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' REPLY BRIEF**

Appellant-Intervenors, Gregg Hubner and Marsha Hubner ("Hubners"), through counsel, hereby submit this reply brief.

REPLY ARGUMENT

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

Rick James and Dr. Jerry Punch, an acoustician and an audiologist, respectively, are both qualified to give opinions regarding the health effects caused by sound emitted from wind turbines. Therefore, the Hearing Examiner committed reversible error when he excluded those portions of both James and Punch's testimony.

PWP argues James and Punch are not qualified to testify as medical experts. Petitioners do not disagree; James and Punch cannot make medical diagnoses. But James and Punch did not

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offer medical testimony or attempt to make medical diagnoses. Rather, they attempted to offer opinions regarding potential health effects that could be caused by sound emitted from wind turbines (which are recognized in the literature they reference) and how the risk of adverse health effects could be alleviated (e.g., through proper setbacks or sound restrictions). Such opinions fit squarely within James's and Punch's knowledge, skill, experience, training, and education.

PWP claims Hubners are making a "false distinction" between testimony on health effects and medical opinions. Not so. If, for example, the Hubners had sued PWP claiming the sound emanating from PWP's turbines caused them specific health problems, then the Hubners would probably need medical testimony to prove their claims.[1] That is not the case here, though. Instead, James and Punch attempted to opine about how potential health effects caused by sound generated by turbines can be alleviated or prevented. The potential health effects are recognized in the relevant literature. *See, e.g.*, *infra*, namely the 180 references included in James and Punch's 2016 Articles, the World Health Organization articles (Evid. Hearing Exs. I-31 and I-32); *Wisconsin Realtors Ass'n v. Public Service Com'n of Wisconsin*, 867 N.W.2d 364, 467 (Wisc. 2015) ("It is well known that wind turbines may be harmful to the health of those who live close to them and are sensitive to the noise and shadow flicker they produce.") (dissenting). Accordingly, James and Punch are qualified to give the opinions that were stricken by the Hearing Examiner.

Furthermore, James has been studying wind turbine sound and its related health effects (e.g., sleep disturbance, dizziness, tinnitus, headaches, pressure, and odd sensations) since 2006.[2]

[1] Notably, both James and Punch were permitted to give specific causation opinions in the Michigan case provided to the Court.

[2] The majority of James's career was spent consulting for major corporations on how to design and operate projects to minimize adverse effects on a community and workers.

Punch has been studying the same since 2009. They have reviewed countless articles regarding health effects caused by wind turbine sound; visited and performed testing at several different wind farms; interviewed numerous individuals living in and around wind farms experiencing said health effects; coordinated with other subject-matter experts regarding health effects caused by wind turbine sound; and testified to courts and government entities regarding health effects caused by wind turbine sound.[3] Put simply, they have the knowledge, skill, experience, training, *and* education that qualify them to provide opinions regarding the health effects that could be caused by sound emitted from wind turbines and how the risk of adverse health effects could be alleviated.

PWP argues James and Punch cannot rely upon their 2016 paper to qualify themselves as experts. PWP's argument misses the mark. In 2016, James and Punch co-authored a paper titled: "Wind Turbine Noise and Human Health: A Four-Decade History of Evidence that Wind Turbines Pose Risks," which is a peer-reviewed literature review of research spanning 40 years showing wind turbines cause risks of adverse health effects from both audible and inaudible sound emissions. (AR 017314-85.) Therein they cite to 180 references, several of which directly support their opinions regarding the health effects caused by wind turbine sound. For example, the following references were included in the 2016 article:

> 1) Ambrose, S.E., Rand R.W., & Krogh, C.M.E. (2012). Wind turbine acoustic investigation: Infrasound and low-frequency noise—a case study. Bulletin of Science, Technology & Society, 32(2), 128-141.[4]

[3] James specifically referenced the *Daubert* hearing in the Michigan court case (the transcript of which was provided for this Court's reference) during his re-direct. (AR 018097 (". . . at the very bottom is the Michigan court case where I went through a Daubert hearing, and the judge concluded that I was an acoustician with expertise in measurement of wind turbine noise and its effects on people and I was qualified to opine that the Plaintiff's symptoms were caused by the Defendant's wind turbines after that special Daubert hearing.").)

[4] Available from: https://journals.sagepub.com/doi/abs/10.1177/0270467612455734.

