional association, hospital, and industrial settings. (App'x Att. 9 (Ex. I-2 at Lines 28-30).) He is a Professor Emeritus in the Department of Communicative Sciences and Disorders at Michigan State University. (*Id.* at Lines 2-3.)

As an audiologist, Punch is knowledgeable of the anatomy and physiology of the ear, sound generation, propagation, and perception, and how the ear processes sound. (*Id.* at Lines 18-20.) He has knowledge of research design and interpretation of research findings. (*Id.*) All of this background has led to an understanding of the relationship between noise and the impacts it has on human health. (*Id.*)

Specifically, with regard to wind turbine noise and health effects, Punch has a wealth of experience, literature, and research. (*Id.* at Lines 60-81; *see also* Ex. I-2(a).) He co-authored a reviewed article on wind turbine noise in *Audiology Today*, served as Chairperson of the Wind and Health Technical Work Group at the invitation of the Michigan Department of Energy,

presented comments at public hearings for zoning boards and commissions in several states, and published various articles with James. (*Id.*) He has conducted ongoing reviews of scientific literature on the health effects of wind turbine noise, and co-authored, with Mr. James, an extensive peer-reviewed article in 2016 addressing the very issues of health effects and wind turbine noise. (*Id.*; App'x Att. 11 (Ex. I-2(b)).) This article covered forty years of evidence demonstrating the health effects posed by wind turbines. (*Id.*) Like James, Punch has been qualified to testify before courts as an expert audiologist and has addressed the very issues that the Hearing Examiner determined he could not discuss here. (App'x Att. 13 (Daubert Hearing Transcript at pp. 168-171.)

However, the Hearing Examiner struck any opinions Punch offered related to health effects caused by the sound generated from wind turbines. Punch has the experience, education, training, and knowledge to offer the exact opinions that were precluded here. Furthermore, his opinions were supported with a plethora of literature spanning decades. Audiologists, like Punch, have the educational background to understand the relationship between sound and the human body, specifically the ear. It is this relationship audiologists study. Put simply, the health effects of wind turbines is right in Punch's wheelhouse. Excluding his testimony on health effects makes little sense when viewed through the lens of his extensive education, experience, training, and study of the specific issue at hand. The Hearing Examiner's decision to exclude Punch's testimony on the issue of health effects was error and should be reversed.

C. The Hearing Examiner's Reliance on an Oregon Court Decision Was Error.

The basis for the Hearing Examiner's decision to exclude portions of Punch and James's testimony was a federal district court case from Oregon—*Williams v. Invenergy, LLC*, 2016 WL 1725990 (D. Or. Apr. 28, 2016). However, the Hearing Examiner incorrectly applied the

decision. The decision does not form a basis for excluding the opinions of Punch and James in this case.

To start, the Court in *Williams* specifically held that Punch was qualified to offer an opinion that wind turbines produce audible noise which may disturb individuals and interfere with sleep. *Id.* at *17. Stated differently, Punch was qualified to offer an opinion that wind turbine noise can cause health effects.

Moreover, *Williams* made clear that if the foundational literature supported the causation opinions it would be admissible under *Daubert*. *Id.* at *15 ("Therefore, for Punch's causation testimony to be admissible under *Daubert*, he must support his causation opinion with reference to foundational literature which establishes the causal relationship through the application of 'scientific knowledge.'"). Punch and James have responded to this issue by writing and publishing a peer-reviewed literature review of research spanning forty years showing wind turbines cause risks of adverse health effects from both audible and inaudible sound emissions. (App'x Att. 11 (Ex. I-2(b)).) This published literature review, entitled "Wind turbine noise and human health: a four-decade history of evidence that wind turbines pose risks," was published in the Journal of Hearing Health and Technology Matters on October 4, 2016. (*Id.*) Therein, they provide substantial foundational support for their opinions based upon scientific literature.

Therefore, *Williams* is inapposite here. James and Punch's paper provides the necessary foundation for them to both opine regarding health effects caused by the sound generated by wind turbines.

Further, Punch and James have been qualified to testify before other state administrative agencies. In *Application of Cassadaga Wind LLC for A Certificate of Envtl. Compatibility & Pub. Need Pursuant to Article 10 to Construct A Wind Energy Facility.*, 14-F-0490, 2017 WL

3149389, at *2-3 (June 29, 2017), for example, the applicant relied on *Williams* when it filed a motion to exclude James and Punch's testimony, arguing that neither James nor Punch had the requisite expertise to testify about potential health impacts from wind turbines because neither of them had medical degrees. The New York Public Service Commission, however, denied the applicant's motion and concluded that cross-examination rather than exclusion would be more appropriate for determining whether James and Punch possessed the relevant experience to testify about adverse health effects.

