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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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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
=====
Transcript of Recorded Proceedings
September 21, 2018
=====

EL18-026

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION,
KRISTIE FIEGEN, CHAIRWOMAN (Telephonically)
GARY HANSON, VICE CHAIRMAN (Telephonically)
CHRIS NELSON, COMMISSIONER (Acting Chairman)

COMMISSION STAFF
Adam de Hueck
Karen Cremer
Kristen Edwards
Amanda Reiss
Greg Rislov
Darren Kearney
Jon Thurber
Katlyn Gustafson

A P P E A R A N C E S

Mollie Smith,
appearing on behalf of Prevailing Wind Park.

Karen Jenkins,
appearing pro se.

Reported By Cheri McComsey Wittler, RPR, CRR
Precision Reporting, 213 S. Main, Onida, South Dakota

1 The following transcript of recordings
2 proceedings was held in the above-entitled matter at the
3 South Dakota State Capitol Building, 500 East Capitol
4 Avenue, Pierre, South Dakota, on the 21st day of
5 September, 2018.

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1 COMMISSIONER NELSON: We'll call the Public
2 Utilities Commission meeting to order. This is
3 Commissioner Nelson. I'm going to be chairing today.
4 9 o'clock, September 21 in the State Capitol.

5 We're here with Docket EL18-026, In the Matter
6 of the Application by Prevailing Wind Park, LLC for a
7 Permit of a Wind Energy Facility in Bon Homme County,
8 Charles Mix County, and Hutchinson County, South Dakota
9 for the Prevailing Wind Park Project.

10 We have four specific motions that we're going
11 to deal with today. The first is shall the Commission
12 grant the Motion to have Witnesses Appear Telephonically?
13 Second, shall the Commission grant the Motion to Exclude
14 Lay Testimony? Third, shall the Commission quash
15 subpoenas? And, fourth, shall the Commission require
16 further disclosure of lay witnesses?

17 The first motion that was filed with us was the
18 motion on behalf of several of the Intervenors to have
19 witnesses appear telephonically. And so, with that,
20 Mr. Rische, I understand you are standing in for
21 Mr. Almond; is that correct?

22 MR. RISCHÉ: Yes, I am, Chairman.

23 COMMISSIONER NELSON: With that, go ahead with
24 your argument.

25 MR. RISCHÉ: Thank you, Chairman, and

1 Commissioners.

2 First, if it's -- with your permission, I'd like
3 to just kind of start with a brief introductory
4 statement. And that's kind of that I see a common theme
5 amongst all of these motions and the positions the
6 parties have taken on these motions, and that is that the
7 Intervenors that we represent, Gregg Hubner, Lisa -- or
8 Marsha Hubner, Lisa Schoenfelder, and Paul Schoenfelder,
9 are trying their best to give the Commission the benefit
10 of a full and fair hearing that includes their
11 perspective and their feelings about this proposed
12 project that can have a rather large impact on their
13 lives. And this motion to allow electronic testimony for
14 their expert witnesses, I think, is indicative of that
15 intention.

16 They've had a very short time line to find and
17 work with these expert witnesses to help prepare their
18 case. And part of that -- part of the issue that comes
19 with having these hearings be so, I think -- on such a
20 tight time line is that it's hard to get experts that are
21 both able to support your case and appear in person at
22 Pierre for these hearings.

23 So, with that in mind, the Intervenors have
24 requested that these experts be allowed to testify
25 electronically. As I understand, the Commission has had

1 experts testify electronically in the past, usually via
2 telephone, and I understand that the Commission, like a
3 trial court, would have discretion to control the manner
4 in which witnesses testify.

5 Now some of the considerations that I think the
6 Commission would bring up or would consider in
7 determining whether or not these witnesses should testify
8 are whether -- you know, the timeliness of the request
9 and whether they've had proper opportunity to prepare and
10 whether that electronic testimony would prejudice the
11 parties to the matter in any way.

12 As far as the timeliness of the request goes, I
13 think that this is a timely request. The expert
14 witnesses have prepared prefiled testimony that I
15 understand has been filed already. We have a month to
16 prepare any cross-examination that might be necessary for
17 those witnesses, and any concern about being able to
18 gauge the credibility --

19 Well, and then as far as the prejudice goes, one
20 concern that was brought up by the Applicant is the
21 ability to gauge the credibility of these witnesses over
22 the phone.

23 That can be mitigated, I believe, by
24 videoconferencing, which is -- I think it's available at
25 your facilities in Pierre and that the expert witnesses

1 would definitely be willing to do so, that, I think, can
2 mitigate any concerns about gauging the credibility of
3 the witnesses.