2) Nissenbaum, M.A., Aramini, J.J., & Hanning, C.D. (2012). Effects of industrial wind turbine noise on sleep and health. Noise and Health. 14, 237-243.[5]

3) McMurtry, R.Y., & Krogh, C.M.E. (2014). Diagnostic criteria for adverse health effects in the environs of wind turbines. Journal of the Royal Society of Medicine Open, 5(10), 1-5.[6]

4) Cooper, S. (2015). Cape Bridgewater Wind Farm acoustic study.[7]

5) Nuno, A.A., Castelo Branco, Alves-Pereira, M., Pimenta, A.M., & Ferreira, J.R. (2015). Clinical protocol for evaluating pathology induced by low frequency noise exposure. Paper presented at EuroNoise Conference.[8]

6) Schomer, P. D., Erdreich, J., Pamidighantam, P.K., & Boyle, J.H. (2015). A theory to explain some physiological effects of the infrasonic emissions at some wind farm sites. Journal of the Acoustical Society of America, 137(3), 1356–1365.[9]

7) Alves-Pereira, M., & Bakker, H.H.C. (2017). Occupational and residential exposures to infrasound and low frequency noise in aerospace professionals: Flawed assumptions, inappropriate quantification of acoustic environments, and the inability to determine dose-response values. Scientific Journal of Engineering and Mechanics, 1(2), 83-98.[10]

8) Krogh, C.M., Dumbrille, A., McMurtry, R.Y., James, R., Rand, R.W., Nissenbaum, M.A., et al. (2018). Health Canada's wind turbine noise and health

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[5] Available from: http://www.noiseandhealth.org/text.asp?2012/14/60/237/102961.

[6] Available from: http://shr.sagepub.com/content/5/10/2054270414554048.

[7] Available from: http://www.pacifichydro.com.au/english/our-communities/communities/cape-bridgewater-acoustic-study-report/.

[8] Available from: http://na-paw.org/Clinical-Protocol-2015-Euronoise.pdf.

[9] Available from: https://asa.scitation.org/doi/pdf/10.1121/1.4913775?class=pdf.

[10] Available from: https://mail.campusad.msu.edu/owa/attachment.ashx?attach=1&id=RgAAAADJKzqiAd1dSpGa%2fCYCA%2f7ABwBD9V%2f%2fwrB1Qr4qbLAkBR4%2bAAAAAAEMAACmadRT6GNeRrF3uNMzGiZOAABRAphYAAAJ&attid0=BAAAAAAA&attcnt=1.

study—A review exploring research challenges, methods, limitations and uncertainties of some of the findings. Open Access Library Journal, 5, e5046.[11]

These references, and others, provide support for the opinions of James and Punch regarding the health effects caused by sound from turbines. In sum, their 2016 article does not itself "qualify" them as experts; rather, it demonstrates their knowledge, education, and level of expertise on the subject matter and, accordingly, their qualifications to provide expert testimony. *See Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 19, 737 N.W.2d 397, 404 ("Reading, study, and practice can be a source of education and knowledge sufficient to qualify a person as an expert."). The paper further demonstrates that their opinions rest upon good grounds, based on what is known. *See id*. at ¶ 24, 737 N.W.2d at 406 ("A party who offers expert testimony is not required to prove to a judge in a *Daubert* hearing that the expert's opinion is correct; all that must be shown is that expert's testimony rests upon good grounds, based on what is known."). Indeed, the reference to 180 pieces of literature in that paper reveals James and Punch *did* provide "credible literature supporting their assertions."[12]

PWP further argues that its witness, Dr. Mark Roberts, disagrees with the opinions of James and Punch. That another expert disagrees with the opinions of an expert is not grounds for disqualification. In fact, a party who offers expert testimony is not even "required to prove to a judge in a *Daubert* hearing that the expert's opinion is correct." *Id*. All that is required is a showing that the expert is qualified. Any specific "deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial." *Id*. James and Punch's opinions rest upon good grounds, as is shown via their 2016 article and its 180 references and through their written and oral testimony and CVs. More generally, their knowledge, skill,

[11] Available from: http://www.oalib.com/paper/pdf/5301313.

[12] PWP also ignores the WHO articles James and Punch relied on to support their opinions.

experience, training, and education qualify them to provide the opinions the Hearing Examiner excluded. Any disagreement with their opinions should have been tested through cross examination and the adversary process.

