STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BON HOMME	FIRST JUDICIAL DISTRICT

GREGG AND MARSHA HUBNER; SHERMAN FUERNISS; KELLI PAZOUR; AND KAREN JENKINS, Appellants, vs. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION; PREVAILING WIND PARK, LLC; SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF; PAUL SCHOENFELDER; LISA SCHOENFELDER; AND CHARLES MIX COUNTY, SOUTH DAKOTA, Appellees.	Case No. 04CIV18-000084 **PREVAILING WIND PARK, LLC'S RESPONSE BRIEF**

INTRODUCTION

Appellee Prevailing Wind Park, LLC ("Prevailing Wind Park") submits this brief in response to the opening brief submitted by Appellants Gregg and Marsha Hubner (together, "Appellants").[1] Appellants have appealed the South Dakota Public Utilities Commission's ("Commission") issuance of an energy facility permit for the Prevailing Wind Park Energy Facility ("Project") and ask the Court to remand for a new contested hearing. However, Appellants cite little to no legal or factual support for their claims. They also misstate the record and make new arguments not previously presented to the Commission. Further, Appellants attempt to rely on documents outside of the record before the Commission; this is not proper in

[1] Appellants Sherman Fuerniss, Kelli Pazour, and Karen Jenkins have not submitted a written brief.

an appeal of an agency decision, where the Court's review of the Commission's decision is limited and conducted in accordance with SDCL 1-26-36. As described in more detail below, the record supports the Commission's decision and Prevailing Wind Park respectfully requests that it be affirmed.

STATEMENT OF THE CASE AND FACTS

I. THE PROJECT.

Prevailing Wind Park proposes an up to 219.6 megawatt ("MW") wind project in Bon Homme, Charles Mix, and Hutchinson Counties, South Dakota. The Project consists of up to 61 wind turbines. Prevailing Wind Park has more than 50,000 acres under lease for Project facilities. (Final Decision and Order Granting Permit to Construct Facilities and Notice of Entry ("Decision") at ¶¶ 10-12.)

On September 27, 2017, Prevailing Wind Park was formed. (Administrative Record ("AR") at 012701 (Ex. A37, Ownership Structure of Prevailing Wind Park).) The next month, October 2017, Prevailing Wind Park acquired the assets and development rights to the Project from a different entity, Prevailing Winds, LLC. (AR at 012758 (Application).) Prior to October 2017, neither Prevailing Wind Park nor its parent company, sPower Development Company, LLC, was involved with the Project. (*Id.*)[2] After acquiring the assets and development rights to the Project, Prevailing Wind Park has conducted additional development activities, including easement acquisition, environmental surveys and studies, agency coordination, and Project design and siting. (*Id.* at 012758-012759.)

[2] Prevailing Winds, LLC, submitted an application to the Commission in June 2016, at which time Appellants sought to intervene. *See* Application for Party Status, *In the Matter of the Application by Prevailing Winds, LLC, for a Wind Energy Facility Permit for the Prevailing Winds Wind Energy Facility,* Commission Docket No. EL16-022 (available at https://puc.sd.gov/commission/dockets/electric/2016/EL16-022/landownerspartystatus.pdf). The application was later withdrawn. (AR at 012758 (Application).)

II. LOCAL PERMITTING.

The Project is located in three counties with differing regulatory frameworks. Bon Homme County's zoning regulations contain specific provisions for wind energy facilities, and Bon Homme County granted a Large Wind Energy System approval for the Project on August 21, 2018. (*Id.* at 012787-012788 (Application) and 008485 (Ex. A7, Pawlowski Rebuttal).) Hutchinson County has a zoning ordinance, but does not have wind-specific regulations; Prevailing Wind Park obtained conditional use approvals from Hutchinson County on September 4, 2018. (*See id.*) Charles Mix County does not have a zoning ordinance; Prevailing Wind Park nonetheless coordinated with the County regarding the Project and executed an affidavit in favor of Charles Mix County that identified Prevailing Wind Park's commitments with respect to the Project in that county. (AR at 003276-003277 (Ex. A6, Pawlowski Supplemental) and 010025-010028 (Ex. I-22).) Charles Mix County Board of Commissioners accepted that affidavit in August 2018. (AR at 003276-003277 (Ex. A6, Pawlowski Supplemental).)

III. THE COMMISSION'S PROCESS.

In South Dakota, an energy facility permit from the Commission is required for wind energy facilities with a capacity of 100 MW or more. SDCL 49-41B-2(7), (13); SDCL 49-41B-4. Where, as in this case, there are intervening parties and no settlement is reached, the Commission holds a contested case hearing under SDCL Chapter 1-26. Additional details regarding that process are provided in this section.