4 And the prejudice to Intervenors in this case
5 would be great. Because without the ability to have
6 these witnesses appear either telephonically or via
7 video, likely -- it's very likely that these experts
8 would be unable to attend the hearing. So that would
9 mean that you would not have the benefit of their
10 testimony at all, which is an important part of the
11 Intervenors' case.

12 And even if they were able to testify, that
13 would create a huge burden as far as expense and time
14 constraints on the Intervenors, you know, who are just
15 four individuals who are trying to get their side of the
16 story heard. They would have to cover the expenses of
17 these experts to travel from -- two of them from
18 Michigan, another one from Portugal, to come all the way
19 from -- to Pierre for this hearing. And that may not be
20 something that's financially feasible for them at this
21 time as well.

22 So, with that, I'd ask that the Commission grant
23 our motion to allow these Intervenors to -- or allow
24 these experts to testify electronically.

25 COMMISSIONER NELSON: Thank you.

1 Prevailing Winds.

2 MS. SMITH: Thank you. Can you hear me?

3 COMMISSIONER NELSON: Yes.

4 MS. SMITH: Okay. My headset was not working
5 earlier so I just wanted to confirm. This is Mollie
6 Smith on behalf of Prevailing Wind Park, LLC.

7 We sympathize with the comments made regarding
8 this motion. Our concern is the ability to effectively
9 view the credibility and cross-examine witnesses by
10 telephone. In the past we are aware of the Commission
11 allowing telephonic testimony by experts.

12 However, the particular case that was cited was
13 with respect to Hessler, and in that case there wasn't a
14 contested issue anymore with respect to sound issues as
15 the Applicant and the Staff had reached an agreement
16 regarding a condition and, therefore, there didn't seem
17 to be a need to bring Hessler to testify live because
18 there wasn't a contested issue. He was simply
19 reaffirming what had been stated.

20 And we also know that the Commission has denied
21 telephonic testimony in the past, as cited in our
22 memorandum.

23 We understand that if there is actually a reason
24 that the experts are not available -- for instance, if,
25 as is mentioned in the brief, Mr. James has a heart

1 condition and he could not travel to the hearing, that we
2 would understand, and we would accept. But there hasn't
3 been any other reasons given as to why these witnesses
4 could not attend.

5 And typically we would like to see witnesses
6 live. We're planning to have our witnesses live, unless
7 there is an unexpected issue that comes up where no one
8 knew it was going to happen and the witness needs to
9 present.

10 So that's our position today.

11 COMMISSIONER NELSON: Thank you.

12 And I understand -- Karen Jenkins; correct --
13 one of the Intervenors has just entered the meeting room.
14 Ms. Jenkins, do you care to weigh in on this issue?

15 If you need to say anything, you're going to
16 have to come up to the microphone.

17 MS. JENKINS: Thank you.

18 COMMISSIONER NELSON: And just to make sure
19 you're on the right page with us, we are on the motion to
20 have witnesses appear telephonically. If you'd identify
21 yourself, please.

22 MS. JENKINS: I'm Karen Jenkins. I'm the
23 Intervenor.

24 COMMISSIONER NELSON: Yes. Go ahead.

25 MS. JENKINS: The importance of the witnesses

1 being able to correspond by the telephone you've already
2 stated. I think, you know, the travel conditions and
3 that.

4 The one thing I would say is that if the
5 Applicant isn't comfortable with it, that the Intervenors
6 are able -- if the Commission is not able to make it
7 where it's a tele -- I'm sorry, but I don't know the
8 words, where you can see the witness on the screen. And
9 the Intervenors would provide that if -- if the
10 Commission is not prepared for that.

11 COMMISSIONER NELSON: Thank you.

12 Staff.

13 MS. EDWARDS: Thank you. This is Kristen
14 Edwards for Staff.

15 We chose not to file a brief in this -- for this
16 motion in response because we didn't really have an
17 interest in it. I don't feel that I would be at all
18 unable to cross-examine the witnesses via telephone.

19 However, if the motion was granted, we would
20 reserve the right to interject an objection, should it
21 become difficult to understand them at the hearing, and
22 ask that any testimony that was not understandable be
23 stricken from the record at that time. We advocate a
24 fair process in which each party has every opportunity to
25 participate regardless of means, so long as a full

1 opportunity for cross-examination is afforded to all.