In *Wis. Realtors Ass'n v. Pub. Serv. Com'n of Wis.*, 867 N.W.2d 364 (Wis. 2015) (dissenting opinion), the Chief Justice of the Wisconsin Supreme Court cited to James and Punch's article, "Negative Health Effects of Noise from Industrial Wind Turbines: Some Background," to support his conclusion that "it is well known that wind turbines may be harmful to the health of those who live close to them and are sensitive to noise and shadow flicker they produce." *Id.* at 382.

In sum, the Hearing Examiner abused his discretion by striking testimony from Punch and James. The ruling should be reversed and this matter remanded for a new evidentiary hearing.

II. The Hearing Examiner Erred by Refusing to Admit Out-of-Court Statements Made by Roland Jurgens.

During the Evidentiary Hearing, intervenors attempted to provide and illicit testimony concerning out-of-court statements made by Roland Jurgens. Such attempts were met with hearsay objections from PWP's counsel. The Hearing Examiner sustained the hearsay objections and refused to admit out-of-court statements made by Jurgens. Because such statements are not hearsay under SDCL 19-19-801(d)(2), the Hearing Examiner erred by refusing to admit out-of-court statements made by Jurgens.

In her direct testimony, intervenor Karen Jenkins attempted to testify regarding representations made to her by Jurgens. (App'x Att. 4 (Evid. HT at 616-624).) It is apparent from her testimony that Jenkins was going to provide testimony showing Jurgens lied to her and deceived her. (Evid. HT at 621.) The Hearing Examiner, however, refused to allow Ms. Jenkins to testify about what Jurgens told her. (Evid. HT at 617-619; 624.)

Moreover, Exhibit I-24 (App'x Att. 14), which was an email sent by Jurgens, was moved for admission but refused by the Hearing Examiner. (Evid. HT at 683.) Specifically, in the email, Jurgens states:

> The 1,500 feet from any habitable structure is fine but if you are really worried about safety, I would use the ice throw formula plus 10% instead; Max Throw = 1.5(2R+H). Because it is possible that 1500 feet is not enough in the future if turbine blades get larger as they have been. . . .
>
> The 45 dB participant, 35 dB non-participant noise restrain is absolutely the best way to protect non-participants.

(App'x Att. 14 (AR 010038).) The Hearing Examiner refused to admit Exhibit I-24 based on a hearsay objection.

Because Jurgens's statements are not hearsay under SDCL 19-19-801(d)(2), the Hearing Examiner erred by refusing to admit such statements. SDCL 19-19-801(d)(2) provides:

> A statement that meets the following conditions is not hearsay:
>
> . . .
>
> (2) An opposing party's statement. The statement is offered against an opposing party and:
>
> (A) Was made by the party in an individual or representative capacity;
>
> (B) Is one the party manifested that it adopted or believed to be true;
>
> (C) Was made by a person whom the party authorized to make a statement on the subject;

> (D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
>
> (E) Was made by the party's coconspirator during and in furtherance of the conspiracy.
>
> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

It is evident Jurgens's statements were going to be offered against an opposing party, so the only question is whether the statements fall within any of the subsections (A) through (E). The following facts answer that question:

- Bon Homme County Commissioner Soukup testified that Jurgens is the project manager and developer for the wind farm. (Evid. HT at 676-77.)
- The Yankton Daily newspaper, as recently as January 16, 2019, quoted Jurgens as the "project manager" for an assortment of information about the project. (App'x Att. 15.)
- Jurgens approached people living in the project area, tried to convince people to sign up for the project, negotiated with potential participants, and made various representations while doing so. (Evid. HT at 954.)
- Peter Pawlowski confirmed sPower spoke with Jurgens during its due diligence process where sPower was attempting to learn what was said to landowners, what promises had been made, and to understand what obligations sPower was stepping into. (Evid. HT at 226-227.)
- In its Application, PWP relied upon correspondence between Jurgens and Western EcoSystems Technology, Inc. regarding environmental survey efforts. (AR 000381-82.)