PWP claims Hubners were not prejudiced by the Hearing Examiner's exclusion of the relevant testimony. To obtain a permit, PWP shouldered the burden of proving its project will not substantially impair the health of the inhabitants. SDCL 49-41B-22. PWP attempted to meet its burden through expert testimony of its own. The excluded testimony was the sole expert testimony Intervenors offered regarding that element. Thus, the effect of the exclusion was that PWP's expert testimony became *the only* expert testimony regarding health effects. Not surprisingly, the Commission accepted PWP's expert testimony, given there was no expert testimony to the contrary. *See* Final Decision and Order, Findings of Fact ¶¶ 68-77. That Intervenors were prejudiced by the exclusion is obvious.

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, the Hearing Examiner refused to admit out-of-court statements made by Roland Jurgens on hearsay grounds. Because such statements are not hearsay under SDCL 19-19-801(d)(2), the Hearing Examiner erred.

PWP first responded to this argument with a strawman argument. PWP references the Hearing Examiner's limitation of the questioning of a witness (Mike Soukup) regarding Exhibit I-24 and argues the Hearing Examiner did not err by limiting questioning of Mike Soukup regarding Exhibit I-24 because Soukup lacked the foundation to testify regarding Exhibit I-24.

See PWP's Brief at 18-19. Intervenors never made any such argument in their opening brief, as it was obvious during the hearing that Soukup lacked the foundation to testify about the exhibit. Rather, Intervenors argued, and continue to argue, the Hearing Examiner erred by refusing to admit Exhibit I-24 and by refusing to admit other out-of-court statements made by Jurgens.

Presumably, PWP made its strawman argument so as to make foundation another issue relevant to whether Exhibit I-24 should have been admitted. That is troubling, as PWP's counsel stipulated to the foundation of Exhibit I-24 before the hearing via email. (*See* Attachment 20, attached hereto.) It is further troubling that PWP's brief claims "Appellants failed to find a way to lay adequate foundation for a document they wished to use at the hearing." *See* PWP's Brief at 19. By stipulating to the foundation of Exhibit I-24 before the hearing, PWP cannot now make a foundation objection to Exhibit I-24. Its attempt to do so is blatant underhandedness.

The primary question for this Court is whether Jurgens's out-of-court statements (those made in Exhibit I-24 and those which Karen Jenkins was not allowed to testify regarding) are hearsay under SDCL 19-19-801. The answer is no, because Jurgens's statements were being made on behalf of the project as the "project manager and developer" and are therefore non-hearsay party admissions.

Jurgens held himself out to Bon Homme County as the "project manager" and "developer" of the project. (Evid. HT at 676-78.) Just recently, Jurgens held himself out to the Yankton Daily newspaper as the "project manager." (App'x Att. 15.) Thus, statements he made in Exhibit I-24 and to Karen Jenkins were statements being made on behalf of the project, 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. Accordingly, Jurgens's statements were admissible non-hearsay under SDCL 19-19-801.

PWP argues that Jurgens's statements were made before the formation of PWP, so they cannot be party admissions. First, it is clear from the Yankton Daily article[13] that Jurgens continues to make statements on behalf of the project. Second, the Commission was deciding whether to approve *the project*, and Jurgens's statements were made *on behalf of the project.* PWP was formed to purchase and continue developing the project. PWP cannot hide behind the corporate structure to shield itself from damning admissions project representatives made. If that were the case, an applicant could simply "sell" a project the day before an evidentiary hearing to a new corporate entity to avoid any party admissions from being used against it. In fact, PWP's current representative responsible for planning and implementation of all aspects of project development, Peter Pawlowski, confirmed PWP spoke with Jurgens during its due diligence process to learn what was said to landowners, what promises had been made, and to understand what obligations PWP was stepping into. (Evid. HT at 226-27.) In other words, PWP recognized that it could be bound by certain statements Jurgens had made before PWP was formed. *See Griffeth v. Sawyer Clothing, Inc.*, 276 N.W.2d 652, 655 (Neb. 1979) ("The plaintiff is bound by Bolines' admissions made prior to the sale of the business and the purported assignment of their rights, as though he had made the admission himself."); *Pearson v. Mullins,* 369 P.2d 825 (Okl. 1962) (recognizing admissions made by prior owner of real property are not hearsay when used against later owner). And third, in its application PWP relied upon correspondence between Jurgens and Western EcoSystems Technology, Inc. regarding environmental survey efforts. (AR 000381-82.) Thus, when it benefits PWP, it is happy to hold Jurgens out as its representative. But when it works against PWP, PWP claims Jurgens's