Prevailing Wind Park submitted its Application for the Project to the Commission on May 30, 2018.[3] With the Application, Prevailing Wind Park also submitted written testimony for five witnesses. (Decision at 1.) The Commission held a public input hearing on July 12, 2018. (*Id.* at 2.) Six individuals (including Appellants, Sherman Fuerniss, and Karen Jenkins) and Charles Mix County[4] intervened as parties before the July 30, 2018 deadline, and the Commission granted party status to each intervenor at its August 7, 2018 meeting. (AR at 001958-001959 (Order Granting Party Status and Establishing Procedural Schedule ("Procedural Order")).) At this meeting, the Commission also established a procedural schedule for the contested case proceedings. (*Id.*) No party objected to the procedural schedule. Appellant Mr. Hubner specifically stated: "I have no objection to the schedule so I don't have anything else to say." (*See* AR at 001938 (Aug. 7, 2018 Meeting Tr.).)

On August 10, 2018, Prevailing Wind Park filed written supplemental testimony for five witnesses. (*See* Decision at 3.) On September 10, 2018, Commission Staff submitted written direct testimony for three witnesses. (*See id.*) On September 10-11, 2018, Appellants submitted written testimony for three expert witnesses; they also disclosed the names of 17 lay witnesses they intended to call at the evidentiary hearing. (*See id.*; AR at 003975-003978 (Intervenors'

[3] The record for this appeal began when Prevailing Wind Park submitted its Application. However, as Appellants testified in this proceeding, they have been actively advocating against the Project at the county level for several years (even before Prevailing Wind Park acquired the Project's assets). (*See, e.g.,* AR. at 012326 (Evidentiary Hearing Transcript ("Evid. Hrg. Tr.")) ("Well, we got pretty involved in the county process after [Prevailing Winds, LLC] came to our place [in 2015]."); *see also id.* at 012328 ("And so we started attending Zoning and Commissioners meetings in the spring summer of 2015. I looked up in my records. We attended -- my wife and I and several neighbors and people that were interested -- eight meetings in 2015..."); *id.* at 012339 ("We were there eight times in 2015, six times in 2017."); *see also* AR at 009130 (Ex. A22-1) (table listing Appellants' attendance at and participation in meetings concerning the Project at the county level).)

[4] Charles Mix County did not actively participate in the proceedings or attend the evidentiary hearing. (*See* AR at 010025-010026 (Ex. I-22).)

Disclosure of Lay Witnesses).) Prevailing Wind Park submitted written rebuttal testimony for eight witnesses on September 26, 2018. (*See* AR at 004884.)

Before the evidentiary hearing, Appellants served subpoenas on four individuals for testimony and subpoenas duces tecum on Bon Homme County, Charles Mix County, Hutchinson County, and Brian McGinnis (with District III/Planning & Development). (*Id.* at 004712, 004716, 004720, 004724, 004848, 004852, 005286, 010534.) The Commission denied Prevailing Wind Park's motion to quash the subpoenas. (*Id.* at 005285.) Also before the evidentiary hearing, the parties exchanged discovery requests and responses. Appellants served four sets of discovery requests on Prevailing Wind Park, and Prevailing Wind Park responded to each set of requests. (*See* AR at 010086 (Ex. I-26), 010093 (Ex. I-27), 017517 (Ex. I-28), 017527 (Ex. I-29).)

The Commission held an evidentiary hearing on October 9, 10, 11, and 12, 2018. (Decision at 5.) At the hearing, Prevailing Wind Park presented 11 witnesses, nine of whom had previously submitted written testimony[5] and all of whom were cross-examined. (*See* AR at 011150-011152 (Evid. Hrg. Tr.).) Appellants presented testimony from 11 lay witnesses and two expert witnesses (having, without explanation, withdrawn the testimony of one of their expert witnesses, Dr. Mariana Alves-Pereira). (*See id.* at 011152-011155 and Decision at 3.) The Hearing Examiner excluded portions of the testimony of Appellants' two expert witnesses to the extent they provided medical testimony because the witnesses lack medical education, training, or qualifications. (*See* Section I below.) Over Prevailing Wind Park's objection, the Commission permitted Appellants' expert witnesses to testify via video conference. (AR at

[5] Prevailing Wind Park's lay witnesses, Karen Peters and Dustin Brandt, had submitted a disclosure of the topics about which they would be testifying. (AR at 004886-004887 (Ex. A19, Applicant's Disclosure of Lay Witnesses).)

005284-005285.) Appellants Mr. Hubner, Ms. Pazour, Ms. Jenkins, and Mr. Fuerniss also testified at the evidentiary hearing. (*See* AR at 011152-011153, 011155 (Evid. Hrg. Tr.).) Commission Staff presented testimony from two witnesses who were also available for cross-examination. (*See id.* at 011154, 011156.) The Hearing Examiner presided at the hearing and each of the Commissioners was present for the entirety of the hearing.