Given these facts, Jurgens has made various statements in the past on behalf of the Project and continues to speak for the Project. Such statements were made in a representative capacity, were made by a person whom was authorized to make the statements, and were made by an agent on a matter within the scope of that relationship and while it existed. As such, statements made by Jurgens related to the Project are party admissions under SDCL 19-19-801(d)(2) and are not hearsay. Therefore, the Hearing Examiner erred when he refused to permit

witnesses to testify regarding Jurgens's out-of-court statements and refused to admit Exhibit I-24.

Moreover, the Hearing Examiner's refusal to admit Jurgens's out-of-court statements produced some effect upon the final result and affected some rights of the party assigning it. Jurgens's out-of-court statements were very damaging admissions. For example, his statement that a "35 dB nonparticipant noise restrain is absolutely the best way to protect nonparticipants" totally cut against PWP's position throughout the process advocating for a 45 dB limit on non-participating residences. Further, his statement that if the county was "really worried about safety," it would impose a setback of the "ice throw formula plus 10%" cuts against PWP's position regarding setbacks from both residences and property lines/rights of way. Applying Jurgens's ice throw formula[4] plus 10% would yield a setback distance (~1,345 ft.) greater than that advocated for by PWP to the Commission and that which was ultimately adopted by the Commission. And lastly, if Jurgens was lying to and deceiving people during negotiations pertaining to the Project, that information would be highly relevant to the Commission. *See, e.g.,* SDCL 49-41B-33 (allowing for revocation of a permit for "any misstatement of a material fact in the application or in accompanying statements or studies required of the applicant"). In sum, the Hearing Examiner's error was prejudicial and reversal and remand is appropriate.

III. The Commission Erred by Refusing/Failing to Enlarge Setbacks from Non-Participating Residences Due to Its Mistaken Belief that It Lacked the Authority to Do So.

A major issue in this matter related to setbacks from non-participating residences. In past dockets, the Commission has taken the position that counties, through zoning ordinances, determine setback distances from non-participating residences and that the Commission cannot

[4] The ice throw formula Jurgens referenced is 1.5(hub height + rotor diameter).

depart from a county's adopted setback. And that is what happened here—the Commission refused to adopt setbacks from non-participating residences that differed from county setbacks. The Commission's position that it cannot differ from county setbacks is incorrect and an error of law. *See In re Otter Trail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d at 602 (noting conclusions of law are reviewed de novo).

The Project is to be built in three counties—Bon Homme, Hutchinson, and Charles Mix. Hutchinson County and Charles Mix County do not have zoning ordinances specific to wind farms and thus do not have setbacks for non-participating residences. (AR 000067.) Bon Homme County's setback for non-participating residences is 1,000 feet. (*Id.*)

During the Evidentiary Hearing and after, intervenors argued for increased setbacks for non-participating residences. (*See, e.g.*, App'x Att. 6 (AR 18266-86).) During deliberations, Commissioners Hanson and Fiegen acknowledged that the counties' setbacks are insufficient and outdated. Commissioner Hanson explicitly stated: "I don't think that the setbacks by the counties are sufficient." (App'x Att. 5 (11-20-18 HT at 94); *see also* 11-20-18 HT at 92 ("I wouldn't want to have [a wind turbine] within 2 or 3,000 feet of my property.").) Commissioner Fiegen also recognized Bon Homme County's lack of expertise when it comes to determining appropriate setbacks: "And what I have learned, especially through this evidentiary hearing, that the technical expertise for counties to decide on setbacks may be limited." (11-20-18 HT at 66.) Nevertheless, the Commission refused to entertain the notion of increasing setbacks for non-participating residences, believing it did not have the authority to do so:

> The big problem that we have is that we have counties making decisions on setbacks. And we've always said that the closer government is to the people, the better that government will be. But for a county not to have any regulations and then to have—

> There's the challenge for us from the standpoint of different counties having difference setbacks. And, frankly, I don't think that the setbacks by the counties are sufficient. I think that they should be greater than what they are. But that's not for me to decide. That's for the county commissioners to decide.

(11-20-18 HT at 94-95.) *See also* 11-20-18 HT at 98-99 (Commissioner Hanson was prepared to make motions to increase setbacks, noting "Because I believe that we have had testimony that provides us with support and evidence from a standpoint of being able to require further setbacks." However, after conferring with counsel he chose not to make the motions because he thought it would get reversed on appeal.).[5]

The question for this Court to determine is whether the Commission has the legal authority to impose larger setbacks than those imposed by counties. The answer to that question is undoubtedly "yes."