2 One question I did pose to Mr. Almond yesterday
3 is whether or not a continuance or rescheduling would
4 have afforded them the opportunity to have their
5 witnesses personally present. That's not really an
6 option in this case because of the time line. However,
7 usually we work with some flexibility in order to get
8 everybody here in person, and in circumstances like this
9 the flexibility might have to be on the mode of testimony
10 end, rather than scheduling.

11 So, with that, I have nothing else to add.

12 I guess one question that did pop into my mind
13 was whether -- if cost were an issue, there's maybe a
14 witness closer than Portugal that they could call to get
15 to come here. Otherwise, we take no position.

16 Thank you.

17 COMMISSIONER NELSON: Thank you.

18 Questions from the Commissioners.

19 Commissioner Fiegen.

20 CHAIRWOMAN FIEGEN: None.

21 COMMISSIONER NELSON: Commissioner Hanson.

22 COMMISSIONER HANSON: No. I don't have any
23 questions. Thank you.

24 COMMISSIONER NELSON: And I have no questions.

25 What I'd like to do is take a motion on this

1 particular issue before we move on to the others.

2 Is there a motion?

3 COMMISSIONER HANSON: Mr. Chairman.

4 COMMISSIONER NELSON: Go ahead.

5 COMMISSIONER HANSON: In Docket EL18-026 I move
6 that the Commission allow the witnesses to appear
7 telephonically.

8 COMMISSIONER NELSON: Discussion on the motion.
9 Commissioner Hanson.

10 COMMISSIONER HANSON: Thank you, Acting
11 Chairman.

12 Traditionally, at least for the most part, we've
13 allowed telephonic presentations, and we've sworn people
14 in over the phone. Actually the Applicant argues that
15 it's at a disadvantage for them, and, frankly, I think
16 it's at a significant disadvantage for the expert
17 witnesses and for the folks who are attempting to get
18 their expert witnesses' points across.

19 I would want my witnesses to attend because I do
20 believe it's at a disadvantage to them. I believe that
21 from the standpoint of depriving the Commission of being
22 able to ascertain or the Applicant being able to
23 ascertain the composure or whatever of the witnesses, the
24 Commission has the ability to assess witnesses' veracity.
25 We do that all the time with all of the witnesses, and I

1 think that we need to be able to provide every
2 opportunity to both sides to have a fair hearing. And
3 for those reasons I support the motion.

4 COMMISSIONER NELSON: Additional discussion.

5 CHAIRWOMAN FIEGEN: I am going to oppose the
6 motion. And Commissioner Hanson used the word
7 "disadvantage." And I guess I would argue unless these
8 particular witnesses are in the room, I think everybody
9 is disadvantaged.

10 I've read through their prefiled testimony.
11 I've read through a lot of their attachments to their
12 testimony, and it became clear to me that for these
13 Intervenors these witnesses are really the touchstone and
14 the word that Ms. Smith used was the "crux" of their
15 case.

16 I mean, these folks are incredibly important to
17 this case for the Intervenors, and I would agree that I
18 think they only disadvantage themselves if these folks
19 are not in the meeting room. And so for that reason
20 because of the importance of what they are attempting to
21 bring to the process, I think they need to be in the
22 meeting room.

23 Additional discussion.

24 CHAIRWOMAN FIEGEN: With the limited time frame
25 in state statute with wind development and permitting,

1 you know, it's frustrating for all of us, and it's
2 certainly frustrating for Intervenors.

3 I think this is a fairness issue for the public
4 at hand. And I don't make this a standard at the PUC
5 because I would rather have these people in person, but I
6 do believe as a Public Utilities Commissioner I do need
7 to give flexibility to Intervenors and all parties to
8 allow them really to mount their case. And I see this
9 more as a fairness issue.

10 And as a Commissioner -- and all three of us as
11 Commissioners, we'll give the testimony and the evidence
12 the weight it deserves. So at this point I will be
13 supporting the motion.

14 COMMISSIONER NELSON: Additional discussion.

15 I would just make one additional comment.
16 Ms. Edwards talked about the Staff would be asking to
17 disallow any testimony that was not understandable. And
18 I'll just say, I mean, we've had a fairly recent example
19 of testimony over the telephone that was hardly
20 understandable. It was a tremendous burden for our court
21 reporter to try to decipher it. And so if we end up in
22 that situation again, I will absolutely support
23 Ms. Edwards on striking any of that testimony that is not
24 comprehensible or understandable.

25 Additional discussion?

1 Hearing none, all those in favor of the motion
2 to grant the motion to have witnesses appear
3 telephonically will vote aye; those opposed, nay.