The parties submitted post-hearing briefs on November 13, 2018. (*See* AR at 018263 (Fuerniss), 018266 (Hubners and Schoenfelders), 018287 (Staff), 018326 (Prevailing Wind Park), 018406 (Jenkins), 018408 (Pazour).) On November 20, 2018, the Commission met to consider whether to issue a facility permit for the Project. (*See* AR at 018447 (Nov. 20, 2018 Meeting Tr.).) At that meeting, each party again had the opportunity to summarize their positions before the Commission. (*See id.* at 018450-018476.) Appellants chose to speak themselves, rather than having their attorney address the Commission. (*See id.* at 018449-01850, 018460-018464.) At that meeting, the Commission voted unanimously to issue a permit for the Project. (*See id.* at 018545-018546.)

On November 28, 2018, the Commission issued its Decision granting a permit for the Project. Among other things, the Commission concluded that Prevailing Wind Park had met its burden of proof with respect to each of the requirements under SDCL 49-41B-22. (Decision at 30-31.) The Decision also includes 42 conditions related to various aspects of the Project, including noise and shadow flicker limits, decommissioning requirements, and environmental issues. (*See id.* at 32-42.)

GENERAL LEGAL STANDARD APPLICABLE TO REVIEW OF A COMMISSION DECISION

SDCL 49-41B-30 permits "[a]ny party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit" to "obtain

judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26 [the Administrative Procedures Act]." SDCL 49-41B-30.[6] Review of the Commission's decision is governed by SDCL 1-26-36, which requires a reviewing court to "give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II* (hereinafter "*Big Stone II*"), 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (agency findings of fact reviewed under the clearly erroneous standard). An agency's conclusions of law are reviewed *de novo*. *Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d at 602. Mixed questions of law and fact may be reviewed under either standard, depending upon whether the agency's analysis is predominantly factual or legal. *In re Dorsey & Whitney Tr. Co. LLC*, 2001 S.D. 35, ¶ 5, 623 N.W.2d 468, 471 (noting that when reviewing mixed questions of law and fact, "courts apply the clearly erroneous standard if the 'analysis is essentially factual, and thus is better decided by the agency or lower court …,' and the de novo standard when the 'resolution requires consideration of underlying principles behind a rule of law.'").

The South Dakota Supreme Court has determined that the Commission's conclusion that the permittee had met one of the factors under its burden of proof (SDCL 49-41B-22) is to be reviewed under the "clearly erroneous" standard. *See Big Stone II*, 2008 S.D. 5, ¶ 29, 744 N.W.2d at 603. The Court noted: "Our task in this appeal is to decide the narrow question of whether the [Commission's] conclusion that [the project] will not pose a threat of serious injury to the environment was clearly erroneous in light of all the evidence." *Id.*

[6] "The sections of Title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal." SDCL 1-26-32.1; *see also* SDCL 15-6-81(c) ("[SDCL ch. 15-6] does not supersede the provisions of statutes relating to appeals to the circuit courts.").

ARGUMENT

I. THE HEARING EXAMINER DID NOT ABUSE HIS DISCRETION IN EXCLUDING LIMITED PORTIONS OF THE TESTIMONIES OF RICHARD JAMES AND JERRY PUNCH REGARDING HEALTH EFFECTS.

Appellants assert that the Hearing Examiner erred in excluding portions of the testimonies of Richard James ("James") and Jerry Punch ("Punch"), arguing both that the Hearing Examiner "struck significant portions" of their testimony and that both witnesses (both of whom admitted they were not medical doctors) were qualified to opine on health effects. (Appellants' Brief ("App. Br.") at 4, 7-12.) Neither contention is accurate. The Hearing Examiner did not strike "significant" portions of the testimony—the redactions were limited. Further, because neither witness had the experience, training or education to testify as an expert on health effects, the Hearing Examiner's decision to strike limited portions of their testimony was fully supported by the record. Even if the Hearing Examiner's decision could be construed as an abuse of discretion, Appellants suffered no prejudicial effect because the majority of the testimony was admitted and the essence of their unsupported claims regarding health effects was presented.

A. Legal Standard.

A witness may testify as an expert if the witness is "qualified as an expert by knowledge, skill, experience, training, or education" and:

> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

SDCL 19-19-702. These requirements also apply in contested case proceedings. *See* SDCL 1-26-19(1) ("The rules of evidence . . . shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted . . . if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."). An agency's evidentiary rulings are reviewed for an abuse of discretion. *Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Id.* (internal citations omitted).

Even if the court finds that the agency abused its discretion, the court "will not overturn unless the abuse produced some prejudicial effect." *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." *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10.