SDCL 49-41B-25 provides: "Within six months of receipt of the initial application for a permit for the construction of a wind energy facility, the commission shall make complete findings, and render a decision, regarding whether a permit should be granted, denied, or granted upon such terms, conditions, or modifications of the construction, operation, or maintenance **as the commission deems appropriate**." (emphasis added). The plain language demonstrates the Commission can impose conditions it deems appropriate, regardless of whether a condition is different from a condition imposed by a county.

Furthermore, imposing a condition that required *larger* setbacks from non-participating residences would not even conflict with a county scheme. The only county that has setbacks (i.e., Bon Homme County) imposes a 1,000 feet setback for non-participating residences. Had

[5] In prior proceedings, all three Commissioners have indicated they are required to defer to counties on the issue of setbacks. *See, e.g.*, EL18-003 – In the Matter of the Application by Dakota Range I, LLC, July 10, 2018 Commission Meeting Audio, at 33:30; 1:38:50; 1:40:40; and 1:44:00, located at https://puc.sd.gov/commission/media/2018/puc07102018pm.mp3 .

the Commission imposed, for example, a 1-mile setback, the project would necessarily be forced to comply with Bon Homme County's scheme. So there would not even be a conflict with the county scheme.

From a practical standpoint, it makes little sense for the Commission to blindly defer to counties on the issue of setbacks. To start, Commissioner Fiegen recognized Bon Homme County's lack of expertise when it comes to determining appropriate setbacks: "And what I have learned, especially through this evidentiary hearing, that the technical expertise for counties to decide on setbacks may be limited." (App'x Att. 5 (11-20-18 HT at 66).) Indeed, when asked to explain details of Bon Homme County's wind ordinances, Bon Homme County Commissioner Soukup candidly admitted: "This is over my intelligence." (App'x Att. 4 (Evid. HT at 687).)

Moreover, when adopting its 1,000-feet setback for non-participating residences, Bon Homme County actually deferred to what it called the "state standard." (Evid. HT 959.) There is no "state standard" for setbacks from non-participating residences. What Bon Homme County actually deferred to and called the "state standard" was a model ordinance prepared *by the Commission* years ago. (Evid. HT at 673; App'x Att. 18 (Ex. I-23).) Since then, the Commission has taken the position that said model ordinance is no longer valuable and outdated. (App'x Att. 17.) So in reality, the Commission is deferring to a setback it created years ago and which the Commission has represented is no longer valuable and outdated. Thus, deferring to Bon Homme County's setback made little sense.

In sum, the Commission has the legal authority to impose larger setbacks for non-participating residences than what a county imposes. The Commission's mistaken belief that it lacked such authority is an error of law and grounds for reversal. *See* SDCL 1-26-36 (recognizing an error of law as grounds for reversal).

IV. The Commission Erred by Refusing/Failing to Enlarge Setbacks from Property Lines and Rights-of-Way Due to Its Mistaken Belief that It Lacked the Authority to Do So.

In addition to setbacks from non-participating residences, setbacks from property lines and rights-of-way were also a major issue in this matter. Like with setbacks from non-participating residences, the Commission refused to enlarge setbacks from property lines and rights-of-way due to its mistaken belief that it lacked the authority to do so.

Again, Charles Mix County and Hutchinson County do not have zoning ordinances specific to wind facilities and thus do not have setbacks pertaining to property lines or rights-of-way. Bon Homme County's setback from property lines and rights-of-way is 500 feet or 1.1 times the system height, whichever is greater. (AR 000067.) SDCL 43-13-24 provides in relevant part: "Each wind turbine tower of a large wind energy system shall be set back at least five hundred feet or 1.1 times the height of the tower, which distance is greater, from any surrounding property line."

Intervenors advocated for a 1,500 feet setback from property lines and rights-of-way. (*See, e.g.*, App'x Att. 6 (AR 18266-86.) In support of this, intervenors relied, in part, on a research article demonstrating turbine malfunctions could cause turbine debris to be thrown up to 6,562 feet from the turbine and that ice could be thrown 1,969 feet from a turbine. (App'x Att. 16 (AR 015944-59 (Ex. A28)).) Intervenors also provided testimony from a witness who had a turbine malfunction on his own property that resulted in turbine debris being thrown approximately 1,320 feet (1/4 of a mile) from the turbine. (Evid. HT at 1067.) PUC Staff even recognized that a 1,500 feet setback from property lines is reasonable if ice throw is concern. (11-20-18 HT at 25.)