4 Commissioner Hanson.

5 COMMISSIONER HANSON: Aye.

6 COMMISSIONER NELSON: Commissioner Fiegen.

7 CHAIRWOMAN FIEGEN: Fiegen votes aye.

8 COMMISSIONER NELSON: And Nelson votes nay.

9 Motion carries.

10 The next set of motions are three motions from
11 the Applicant. And I guess what I'd like you to do is
12 allow you to argue all three of these and then at the end
13 I guess we'll see whether Commissioners want to make a
14 motion individually on them or all three of them
15 together, but I think we can argue all three of them
16 together.

17 So with that, Ms. Smith, go ahead.

18 MS. SMITH: Thank you. And I appreciate that.
19 That's how I had planned to approach them as well.

20 With respect to the motion we have today, there
21 were several witnesses that were in the lay witness list
22 provided by Intervenors that indicated that they planned
23 to provide testimony regarding zoning processes or
24 underlying processes at the county level. And we've
25 outlined who those particular witnesses are in our

1 motion.

2 In addition, there were subpoenas issued to the
3 counties and to a gentleman from First District who
4 advises the county seeking a whole host of documents,
5 including correspondence between Commissioners and the
6 county and third parties related to zoning and related to
7 this project. And then the subpoena to the First
8 District as well, seeking all communications regarding
9 work with the counties on zoning and on matters to do
10 with this project.

11 We're bringing this motion because we believe
12 that the information that's being sought is not relevant
13 to the proceeding that the Commission is holding here on
14 this particular application.

15 First of all, we understand that the assertion
16 is that information needs to be obtained from
17 governmental units to understand what their views are.
18 However, governmental units can only act officially as a
19 unit at a public meeting. And so under that theory the
20 only thing that would be relevant would be official
21 decisions and minutes of those decisions, and these
22 requests and the testimony offered go much further, far
23 beyond the simple decisions that were made with respect
24 to either zoning, which we do not think should be an
25 issue here, or the permits and agreements entered into

1 with respect to the project.

2 And so, for those reasons, anything that has to
3 do with individual correspondence with officials is not
4 relevant because that's not the decision of the
5 governmental unit or the governmental unit's views. And
6 certainly correspondence to and from third parties is not
7 relevant as well.

8 Second, information regarding the local zoning
9 processes and the underlying bases for decisions at the
10 county level is not relevant to this PUC's decision here.
11 The Commission has issued decisions in the past without
12 such information. For instance, in Crocker and in the
13 Dakota Range case. And contrary to what Intervenors and
14 Staff have contended, the Applicant here is not relying
15 on the county zoning or decisions to meet its burden of
16 proof.

17 I think with respect to the burden of proof, the
18 views of the Commission come into play with respect to
19 the orderly development of the region, which is typically
20 how have they zoned and how have they permitted a
21 project.

22 There is also a burden of proof as far as,
23 number, one under 49-41B-22, which is that the proposed
24 facility complies with all applicable laws and rules.
25 The Applicant has to be able to discuss its permits that

1 it's obtained and the requirements it's met at the local
2 level in order to demonstrate its burden of proof on
3 number one.

4 What's been asserted is that Prevailing Wind
5 Park is using the county's standards to meet its burden
6 of proof with respect to health, safety-related issues.
7 And that's not the case. We have not only provided
8 numerous studies but we have provided expert testimony
9 from witnesses such as Dr. Roberts regarding health and
10 safety, and we're in the process of developing rebuttal
11 testimony to address a number of issues including from
12 Dr. Roberts, Chris Howell, who is a noise expert. So we
13 are not relying on compliance with county requirements to
14 meet these burdens of proof.

15 Finally, the views of the officials. There were
16 references that the staff referenced our data requests to
17 the Intervenors about communications with officials and
18 agencies. However, those data requests were seeking the
19 views of the Intervenors because we need to understand
20 those concerns as we go into and prepare for the
21 evidentiary hearing. And also those communications have
22 been offered as exhibits in past siting proceedings.

23 For instance, in the Crocker proceeding there
24 were several communications between -- that involved the
25 Intervenors and agencies, and the Applicant's witnesses

1 were asked to address those communications so we need to
2 see them in advance to be properly prepared for them.