[13] PWP asks the Court not to consider this article because it is not in the record. The article came out months after the evidentiary hearing so there was no way for it to be in the administrative record. Further, the article merely demonstrates that Jurgens is continuing to speak on behalf of the project—a fact PWP does not explicitly dispute in its brief.

statements were not on behalf of the project. PWP cannot have it both ways—what's good for the goose is good for the gander.

Lastly, PWP argues Intervenors were not prejudiced because Exhibit I-24 was used for impeachment purposes. As the Court well knows, impeachment evidence cannot be used as proof of the truth of what the witness said in the earlier statement. So the Commission could not (and did not) consider Jurgens's out-of-court statements for proof of the truth of those statements. As explained in Intervenors' opening brief, Jurgens's statements were highly relevant and cut against PWP's positions regarding noise restrictions and setbacks during the evidentiary hearing. Again, the prejudice is evident.

III. and IV. The Commission Erred by Refusing/Failing to Enlarge Setbacks Due to a Mistaken Belief that It Lacked the Authority to Do So.

The Commission erroneously believed that it cannot depart from a county's adopted setback distances from non-participating residences or from property lines. Commissioner Hanson made the following statement during deliberations:

> 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 (emphasis added).) In prior siting proceedings, all three Commissioners have indicated they are required to defer to counties on the issue of setbacks.[14]

As argued in Intervenors' opening brief, the Commission has the legal authority to impose larger setbacks than those imposed by counties. And PWP does not even disagree with that legal principle. Thus, by believing it lacked the authority to impose larger setbacks than

[14] *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.

those imposed by counties, the Commission committed an error of law and reversal is appropriate.

Rather than address the issue of whether the Commission has the legal authority to increase setbacks, PWP references the fact that the Commission imposed requirements relating to sound and shadow flicker beyond those imposed at the county level. That fact actually further demonstrates the error of law made by the Commission when it concluded it lacked the legal authority to differ from county setbacks. Given the Commission is willing to differ from county regulations with respect to sound and shadow flicker, it is a mystery why the Commission has consistently indicated it lacks the authority to differ from counties with respect to setbacks. (11-20-18 HT at 94-95; *see also* 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.)

PWP claims the record does not support imposing greater setbacks. PWP ignores Commissioner Hanson's statement made during deliberations: "I believe that we have had testimony that provides us with support and evidence from a standpoint of being able to require further setbacks." (11-20-18 HT at 98-99.) After making that statement, Commissioner Hanson was prepared to make motions to increase setbacks. However, after conferring with counsel he chose not to make the motions because he thought it would get reversed on appeal, due to the mistaken belief that the Commission lacks the legal authority to impose greater setbacks.

In claiming the record does not support imposing greater setbacks, PWP fails to understand the lone research article in the record specifically addressing turbine malfunctions and ice throws when it attempts to disregard it by referencing 20-megawatt turbines. *See* PWP Brief at 25. While the research article does analyze 20-megawatt turbines, it also analyzes 2.3-

megawatt, 5-megawatt, and 10-megawatt turbines. For the 2.3-megawatt turbines, debris can be thrown over 2,000 meters (or over 6,561 feet). (AR 015955 (Figure 15 and Figure 18).) And ice can be thrown over 400 meters (or over 1,312 feet) from a 2.3-megawatt turbine. (*Id* at Figure 17.) Given the turbines proposed for the project are 3.8 megawatts, surely calculations pertaining to a smaller turbine of 2.3-megawatts are comparable and highly relevant.

The Commission has the legal authority to impose larger setbacks 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).

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. SDCL 49-41B-25's six-month deadline violated Hubners' due process rights, because it created an unacceptably uneven playing field between PWP and Hubners.