B. Richard James is Not Qualified to Opine on Health Effects.

Appellants assert that James is qualified to offer expert testimony on health effects and wind turbines because: (1) he is an acoustician who has studied and provided testimony on wind turbine noise; (2) he has co-authored or authored papers regarding wind turbine noise and health effects – one of which Appellants submitted; and (3) he has been allowed to testify in other proceedings. Appellants fail to cite case law in support of their arguments, and none of these arguments demonstrates that the Hearing Examiner committed an abuse of discretion.

1. <u>James Lacks Medical Expertise</u>.

James is not qualified to testify as a medical expert: James' training is as an acoustician. Prevailing Wind Park does not dispute that he has previously measured wind turbine sound emissions. However, the expertise to measure sound does not give one the expertise to offer

expert testimony in a legal proceeding regarding the health effects of such sound. *E.g.*, *Klutman v. Sioux Falls Storm, LLC*, 2009 S.D. 55, ¶ 22, 769 N.W.2d 440, 449-50 (ruling that an expert on synthetic turf was not qualified to opine on the medical cause of a knee injury suffered on turf). Specifically, James testified that:

- He was not testifying as a medical expert. ("Q: You're not testifying as a medical expert; is that true? A: That's correct." (AR at 012191 (Evid. Hrg. Tr.).)
- He is not a medical doctor. ("Q: And you're not a licensed physician; is that also correct? A: That would be obvious, yes." (*Id.* at 012191-012192.)
- He is not a licensed psychologist. (*Id.* at 012192.)
- He has not conducted a medical evaluation of any of the people (in prior proceedings) that provided complaints to him. (*Id.* at 012193.)

Similarly, Appellants' counsel admitted at the hearing: "Certainly he can't make any medical diagnosis." (*Id.* at 012203.) These admissions demonstrate that James is unqualified to offer medical testimony. *E.g.*, *Maroney v. Aman*, 1997 S.D. 73, ¶¶ 38-40, 565 N.W.2d 70, 78-79 (holding that an expert in biomechanics who was not a medical doctor is not qualified to offer testimony concerning the cause of a stroke after a vehicle accident).

2. James May Not Rely Upon His Own Paper to Qualify Himself as an Expert.

Appellants' reliance on papers James co-authored (only one of which was submitted into this record) on the topic of wind turbines and adverse health effects is misplaced. The argument was not made to the Hearing Examiner or the Commission and is therefore waived. *Matter of State of S.D. Water Mgmt. Bd. Approving Water Permit No. 1791-2*, 351 N.W.2d 119, 122-23 (S.D. 1984).

In addition, James can author papers on a variety of topics, but he cannot qualify himself as a medical expert solely by pointing to his own papers that are not peer-reviewed. Rather, the

evidence demonstrates that the paper submitted into the record (the "2016 Punch and James Paper") is neither reliable nor well-accepted in the medical community. Prevailing Wind Park witness Mark Roberts, a medical doctor and PhD epidemiologist, reviewed the paper and testified that it "is not consistent with the opinions of local, state, national, and international panels of experts who have reviewed the peer-reviewed, scientific publications related to wind turbines and health effects." (AR at 010518 (Ex. A5, Roberts Rebuttal).)

Dr. Roberts also explained that the claim that the 2016 Punch and James Paper was "peer-reviewed" was specious. (*See id.* at 010518-010519.) Specifically, Punch and James describe the paper as being "peer-reviewed" by "an attorney who represents interveners in wind turbine siting cases" and two individuals associated with a "well-known and decidedly anti-wind group." (*See id.*) Dr. Roberts explained, "[t]his does not describe the typical level of rigorous peer review I would expect before labeling a report 'peer-reviewed'." (*Id.* at 010519.) Thus, the 2016 Punch and James Paper does not qualify James as an expert. *See Klutman*, 2009 S.D. 55, ¶ 22, 769 N.W.2d at 449 (holding that the proponent of the testimony "made no showing that [the expert on synthetic turf] had training in either interpreting medical records or basing an opinion on such records. And although he may have worked closely with those who dealt with sports injuries, the [party's] failure to establish [the witness'] expertise on medical causation was highlighted by the testimony of …. [the patient's] treating orthopedic surgeon specializing in knee and sports medicine at the Mayo Clinic."); *see also Maroney*, 1997 S.D. 73, ¶¶ 38-40, 565 N.W.2d at 78-79. Thus, the record supports the Commission's Decision that neither Punch nor James "provided credible literature supporting their assertions regarding health-related effects." (Decision at ¶ 70.)