3 And, finally, there's been an allegation, I
4 guess, in the Intervenors' responses that the Applicant
5 is somehow trying to overburden them by bringing this
6 motion. And that is not the intent at all. If anything,
7 the intent is to streamline this proceeding and ensure
8 that we are not delving into issues that are not relevant
9 to the decision-making and not requiring counties and the
10 guise of a subpoena issued as an official document
11 through the Commission to be forced to spend time and
12 effort putting together information that is not relevant
13 to the Commission's decision.

14 That's all I have. Thank you.

15 COMMISSIONER NELSON: And we will go to
16 Mr. Rische.

17 MR. RISCHE: Thank you.

18 I think it's noteworthy that as far as the
19 subpoenas go, the county commissions have not objected
20 necessarily to the burden that the subpoenas have placed
21 on them and that they have been working with Mr. Almond
22 to make sure that they can provide the documents that
23 he's requested, that he's subpoenaed. And so really for
24 the applicants to be relying on the burden that it places
25 on the county commission, I think, is misplaced.

1 But going back to the primary issue, there are
2 four factors that the Applicants have the burden of proof
3 on, and that's, as you know, in 49-41B-22, compliance
4 with applicable laws, whether a serious injury to the
5 environment and social, economic conditions of the
6 inhabitants of the siting area, the impairment of health,
7 safety, or welfare of the inhabitants, and then the
8 orderly development of the region with due consideration
9 given to the views of the affected local units of
10 government.

11 Whereas, the Applicants would assert that the
12 only way to determine whether or not the county
13 commission's views -- or the only way to determine the
14 county commission's views are through its official
15 ordinances, zoning laws, I think that that is misplaced
16 in this situation because obviously compliance with
17 applicable zoning laws is one factor, but there's a
18 separate factor that requests views of the local units of
19 government. And if you could derive the views of the
20 local units of government just simply from the zoning
21 ordinances, then you wouldn't need that fourth factor in
22 the local governments.

23 Likewise, the Applicant has made many assertions
24 about the steps they have taken to work with local units
25 of government to seek building permits and other

1 coordination efforts they've used. The Intervenors have
2 the right to test and challenge those assertions and
3 gather evidence regarding those efforts.

4 Finally, what the considerations -- or what
5 factors were considered by the local government officials
6 in creating these zoning ordinances goes directly to
7 whether or not those zoning ordinances adequately protect
8 the health and safety or welfare of the inhabitants of
9 the area, as well as the environment and social and
10 economic condition of the inhabitants.

11 Those zoning ordinances were passed without
12 consideration for any of those different factors. If
13 they were passed without the proper input of the
14 inhabitants of the area or in like the case of Charles
15 Mix County where they -- the basis of this is really just
16 a private agreement between the Charles Mix County
17 Commissioners and the Applicants where there is no
18 evidence that they complied with any of the typical
19 zoning procedures or whether there was any opportunity
20 for public notice or comment about their agreement with
21 how the proposed project would be sited. All of that
22 comes into play in whether or not there was actually due
23 consideration given to those factors.

24 And while I understand the Commission sometimes
25 would like to defer to local government bodies to ensure

1 that those factors are considered, I also wonder if the
2 local governmental bodies defer to the Public Utilities
3 Commission in ensuring that the health and safety of
4 their inhabitants are, you know, considered as well.

5 And so you have this situation where you have
6 two governmental bodies deferring to one another, and
7 neither one of them may be considering all of the proper
8 factors. So it's important that the Intervenors have the
9 opportunity to provide this testimony to really
10 illustrate the considerations -- well, determine and
11 then -- determine and illustrate the considerations that
12 the local governmental bodies considered prior to making
13 these decisions. And, therefore, we'd ask that you deny
14 the request for -- or deny the motions made by
15 Applicants.

16 COMMISSIONER NELSON: Thank you.

17 Ms. Jenkins, do you care to weigh -- I know you
18 weighed in in writing. Do you care to weigh in orally
19 today?

20 And, yep, you do need to come up to the
21 microphone. Thank you.

22 MS. JENKINS: Is it appropriate to ask a
23 question of the Commission?

24 COMMISSIONER NELSON: You can try.

25 MS. JENKINS: Okay. I just wondered when -- it

1 seems like when Prevailing Winds first started coming to
2 develop, that the PUC would be the one to do the siting
3 permit first, and then the counties would then give their
4 permits.

5 And my question is did that change in between
6 2015 and now?

7 COMMISSIONER NELSON: Nothing has changed in the
8 state law in regard to that question.

9 MS. JENKINS: Okay. So my thought would be that
10 the -- if the Commission is going to rely on the local
11 government's ideas and that, it was in the benefit of the
12 wind farm developers to work with the county to make the
13 zoning agreeable or in their benefit. And to me it feels
14 kind of like putting the horse before the cart.