PWP first argues Hubners waived this argument because it was not raised before the Commission. It would have been pointless to raise the issue to the Commission, however, because the Commission was required to apply SDCL 49-41B-25 and lacked the authority to find that the same violated Hubners' due process rights, because such a finding is purely a judicial function. *In re West River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 25, 675 N.W.2d 222, 230 ("[T]he [PUC] must lend credence to the guidelines established in the statutes. The PUC is not a court, and cannot exercise purely judicial functions. Defining and interpreting the law is a judicial function.") (internal citations omitted). Put differently, arguing SDCL 49-41B-25's six-month deadline violated Hubners' due process rights to the Commission would have been futile. And

"the law does not require futile acts." *Tri-City Associates v. Belmont, Inc.*, 2016 S.D. 46, ¶ 14, 881 N.W.2d 20, 23. Therefore, no waiver occurred here.

PWP also argues that Hubners' were afforded due process because they have been opposing the project for several years. Given the project was not even filed with the Commission until May 30, 2018, PWP's argument quickly crumbles. In fact, the part of the record PWP references to support its argument is Gregg Hubner's testimony where he describes being active in his county's zoning legislative process. (AR 012328-29.) As Gregg testified, he went to several county meetings where the county was considering whether to adopt certain wind ordinances. PWP fails to explain how being engaged in a county's legislative zoning process somehow equates to being afforded due process in a contested case hearing before the Commission for a specific project under consideration.

PWP also points to the efforts made by Hubners in this matter as evidence they were afforded due process. While Hubners did their best to put together and present a case to the Commission in the limited amount of time that they had, that does not "balance" the uneven playing field that existed. Commissioner Hanson perhaps stated it best:

> 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 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).)[15] As a commissioner, Commissioner Hanson is both unbiased and in the best position to determine the fairness of the playing field.

Analogizing the proceedings here with typical civil litigation illustrates the unfairness that existed here. After all, contested case proceedings are adjudicatory in nature and similar to typical litigation. *See Application of Union Carbide Corp.*, 308 N.W.2d 753, 758 (S.D. 1981) ("The constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings, particularly where such proceedings are specifically classified as judicial or quasi-judicial in nature."). There is zero chance a plaintiff could file a lawsuit involving the types of complex issues involved here in circuit court and demand a trial four months after filing the complaint and only two months after a defendant is allowed to engage in discovery.[16] Due process would certainly forbid such an uneven playing field. No meaningful difference exists here. As parties to a contested case proceeding, intervenors are afforded a similar amount of due process, which requires a basic level of fairness. *See Valley State Bank of Canton v. Farmers State Bank of Canton*, 213 N.W.2d 459, 463 (S.D. 1973) (recognizing contested cases under the APA include "constitutional requirements of fair play, due process and Agency rules"). Given the factual issues involved here, allowing Hubners only two months to prepare for an evidentiary hearing while PWP (their adversary) has an unlimited amount of time to prepare creates such an uneven playing field that the basic level of fairness afforded by the Due Process Clause was not present. "Due process is not an equation, it

[15] The Evidentiary Hearing in this case was the most recent evidentiary hearing the Commission held before Commissioner Hanson's testimony. Certainly the proceedings here were fresh on his mind when he testified before the Legislature.

[16] Intervenors cannot engage in discovery (e.g., send discovery requests or subpoenas) until they are granted intervenor status, which occurred just two months before the evidentiary hearing here.

is common sense and a reasonable approach applied on a case-by-case basis." *Matter of State of S.D. Water Mgmt. Bd. Approving Water Permit No. 1791-2*, 351 N.W.2d 119, 125-26 (S.D. 1984) (dissenting). Applying common sense to these facts reveals due process was not afforded to Hubners here.

Furthermore, it is telling PWP wholly ignored the three-factor test the Supreme Court has articulated when considering what process is due in a particular case. As stated in Hubners' opening brief, 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 failed to analyze any of these factors in its brief. As shown in Hubners' opening brief, all three factors weigh in the Hubners' favor here. Hubners were due more process than they were afforded. Accordingly, this matter should be remanded to the Commission for a new hearing.

CONCLUSION

For the foregoing reasons and the reasons stated in Hubners' opening brief, Appellants respectfully request the Court remand this matter to the Commission for a new evidentiary hearing.