3. James' Testimony in Other Proceedings Does Not Qualify Him as an Expert Before the Commission.

Appellants assert that the Hearing Examiner committed an abuse of discretion because James has been allowed to testify in other proceedings.[7] Jurisdictions do not all apply uniform standards for the admission of expert testimony, and this alone does not establish an abuse of discretion.[8] In fact, as discussed in more detail below, James has also previously been excluded from offering medical testimony, which further rebuts Appellants' argument that the Hearing Examiner abused his discretion.

4. Testifying on Causation is Offering a Medical Opinion.

After arguing that James is qualified to offer medical testimony, Appellants assert that James was not actually offering medical testimony:

> 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.

(App. Br. at 10.) Appellants' argument is a false distinction between testimony on "health effects" and "medical opinions." An opinion that wind turbines cause health effects *is* a medical

[7] To support this argument with respect to both James and Punch, Appellants submit a lengthy transcript of a hearing before a trial court in Michigan. Appellants did not provide this transcript during the contested case proceeding, and it is thus not relevant because it is not part of the administrative record here and should be excluded from consideration. *E.g.*, *In re B.Y. Dev., Inc.*, 2000 S.D. 102, ¶ 9, 615 N.W.2d 604, 608-09; *see also Dollar Loan Ctr. of S. Dakota, LLC v. Dep't of Labor & Regulation, Div. of Banking*, 2018 S.D. 77, ¶ 20, 920 N.W.2d 321, 326 ("[J]udicial review is confined to the administrative record.").

[8] For example, Appellants refer to a decision from the New York Public Service Commission. (App. Br. at 14.) In proceedings before that agency, unlike before the Commission, "[t]he rules of evidence applicable to proceedings before a court shall not apply." N.Y. Pub. Serv. Law § 167(1)(b).

opinion because it, of necessity, attempts to draw a conclusion regarding a causal relationship between a medical effect and a specific action or event.

5. Appellants Cannot Show Any Prejudice.

Even if the exclusion of medical testimony could be construed as an abuse of discretion, the Appellants cannot demonstrate prejudice because the exclusions were minor and James still offered his opinions regarding health effects. Indeed, Appellants do not even argue they are prejudiced. (*See* App. Br. at 9-10.) The bulk of his testimony remains in the record. The following is an example of the Hearing Officer's limited and surgical striking of testimony from James: "These inaudible acoustic conditions reliably trigger in self-identified 'sensitive people' sensations and ~~adverse~~ effects associated with the complaints by people who live in or near the footprint of utility scale wind turbines." (AR at 018028 (Redacted Ex. I-1, James Prefiled).)

C. Dr. Jerry Punch is Not Qualified to Opine on Health Effects.

As with James, Appellants argue that Punch is qualified to offer expert testimony on health effects and wind turbines because: (1) he is an audiologist who has studied and provided testimony on wind turbine noise; (2) he has co-authored or authored papers regarding wind turbine noise and health effects – one of which Appellants submitted; and (3) he has been allowed to testify in other proceedings. (*See* App. Br. at 11-12.) Again, Appellants fail to cite legal authority for their arguments, and none of these arguments demonstrates that the Hearing Examiner committed an abuse of discretion.

1. Punch Lacks Medical Expertise.

As an audiologist, Punch has expertise regarding hearing problems. However, Appellants repeatedly attempt to blur the line between an audiologist and a medical doctor.[9] This misrepresents the facts and their own witness's testimony. Punch himself testified that he:

- Is not a medical doctor. ("Q: Are you licensed to practice medicine? A: Of course not." (AR at 012267 (Evid. Hrg. Tr.).)
- Would refer an issue to a physician to determine causation. (*Id.* at 012268-012269.)
- Does not have any expertise to assess non-hearing-related maladies. ("Q: And as an audiologist, you don't have any expertise to diagnose nonhearing-related maladies like heart disease or diabetes; is that true? A: That's true. True." (*Id.* at 012269.)
- Has not conducted medical evaluations of any of the people (in prior proceedings) that have provided complaints to him. (*Id.* at 012272.)

Overall, the record demonstrates that Punch himself admits that he does not have the training or expertise to diagnose individuals.

2. Punch May Not Rely Upon His Own Paper to Qualify Himself as an Expert.

Appellants again assert that Punch's reliance on his own work makes him an expert, describing the same 2016 Punch and James Paper that was referred to in James' testimony as "peer-reviewed." (App. Br. at 12.)[10] For the same reasons discussed with respect to James,

[9] (*E.g.*, App. Br. at 12 ("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.").)

[10] Punch described the paper as follows at the hearing: "The article, wind turbine -- well, Exhibit 2 is an article that is published on a website. I called it a blog. I'm not sure it's really a blog. . . ." (AR at 012271 (Evid. Hrg. Tr.).)

Punch cannot rely upon his own work to create the expertise needed to provide medical testimony.