15 And if you -- and I do have experience that I --
16 as you know, when you get a nagging feeling that
17 something isn't right, I have experienced that in all of
18 this since they first came forward to develop this second
19 wind project.

20 So I -- and this is not a small matter. Our,
21 you know -- our biggest asset is on the line here. So I
22 would appreciate it if the Commission would look further
23 into this. Allow us to get the views to find out if
24 this -- public officials that have been represented --
25 representing us really understand what's at stake, you

1 know, for us and instead of just relying on the decisions
2 that they've been made -- that they've made already, as I
3 said.

4 And I do agree that in Charles Mix that the
5 public's input was not allowed, and that is the right of
6 the public. Even me. I'm a Hutchinson County citizen,
7 but I have a right to speak at the community -- the
8 Charles Mix or Bon Homme County public hearing. And
9 because our property is almost on the border of the three
10 counties, you know, this is important. And I would
11 appreciate it if you would allow it.

12 COMMISSIONER NELSON: Thank you.

13 MS. JENKINS: Thanks.

14 COMMISSIONER NELSON: Staff.

15 MS. EDWARDS: Thank you. This is Kristen
16 Edwards for staff. I'm going to attempt to speak slowly
17 and clearly since this will be transcribed by a
18 recording, but that's not a talent I generally possess.

19 I'm going to take this out of order and go to
20 the final motion for disclosure -- further disclosures
21 from lay witnesses. And after that was filed we did work
22 together to obtain more information. I'm not sure how
23 the Applicant feels about that. But at this point I
24 think staff has at least enough information to go forward
25 and ask the appropriate data request to obtain the right

1 information.

2 When the lay witness disclosures first came out
3 there were some that said a witness would be describing
4 their experience with the wind farm. And that doesn't
5 tell us did it make them sick? Did they have shadow
6 flicker? Was it noise? We just needed a little more
7 information there, and I think we did get it.

8 Beyond that, there needed to be enough
9 information to ask discovery requests or take
10 depositions, if need be, and I think now we've gotten to
11 that point. It doesn't necessarily need to be a verbatim
12 word for word what they're going to testify on because as
13 attorneys we come up with cross-examination questions on
14 the fly all the time, and it's what I anticipate doing at
15 the evidentiary hearing.

16 So I think at this point at least from Staff's
17 perspective we have enough information on the lay
18 witnesses to go forward.

19 Getting nods from across the room, which is the
20 important thing.

21 So going back to the other portion of the
22 pending motion, we filed a Brief, and I did find the --
23 find it curious that it was the Applicant and not the
24 counties objecting to the burden placed by the subpoenas.
25 That's not typically how it's done.

1 And in response to a comment made by Mr. Rische
2 that two different parties are each deferring to each
3 other, that is something we've come across with counties
4 in the past where they've said, well, the Applicant --
5 and I'm not saying that that was this Applicant. It was
6 not. Well, the Applicant has assured us that the PUC
7 looks at this. So it does make sense to some degree to
8 make sure two parties aren't each telling each other this
9 is the one looking at it.

10 Also the Applicant misstates, I believe, the
11 standard for discovery, which subpoenas are a tool of.
12 It's not direct relevance. It's a much, much more broad
13 tool, discovery is, than directly relevant. So we would
14 sport subpoenas.

15 Thank you.

16 COMMISSIONER NELSON: Thank you. And because
17 we've covered a lot of territory here, I will give
18 Ms. Smith a brief opportunity for any rebuttal if needed.

19 MS. SMITH: Thank you. With respect to the
20 final motion, as Ms. Edwards says, I believe now we have
21 at least enough information to move forward with next
22 steps so we are -- we can withdraw, if that's easiest,
23 the motion seeking additional lay witness disclosures
24 because we have gotten some additional information.

25 With respect to the other motions, I want to

1 emphasize everyone's focused on burden and everyone's
2 focused on discovery, but the heart of this is that
3 regardless of what is ultimately produced, it is not
4 relevant, and we're seeking that that information be
5 excluded because it is not relevant to the decision.

6 Our understanding from what we can tell is that
7 the Intervenors disagree with how the local units of
8 government came to their decisions, whether it be zoning
9 or whether it be a permit or an agreement. If they
10 disagree, there's nothing stopping them from presenting
11 their own evidence, which they are doing, to oppose any
12 rationale that may have been used to come to those
13 decisions.