During deliberations, commissioners recognized the setbacks were outdated and insufficient. In fact, Commissioner Fiegen specifically stated, "I believe our statute is outdated on setbacks." (11-20-18 HT at 97.) But the Commission refused to even consider a change to setbacks for fear that it lacked the legal authority to impose larger setbacks. (11-20-18 HT at 99.) For the same reasons stated in the above section, the Commission's mistaken belief that it lacked such authority is an error of law and grounds for reversal. *See* SDCL 1-26-36 (recognizing an error of law as grounds for reversal).

V. SDCL 49-41B-25 Violated Intervenors' Due Process Rights.

SDCL 49-41B-25 requires the Commission to issue a written decision within six months of receiving an application for a wind energy facility. All other energy conversion and transmission facilities, on the other hand, have a twelve-month timeline by which the Commission can render its decision. SDCL 49-41B-24. SDCL 49-41B-25's six-month deadline, as applied, violated Intervenors' due process rights, because it created an unacceptably uneven playing field between PWP and intervenors.

A "fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Carey v. Piphus*, 435 U.S. 247, 262 (1978) (One "purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly [.]"). Determining what process is due in a particular case requires consideration of (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguard; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

substitute procedural requirement would entail. *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 18, 802 N.W.2d 905, 912.

PWP submitted its application along with some pre-filed testimony on May 30, 2018.[6] (AR 000015-001210.) As the applicant, PWP had an unlimited amount of time to develop and prepare its application and witnesses (i.e., its case). By choosing when to submit its application, PWP decides when the six-month clock begins to run. As seen from the record, PWP's case consisted of over 1,000 pages of application materials and also included pre-filed testimony (the majority of which is expert testimony) from nine witnesses—James Damon, Bridget Canty, Keith Thorstad, Aaron Anderson, Chris Howell, Dr. Mark Roberts, Michael MaRous, Daniel Pardo, and Peter Pawlowski.

Intervenors, on the other hand, were at a major disadvantage when it came to preparing and developing their case. After receiving PWP's application, the Commission ordered that a public input hearing would take place on July 12, 2018, and that applications for party status had to be received by the Commission on or before July 30, 2018. (App'x Att. 2 (AR 001212-13).) The Commission granted party status to all those who sought it at its August 7, 2018 meeting. (App'x Att. 3.) At that same meeting, the Commission entered a procedural schedule requiring intervenors to submit pre-filed testimony[7] and disclose all lay witnesses by September 10, 2018, and scheduling the Evidentiary Hearing for October 9-12, 2018.[8] (*Id.*) In other words,

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[6] PWP submitted additional pre-filed testimony on August 10, 2018. (AR 001960-3286.)

[7] The Commission required pre-filed testimony for any expert witness.

[8] Intervenors are not criticizing the Commission for the procedural schedule it adopted. It is evident from prior proceedings and this proceeding that, given the choice, the Commission would prefer more time be permitted to review applications. But SDCL 49-41B-25's six-month deadline simply makes that an impossibility.

intervenors had just 33 days between the day they were granted party status and their witness-disclosure deadline to locate and prepare witnesses, both lay and expert. They had just two months between the day they were granted party status and the Evidentiary Hearing to prepare and develop an entire case. Given the issues involved in the proceeding,[9] intervenors did not have sufficient time to meaningfully be heard on all issues.

Importantly, the Commission agrees. Commissioner Hanson testified before the Legislature this year asking that the six-month deadline be changed to a twelve-month deadline. He testified as follows:

> Senate Bill 15 changes the duration from 6 months to 12 months for the maximum amount of time allowed for a wind farm siting docket. . . . **The purpose of this bill is to give the citizens of South Dakota the opportunity for due process.**
>
> **Our citizens are being forced out of the siting process**. . . . **The PUC wants to ensure that due process is adequately afforded to all participants and that a hearing can take place without depriving anyone of the opportunity to properly prepare and present their case. All parties must be treated fairly.**
>
> Permitting is a complex and often controversial process. **The need to change the time line is real. It is a major hurdle to due process.** The PUC evidentiary hearing process necessitates public input meetings, interventions, discovery, motions, data requests, settlement discussions, offers and counter offers, subpoenas, prefiled testimony, rebuttal testimony, briefs, oral arguments, a variety of expert witnesses and lay witnesses, local government officials who are cross-examined by all of the parties, plus preparing an issue and order and decision. These are complex hearings. Evidence is presented regarding sound studies, property valuations, environmental considerations, shadow flicker studies, setbacks, wildlife studies, and ice throw. This should not be limited to a 6-month period. . . .
>
> **The 6-month deadline gives a significant advantage to the applicant and places a significant disadvantage on the citizens of South Dakota who are affected by the wind farm and wish to be heard by their government. That is not fair to our citizens.** When an applicant presents their application to the PUC, they are thoroughly versed and ready to go. Their attorneys, expert witnesses, and