3. Punch's Testimony in Other Proceedings Does Not Qualify Him as an Expert Before the Commission.

For the same reasons discussed above with respect to James, Appellants' argument that Punch should have been allowed to offer medical testimony in this case because he has testified in other cases lacks merit, and Appellants do not cite legal authority supporting their position.

When considering the testimony in this case and the evidence in the record concerning Dr. Punch's qualifications in this case, the Hearing Examiner did not abuse his discretion in excluding some limited portions of Dr. Punch's testimony. *Sorensen,* 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856.

4. Appellants Cannot Show Any Prejudice.

As with James, only limited portions of Punch's testimony was stricken. Again, Appellants do not articulate any alleged prejudice because there was none. (*See* App. Br. at 11-12.) The Hearing Officer struck only those portions of the testimony that contained explicit references to a causal relationship between wind turbines and health effects – often simply striking the phrase "health effects." For example:

> "Q: After reviewing those materials, what is your overall impression regarding any potential ~~health~~ risks posed by the proposed Project? A: In my opinion, those materials paint an overly optimistic picture by indicating or suggesting that limiting wind turbine noise to an average level of 45 dBA will avoid significant ~~adverse health~~ impacts and significant community annoyance." (AR at 018035 (Redacted Ex. I-2, Punch Prefiled).)

As with James' testimony, the bulk of Punch's testimony and opinions remains in the record. For the same reasons that they failed to demonstrate prejudice with respect to James, Appellants have also not demonstrated prejudice by the Hearing Examiner's ruling with respect to Punch.

D. Appellants Misconstrue the Hearing Examiner's Analysis of *Williams v. Invenergy*.

Appellants incorrectly assert that the "basis for the Hearing Examiner's decision to exclude portions of Punch and James' testimony was a federal district court case from Oregon." (App. Br. at 12.) Prevailing Wind Park questioned both witnesses regarding the Oregon case, *Williams v. Invenergy, LLC*, 2016 WL 1275990 (D. Oregon, April 28, 2016) ("*Williams*") (AR at 012681-012700 (Ex. A36, *Williams*)), and the relationship between the opinions they offered in that case and this one. (*See, e.g.*, AR at 012198-012203, 012274-012278 (Evid. Hrg. Tr.).) However, the record does not support Appellants' assertion that *Williams* was the "basis" for the exclusion of the testimony. Rather, the record shows that the basis for the decision was the witnesses' lack of qualifications to make a medical diagnosis. Both Punch and James admitted during cross-examination to not being licensed physicians. (*Id.* at 012191-012192, 012267.) Additionally, Punch stated that he would refer a patient to a physician to establish causation. (*Id.* at 012268-012269.) Further, the Hearing Examiner did not cite to this case as the rationale for his decision. (*Id.* at 012204-012205, 012284-012285.)

Appellants next assert that the *Williams* court determined that "Punch was qualified to offer an opinion that wind turbine noise can cause health effects." (App. Br. at 13.) This is not accurate. The *Williams* court held: "Punch is neither a medical doctor nor an epidemiologist who could opine on the cause of Williams's symptoms . . . ." (AR at 012694 (Ex. A36, *Williams)*.) The *Williams* court further held that, "[a]lthough Punch may not testify that non-audible infrasound and other low-frequency sound pulses cause adverse health effects," he would be allowed to rely upon reliable evidence, such as a report issued by the World Health Organization "to support his opinion that wind turbines produce audible noise which may disturb individuals

and interfere with sleep." (*Id.* at 012696.) Notably, this is the same ruling issued by the Hearing Examiner in this case. (AR at 012284-012285 (Evid. Hrg. Tr.).)

Appellants then assert that *Williams* "is inapposite" and point to an administrative proceeding in New York and a dissenting opinion from a Wisconsin case. (App. Br. at 13-14.) With respect to the New York proceeding, Appellants state that the agency denied a motion to exclude "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." (App. Br. at 14.) Notably, in this case, Prevailing Wind Park first cross-examined each witness and, after it became apparent that neither witness had medical training qualifying him to offer medical testimony, Prevailing Wind Park moved to exclude the testimony. (*See* AR at 012203, 012280 (Evid. Hrg. Tr.).) Thus, the Hearing Examiner (and the Commission) fully heard each witness's testimony – including their own discussion of their background and qualifications – before excluding limited portions of the testimony. With respect to the Wisconsin case, Appellants cite a dissenting opinion that is of no precedential value, here or in Wisconsin. (App. Br. at 14.) In that case, the Wisconsin Supreme Court upheld the Wisconsin Public Service Commission's adoption of rules allowing for and governing wind energy facilities in that state. *See generally Wis. Realtors' Ass'n v. Pub. Serv. Comm'n of Wis.*, 867 N.W.2d 364 (Wis. 2015). The majority opinion specifically notes that the rules were adopted after considering "[a]dvice from consulting professionals with public health experience in Wisconsin." *Id.* at 368.