14 So they still have their opportunity to make
15 their case, and it really doesn't matter the basis of
16 that because I do not believe that the Commission's
17 deferring wholly to the local units of government and
18 making the decision in these cases. While there has been
19 some deference on setbacks in certain cases, I don't
20 believe that that's the overarching approach of the
21 Commission.

22 And, in addition, in this case not only do we
23 have the local units of government setbacks and
24 agreements, et cetera, we have the prior conditions of
25 the Commission, which the Applicant has already indicated

1 in testimony it plans to agree to. And so there's not
2 just the local units of government. There's also the
3 prior conditions of the Commission that were based on
4 testimony in other cases as well.

5 So I want to emphasize the need for -- there's
6 no need to obtain information that's ultimately going to
7 be excluded, and that's the point of our motion.

8 COMMISSIONER NELSON: Thank you.

9 Questions from the Commission.

10 Commissioner Fiegen.

11 CHAIRWOMAN FIEGEN: None.

12 COMMISSIONER NELSON: Commissioner Hanson.

13 COMMISSIONER HANSON: I have none.

14 COMMISSIONER NELSON: And I have none.

15 Motions.

16 I will -- I'm going to take them one at a time
17 since it appears that the Commission is on a track for
18 split votes on a lot of these things. I'm going to just
19 take these one at a time just to make sure we're clear on
20 where we're at.

21 I would move that the Commission grant the
22 Motion to Exclude Testimony as it relates to the county
23 zoning process.

24 Discussion on the motion.

25 I find nothing in law that gives the Public

1 Utilities Commission any authority to review the
2 processes of county government. We just simply don't
3 have that authority. And because we don't have that
4 authority, there's no need to have testimony on those
5 processes in this particular proceeding.

6 Now let me be clear. Just because we don't have
7 authority to review the process, that does not negate our
8 responsibility to make sure that the four prongs that we
9 are charged with reviewing are fully fulfilled. And so
10 we ultimately -- that's our responsibility. And if the
11 county has done something that doesn't preserve the
12 health, safety, welfare of the inhabitants, that is
13 something that is under our purview. But looking at the
14 actual process that the county's used I don't believe is
15 and, hence, my motion.

16 Additional discussion.

17 COMMISSIONER HANSON: Mr. Chairman.

18 COMMISSIONER NELSON: Commissioner Hanson.

19 COMMISSIONER HANSON: Thank you.

20 I appreciate your thoughts, and I would agree
21 that the Applicant has some good points. Frankly, we
22 don't know exactly what information would be presented by
23 the county official. I don't find it irregular to have
24 elected officials come before us and testify. I know
25 that it was expressed by the Applicant that there's some

1 disagreement amongst the Commissioners, and this would
2 give some an opportunity to come before us and reargue
3 their position that they argued previously.

4 However, we have the ability to determine what
5 is hearsay and what is relevant or not relevant. And I
6 would caution the Intervenor that we won't accept
7 inappropriate testimony. It needs to be relevant. At
8 the same time, this is not unusual to have elected
9 officials testify or make presentations, whether the PUC
10 does it during the legislative session, we go to the
11 counties -- to the committees, rather, and give testimony
12 individually. Certainly we discuss that ahead of time,
13 but we do it, nevertheless, and on occasion we do not
14 have 100 percent agreement in the presentations.

15 Just this week Commissioner Nelson testified in
16 court regarding a docketed item. There's -- I don't find
17 it unusual to be looking at this from that particular
18 standpoint. And there may very well be some information
19 and some questions that we as Commissioners would like to
20 ask of the Commission. And, like I say, we have the
21 ability to weigh and determine whether or not it's
22 relevant.

23 COMMISSIONER NELSON: Additional discussion.

24 CHAIRWOMAN FIEGEN: Commissioner Nelson.

25 COMMISSIONER NELSON: Yes.

1 CHAIRWOMAN FIEGEN: I move a substitute motion.

2 COMMISSIONER NELSON: Go ahead.

3 CHAIRWOMAN FIEGEN: I move to deny the Motion to
4 Exclude Lay -- Exclude Lay Testimony. And I deny the
5 Motion to Squash Subpoenas.

6 COMMISSIONER NELSON: Discussion on the motion.

7 CHAIRWOMAN FIEGEN: The Commission is going to
8 take the testimony and the evidence and give it the
9 weight it deserves. I believe all parties have an
10 opportunity to cross-examine, and in a fair process I
11 believe that this is the right motion for the whole
12 six-month time frame of this evidentiary hearing.