[9] With any industrial wind farm, there are a number of scientific and technical issues at play. Reviewing the application and the pre-filed testimony of all witnesses demonstrates the complexity of the issues involved in this proceeding.

> evidence are ready to present. Affected citizens may only have, as I said, 5 to 8 days to decide if they wish to become an intervenor and file the proper paperwork, and they need to find attorneys then who can carry this type of a docket.

(App'x Att. 19 (emphasis added).)

1. The private interest affected by the official action

The official action here is governmental approval to build and operate a wind farm. Specifically, the Commission authorized PWP to erect up to 61 wind turbines standing nearly 600 feet tall and to operate the wind farm for 30 years. (Final Decision ¶ 17.)

The private interest of the Hubners (and other intervenors) is that they now must live in an industrial wind farm. That means having to deal with, among other things, the noise emitted by the wind farm, the aesthetics of the wind farm, the shadow-flicker, and the risk of ice-throw and debris from turbine malfunction. There are also concerns regarding decreased property values. The Hubners, like many others living in the area, chose to reside where they do because of the area's calm and quiet rural landscape. Because of the Commission's approval of the permit, that landscape will be changed substantially for the worse.

Indeed, witnesses testified during the hearing regarding their experiences living near wind farms. (App'x Att. 6 (AR 018272-75).) Witnesses described how they were unable to enjoy their properties once the wind farm was built and operating. The noise generated by the wind farms caused sleep loss, which leads to headaches, fatigue, and loss of concentration. One witness described having to abandon his family farmhouse where he had lived for about 45 years. This is just an example of what is at stake for the Hubners and other intervenors who will be forced to live in this industrial wind farm. Put simply, the private interest affected by the official action is great.

2. The risk of an erroneous deprivation of such interest through the procedures used and the value of additional procedural safeguards

It is evident an erroneous deprivation occurred here, as intervenors were limited as to what evidence they could get into the record having only two months to prepare and develop their case. Commissioner Hanson acknowledged the same in his testimony to the Legislature. *See supra.* Further, Commissioner Fiegen stated: "I absolutely believe six months is too short a time frame to weigh such strong conditions and bring the evidence that my fellow Commissioners talked about that we need." (App'x Att. 5 (11-20-18 HT at 97).) PUC Staff even expressed concerns regarding its own ability to review the application and put necessary evidence into the record: "In closing, we are bound by what's in the record and what's in the record is limited to what we could get into the record in four months. . . ." (11-20-18 HT at 25-26.) And PUC Staff had even more time than intervenors.

The value of additional procedural safeguards (i.e., more time for intervenors and the PUC Staff to evaluate the application and prepare their cases) is also evident—it would lead to a fairer hearing process and a more thoroughly vetted application. It would also potentially lead to a more streamlined evidentiary hearing, given the parties would have more time to focus the issues.

3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

The Government's interest is actually better served by allowing more time. As stated above, more time would lead to a more thoroughly vetted application. That's likely a reason why the Commission believes a twelve-month deadline is necessary. Moreover, lengthening the process does not create any fiscal or administrative burdens for the Commission. If anything, it

reduces fiscal and administrative burdens, as PUC Staff is afforded more time to review applications.

In sum, SDCL 49-41B-25's six-month timeline, as applied, violated intervenors due process rights. Reversal and remand is appropriate.

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court remand this matter to the Commission for a new evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Pursuant to SDCL 1-26-33.3, Hubners hereby request oral argument.

Dated at Sioux Falls, South Dakota, this 11th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellants, hereby certifies that on the 11th day of February, 2019, a true and correct copy of Appellants' Opening Brief and Appendix to Appellants' Opening Brief was filed and served via the Odyssey File & Serve system, upon the following:

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