II. APPELLANTS' DISCUSSION OF THE TREATMENT OF STATEMENTS BY ROLAND JURGENS IS MISLEADING, AND THE HEARING EXAMINER DID NOT ERR.

Appellants argue that the Hearing Examiner wrongfully excluded out-of-court statements made by Mr. Roland Jurgens as hearsay. (App. Br. at 14.) Apart from quoting SDCL 19-19-

801(d)(2), Appellants again cite no legal authority for their claims. Appellants' argument not only lacks merit, but it also misrepresents the record. The document at issue was excluded because Appellants failed to lay foundation for it, not for the reasons identified in Appellants' brief. Further, the Hearing Officer properly precluded Karen Jenkins from discussing statements Jurgens allegedly made relating to easement negotiations in or around 2015 for another wind project, Beethoven Wind.

A. Jurgens' Statements Were Excluded Because Appellants Failed to Lay Foundation with the Witness.

For the most part, Appellants' argument focuses on Exhibit I-24, which is an email from Roland Jurgens, Thorstad Companies, to Eric Elsberry, the Bon Homme County Zoning Administrator. (*See* App. Br. at 15.) The email is dated October 28, 2015, which is two years prior to the formation of Prevailing Wind Park and its acquisition of Project assets. (*See* AR at 012701 (Ex. A37, Ownership Structure of Prevailing Wind Park) and App. Br. Attach. 15 (Email (not admitted to the record))); *see also* AR at 012048, 012052-012053 (Evid. Hrg. Tr.).) No party called Jurgens or Elsberry as a witness, and neither individual provided written or oral testimony. (*See, e.g.*, AR at 012052 (Evid. Hrg. Tr.).) At the evidentiary hearing, Appellants' counsel attempted to ask Bon Homme County Commissioner Mike Soukup (who had been subpoenaed by Appellants to appear at the hearing and testify) about the email. (*See id.* at 012048-012052.) Soukup testified that he had never seen the email and did not know anything about a conversation between Jurgens and Elsberry. (*See id.* at 012049-012051, 012053-012054.) Soukup also testified that he did not know anything about the substance of the email. (*See id.* at 012051, 012053-012055.)

The Hearing Examiner excluded the email because Appellants' counsel was asking questions about the email of a witness who had no knowledge of it – Appellants' counsel laid no

foundation for the document with the witness whom counsel was questioning. (*Id.* at 012052 ("So Mr. Elsberry should be on the stand because it's clear from his statement and from observing him he's never seen this. He's completely unfamiliar with this document.").) The Hearing Examiner did not err by limiting Appellants' questioning of a witness who knew nothing about the document. *See* SDCL 19-19-602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

B. Even if Appellants Had Laid Foundation, Jurgens' Statements are Inadmissible Hearsay.

Appellants failed to find a way to lay adequate foundation for a document they wished to use at the hearing. However, even if they had laid foundation with the appropriate witness, the email is nonetheless inadmissible hearsay. *See* SDCL 19-19-801(d)(2)(C) and (D) (providing hearsay exception where statements offered against an opposing party were made "by a person whom the party authorized to make a statement on the subject," or "by the party's agent or employee on a matter within the scope of that relationship and *while it existed*") (emphasis added).

Appellants argue that Jurgens is a party representative and that, thus, his statements should be attributed to Prevailing Wind Park. (App. Br. at 16.) Appellants failed to object or otherwise address this ruling before the Commission; as such, they may not raise the issue to this Court. *See Matter of State of S.D. Water Mgmt. Bd. Approving Water Permit No. 1791-2*, 351 N.W.2d at 122-23.

The argument is also factually inaccurate. The 2015 email at issue pre-dates the formation of Prevailing Wind Park. (*See* AR at 012701 (Ex. A37, Ownership Structure of Prevailing Wind Park) (noting that Prevailing Wind Park, LLC, was formed September 27,

2017).) As such, in 2015, Prevailing Wind Park was not involved with the Project. Accordingly, Jurgens could not have been speaking on behalf of Prevailing Wind Park when he made the statements, and his statements cannot be attributed to Prevailing Wind Park. *See* SDCL 19-19-801(d)(2) (C) and (D). Further, the "facts" identified in Appellants' brief do not establish that Prevailing Wind Park has authorized Jurgens to speak on behalf of Prevailing Wind Park or the Project.[11]

C. Appellants Were Not Prejudiced by the Exclusion of Jurgens' Statements Because Appellants' Counsel Nonetheless Read the Bulk of the Statements into the Record.