13 COMMISSIONER NELSON: If I could ask a question
14 on your substitute motion, did you include a motion on
15 all three issues or just the first two?

16 CHAIRWOMAN FIEGEN: Just the two.

17 COMMISSIONER NELSON: Okay. Thank you. Well,
18 now you've got me in a pickle because I will be honest.
19 I agree with half of your substitute motion, but I
20 disagree, as I have already said, on the first portion.

21 Again, we simply don't have any authority to
22 review the processes of local government. That's beyond
23 any authority that we've been given, and why we would
24 want to take time in this hearing to delve into those
25 issues when we don't have any authority there is beyond

1 me.

2 And so I guess, because of that, I'm not going
3 to be able to support the substitute motion, even though
4 I do believe that we should not quash the subpoenas
5 because, you know, the counties haven't asked us to quash
6 them, and so I'm with you on that part. But ultimately I
7 can't support the substitute.

8 Additional discussion on the substitute motion?

9 Hearing none, all those in favor of the
10 Substitute Motion to Deny the Motion to Exclude Testimony
11 and Deny the Motion to Quash Subpoenas will say aye;
12 those opposed, nay.

13 Commissioner Hanson.

14 COMMISSIONER HANSON: Aye.

15 COMMISSIONER NELSON: Commissioner Fiegen.

16 CHAIRWOMAN FIEGEN: Fiegen votes aye.

17 COMMISSIONER NELSON: Nelson votes nay.

18 Motion carries.

19 And we have one additional issue to resolve. Is
20 there a motion regarding further lay witnesses?

21 MS. SMITH: Commissioner, this is Mollie Smith.
22 I believe we withdrew that motion, given that we had
23 received additional information.

24 COMMISSIONER NELSON: Thank you. I apologize.
25 I missed that, and that was a good move.

1 MS. SMITH: No problem.

2 COMMISSIONER NELSON: And I'm just going to make
3 a comment. You know, when we set up the procedural
4 schedule and to try to accommodate our lay witnesses and
5 folks that don't normally -- aren't normally a part of
6 our process we wanted to make it very easy, not require
7 prefiled testimony and some of the other things that we
8 do, and I think the Intervenors took that to the extreme
9 with just their one-sentence statement. And I fully
10 concur that the one sentence was not sufficient.

11 But what they responded with yesterday I was
12 very satisfied with. I think that gives everybody a good
13 understanding of the direction they're going, and I think
14 that's the right place to land. And so I appreciate
15 everybody working to get us to that point.

16 With that, any other issues to come before us
17 today?

18 If not, is there a motion?

19 CHAIRWOMAN FIEGEN: Is there -- are you going to
20 take public comment today by the phone or just in person?

21 COMMISSIONER NELSON: Okay. So this is the
22 first opportunity I've had to chair since we require
23 public comments.

24 CHAIRWOMAN FIEGEN: And the Chairman gets to
25 decide that.

1 COMMISSIONER NELSON: No. We're going to take
2 public -- Katlyn, has anybody signed up for public
3 comments?

4 Katlyn is checking the record.

5 CHAIRWOMAN FIEGEN: Thank you.

6 COMMISSIONER NELSON: And Katlyn informs me that
7 no one has signed up for public comment. And so,
8 therefore --

9 CHAIRWOMAN FIEGEN: Okay.

10 COMMISSIONER NELSON: But I appreciate very much
11 your reminding me of that section.

12 CHAIRWOMAN FIEGEN: Great.

13 COMMISSIONER NELSON: Is there a motion?

14 CHAIRWOMAN FIEGEN: Move to adjourn.

15 COMMISSIONER NELSON: Move to adjourn. All
16 those in favor will vote aye; opposed, nay.

17 Commissioner Hanson.

18 COMMISSIONER HANSON: Aye.

19 COMMISSIONER NELSON: Commissioner Fiegen.

20 CHAIRWOMAN FIEGEN: Fiegen votes aye.

21 COMMISSIONER NELSON: Nelson votes aye.

22 Motion carries. We are adjourned.

23

24

25

1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTNER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I transcribed in shorthand the
10 recorded proceedings had in the above-entitled matter on
11 the 21st day of September, 2018, and that the attached is
12 a true and correct transcription of the proceedings so
13 taken.

14 Dated at Onida, South Dakota this 8th day of
15 October, 2018.

16

17

18

19 /s/ Cheri McComsey Wittner
20 Cheri McComsey Wittner,
21 Notary Public and
22 Registered Professional Reporter
23 Certified Realtime Reporter

21

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