BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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	**INTERVENORS' OPPOSITION TO HAVING EXHIBITS I-16 AND I-17 BE CONFIDENTIAL** **EL 18-026**

At issue is whether Intervenors' exhibits I-16 and I-17 ("Exhibits") are to be confidential. These Exhibits are documents containing the negotiations and terms for which Mr. Hubner was asked to sign up for a wind lease. They were freely provided to Mr. Hubner absent any agreement to maintain their secrecy and have continued to be in his control and possession. Stated simply, they are Mr. Hubner's documents, and he has no desire to maintain the confidentiality of them. Given that, it would be wholly improper to impose a gag order on Mr. Hubner as it relates to his own documents and his own exhibits. Yet, that is exactly what Prevailing Wind Park, LLC, ("Prevailing Wind") is requesting from the Commission—forcing Mr. Hubner to keep *his own documents* secret from the public. Not only does such a request border on absurdity, South Dakota law precludes Prevailing Wind from being granted its request.

Ignoring that the documents do not even belong to Prevailing Wind, Prevailing Wind's request fails to comport with South Dakota law. South Dakota law explicitly provides that such documents cannot be kept confidential against the will of Mr. Hubner:

> **No wind** or solar **developer may require a property owner to maintain the confidentiality of any negotiations or terms of any proposed easement or lease** except that the parties may agree to a mutual confidentiality agreement in the final executed wind or solar easement, wind or solar lease, or a separate document. Any disclosure of trade secrets or competitive business plans of the

developer may be subject to the confidentiality agreement whether occurring before or after execution of the wind or solar easement or wind or solar lease.

SDCL 43-13-20.5. A plain reading of this statute reveals the Exhibits are not entitled to confidential protection as a matter of law given Mr. Hubner's opposition thereto.

The Commission's own regulations lead to the same inevitable result.[1] Documents, reports, information, and other similar materials submitted to the Commission are presumed to be available to public, unless an exception applies. *See* ARSD 20:10:01:39. Of the six exceptions provided for by this regulation, only these three appear to have any relevance:

(1) Trade secrets or other confidential research, development, or commercial information recognized and protected by SDCL 15-6-26(c)(7) or other law;

(2) Information which is made confidential under any other provisions of state or federal law; and

(3) Information which is determined by the commission to be confidential and entitled to protection from disclosure or improper use.

Id. However, none of these exceptions apply.

First, protection under SDCL 15-6-26(c)(7) applies only to "a trade secret or other confidential research, development, or commercial information[.]" The party seeking protection must also demonstrate good cause. (*Id.*). Good cause can only be established by "a showing that disclosure will work a clearly defined and serious injury. The injury must be shown with specificity. Broad allegations of harm will not suffice." *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 57, 796 N.W.2d 685, 704.

To be considered a trade secret, the information must:

(1) Derive[] independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can

[1] Of course, a state statute such as SDCL 43-13-20.5 controls over an administrative regulation. *In re Yanni*, 2005 S.D. 59, ¶ 16, 697 N.W.2d 394, 400.

obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SDCL 37–29–1(4). "The existence of a trade secret is a mixed question of law and fact." *Bertelsen*, 2011 S.D. 13 at ¶ 58. The legal question is whether the information at issue could be a trade secret under the first part of the definition, *i.e.*, whether it is "information, including a formula, pattern, compilation, program, device, method, technique, or process" potentially subject to protection. *Weins v. Sporleder*, 1997 S.D. 111, ¶ 17, 569 N.W.2d 16, 20 (quoting SDCL 39-29-1(4)). The factual inquiry is whether the remaining two subsections of the statutory definition are satisfied. *Id.* The burden is on the moving party to show the information is a trade secret. *Id.* at ¶ 18.

Here, as a matter of law, the Exhibits are not the type of information subject to trade secrets protection. Rather, the opposite is true because SDCL 43-13-20.5, *supra*, makes the lease documents incapable of receiving trade secret or confidentiality protection unless the parties to the documents agree otherwise. No such agreement exists. Thus, the lease documents are not entitled to trade secrets protection.

In addition, and ignoring SDCL 43-13-20.5 entirely, the lease documents still cannot be trade secrets under the second subsection of SDCL 37–29–1(4) because no reasonable efforts were made to maintain the information's secrecy. Rather, the documents were simply given to Mr. Hubner without any agreement that Mr. Hubner maintain their confidentiality. Voluntary dissemination of ostensibly protected information vitiates its trade secret status. *See Bertelsen*, 2011 S.D. 13 at ¶ 60; *see also Weins*, 1997 S.D. 111 at ¶ 28. Thus, the lease documents are not trade secrets or otherwise entitled to protection under the first exception recognized by ARSD 20:10:01:39.

Second, there is no other provision of state or federal law making the lease documents confidential. As cited, *supra*, SDCL 43-13-20.5 dictates the opposite result. Prevailing Wind cannot now force Mr. Hubner to keep his own documents confidential. Thus, the Exhibits are not entitled to protection under the second exception recognized by ARSD 20:10:01:39.

Finally, the Commission is obligated to follow statutory law. A statute, SDCL 43-13-20.5 , clearly applies here and precludes the Commission from ordering the Exhibits be kept confidential. Our Legislature has provided a clear directive that documents like the Exhibits cannot be required to be kept confidential.

Dated this 8th day of October, 2018.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Intervenors Gregg C. Hubner, Marsha Hubner, Paul M. Schoenfelder and Lisa A. Schoenfelder, certifies that a true and correct copy of the above was served on October 8, 2018, via email upon the following persons listed on the South Dakota Public Utilities Commission's docket service list:

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