Dated at Sioux Falls, South Dakota, this 22nd day of March, 2019.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ Reece M. Almond

Reece M. Almond
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030
Telephone (605) 336-2880
Facsimile (605) 335-3639
ralmond@dehs.com
Attorneys for Appellants

ATTACHMENT 20

Reece M. Almond

From: Agrimonti, Lisa <LAgrimonti@fredlaw.com>
Sent: Thursday, October 04, 2018 3:11 PM
To: Reece M. Almond
Cc: 'Edwards, Kristen'; Eric Elsberry; Lisa Rothschadl; Smith, Mollie
Subject: RE: Eric Elsberry - Testimony [DEHS-iManage.FID468226]
Attachments: RE: Proposed wind ordinance.msg; Subpoena Eric Elsberry 10.4.18-c.pdf

Reece,

Prevailing Wind Park, LLC stipulates to the foundation of the attached two documents so that Mr. Elsberry does not have to testify. Prevailing Wind Park reserves its right to object on other grounds, including, but not limited to, relevancy.

Lisa

Lisa Agrimonti
Fredrikson & Byron, P.A.
Shareholder
200 S. 6th Street, Suite 4000
Minneapolis, MN 55402
P: 612-492-7344 | C: 612-414-8271 | F: 612-492-7077
E: Lagrimonti@fredlaw.com

From: Lisa Rothschadl [mailto:lazrlaw@hcinet.net]
Sent: Thursday, October 04, 2018 2:50 PM
To: 'Reece M. Almond'
Cc: 'Edwards, Kristen'; Agrimonti, Lisa; Eric Elsberry
Subject: RE: Eric Elsberry - Testimony [DEHS-iManage.FID468226]

Reece,
I am attaching the signed Admission of Service. I will put the original in the mail today. The subpoena says he is to testify the 9th. He has other required training that day. I told him Thursday or Friday. Can you arrange for him on Thursday or Friday? Also, will you be sending him his witness fees?

Thanks,

Lisa Z. Rothschadl
Bon Homme County States Attorney
PO Box 476
Tyndall, SD 57066
605-589-3333

From: Reece M. Almond [mailto:RAlmond@dehs.com]
Sent: Thursday, October 04, 2018 10:21 AM
To: Lisa Rothschadl <lazrlaw@hcinet.net>
Cc: Edwards, Kristen <Kristen.Edwards@state.sd.us>; Agrimonti, Lisa <LAgrimonti@fredlaw.com>
Subject: Eric Elsberry - Testimony [DEHS-iManage.FID468226]

Lisa –

As we discussed on the phone, it may be necessary to have Eric Elsberry testify at the upcoming PUC hearing to lay foundation for certain emails he received related to the project (see, e.g., the attached two emails). Thus, I am attaching a Subpoena for Testimony and an Admission of Service. If you could please have Mr. Elsberry sign the admission of service and return it, I'd appreciate it.

In the event the Applicant is willing to stipulate to the foundation of emails received by Mr. Elsberry from Mr. Roland Jurgens, then it is unlikely Mr. Elsberry will need to testify.

Let me know if you have any questions.

Regards,

Reece M. Almond
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030

Phone: 605-357-1251
Fax: 605-335-3639
E-mail: ralmond@dehs.com
Website: www.dehs.com

DAVENPORT EVANS
LAWYERS

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellants, hereby certifies that on the 22nd day of March, 2019, a true and correct copy of Appellants' Reply Brief was filed and served via the Odyssey File & Serve system, upon the following:

Ms. Patricia Van Gerpen
Mr. Adam de Hueck
Ms. Kristen Edwards
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us
Adam.dehueck@state.sd.us
kristen.edwards@state.sd.us

Ms. Mollie M. Smith
Ms. Lisa M. Agrimonti
Fredrikson & Byron, P.A.
200 South Sixth St., Ste. 4000
Minneapolis, MN 55402
msmith@fredlaw.com
lagrimonti@fredlaw.com

Mr. Steven K. Huff
Mr. Nicholas G. Moser
Marlow, Woodward & Huff, Prof. LLC
PO Box 667
Yankton, SD 57078
steve@mwhlawyers.com
nick@mwhlawyers.com
Attorneys for Sherman Fuerniss, Kelli Pazour and Karen Jenkins

and served by U.S. First Class Mail upon the following:

Ms. Sara Clayton
Charles Mix County Auditor
Mr. Keith Mushitz, Chairperson
Charles Mix County Commission
PO Box 490
Lake Andes, SD 57356

Mr. Paul M. Schoenfelder
Ms. Lisa A. Schoenfelder
40228 – 296th Street
Wagner, SD 57380

/s/ Reece M. Almond
Reece M. Almond