Finally, Appellants assert that they were prejudiced by the Hearing Examiner's ruling on Jurgens' statements. (App. Br. at 17.) This is also misleading; Appellants' counsel was allowed to read the bulk of the email at issue into the record:

> Mr. Almond: And, just to be clear, I cannot use this document for impeachment purposes with this witness?
>
> Mr. De Hueck: I have not seen you try to do that yet.
>
> Q: Did the county receive public input from Mr. Roland Jurgens suggesting a 35 dBA limit for nonparticipants?
>
> A: To my knowledge, I cannot remember that. It was three years ago.
>
> Q: Looking at Exhibit I -- what's been marked as Exhibit I-24 in front of you, read along as I read for you. "The 45 dB participant, 35 dB nonparticipant noise restraint is absolutely the best way to protect nonparticipants." Did I read that correctly?

[11] Among other things, Appellants point to a January 16, 2019 article from a local newspaper that was published after the issuance of the Decision that references Mr. Jurgens. (App. Br. at 16.) As with other documents outside the record cited by Appellants, this news article is not part of the record and should not be considered. *See Dollar Loan Ctr. of S. Dakota, LLC*, 2018 S.D. 77, ¶ 20, 920 N.W.2d at 326 ("[J]udicial review is confined to the administrative record."). The newspaper article itself is also inadmissible hearsay. *See, e.g., Crews v. Monarch Fire Prot. Dist.*, 771 F.3d 1085, 1092 (8th Cir. 2014) (citing *Nooner v. Norris*, 594 F.3d 592, 603 (8th Cir. 2010) ("[N]ewspaper articles are 'rank hearsay.'").

A: You're on the page of this I-24?

Q: Yes. It's the fifth paragraph.

***

A: That's what's wrote in the book.

Q: What was that?

A: That's what is written here.

(AR at 012053-012054 (Evid. Hrg. Tr.).) Thus, even if the Hearing Examiner did err (which he did not), Appellants have not established that they were prejudiced in any way, and this claim fails. *See* SDCL 1-26-36 (requiring a finding that an appellant's substantial rights have been prejudiced).

D. Ms. Jenkins' Testimony Was Properly Limited.

Appellants also assert that Ms. Karen Jenkins should have been allowed to testify regarding Jurgens' statements to her because it was "apparent . . . that Jenkins was going to provide testimony showing Jurgens lied to her and deceived her." (App. Br. at 15.) This argument should be rejected. At hearing, Appellants made no offer of proof regarding what Jurgens' statements Jenkins (who was not represented by Appellants' counsel) would have testified to, so there is no record evidence to support Appellants' hindsight speculation.[12]

[12] Appellants also assert that these statements would be relevant to the Commission, citing SDCL 49-41B-33. (App. Br. at 17.) This statute does not support Appellants' argument. The statute provides that a permit may be revoked or suspended by the Commission for "[a]ny misstatement of material fact in the application or in accompanying statements or studies required of the applicant, if a correct statement would have caused the commission to refuse to grant a permit." SDCL 49-41B-33(1). The statements referenced by Appellants were not "in the application or in accompanying statements," nor, as discussed previously, were they statements of Prevailing Wind Park. Rather, as Jenkins stated, she was testifying concerning the Beethoven wind project – a different project and a different company. (AR at 011927 (Evid. Hrg. Tr.).)

In addition, Appellants cannot establish that Jurgens' statements would qualify as an exception to the hearsay rule. Jenkins clarified that she was talking about statements concerning easement negotiations in a different wind project (the Beethoven project) developed by a different company. (AR at 011927 (Evid. Hrg. Tr.) ("Q: You're talking Beethoven? A: Yes.").) Further, the Hearing Examiner assisted Jenkins with her direct testimony on multiple occasions. (*E.g.*, *id.* at 011927-011930.) On these facts, the record does not demonstrate prejudice.

III. THE COMMISSION'S DECISIONS WITH RESPECT TO PROJECT SETBACKS ARE SUPPORTED BY THE RECORD.

Appellants assert that the Commission erred by imposing the same setbacks as those imposed at the local level because the Commission believed that it lacked authority to impose greater setbacks. (App. Br. at 17-18.)[13] Appellants misrepresent the record and once more fail to cite legal authority for their arguments.

A. Appellants Apply the Wrong Standard of Review.

As an initial matter, Appellants contend that the Commission committed an error of law, arguing that the Commission misunderstood applicable law. (App. Br. at 18.) As discussed below, there is no support for this argument in the record; rather, it is Appellants' attempt to secure a more favorable standard of review for their arguments. In short, Appellants argue that the Commission should have imposed greater setbacks than it did. (App. Statement of Issues at ¶¶ 4, 5.) In reviewing the record and imposing conditions (such as setbacks and other siting constraints), the Commission is determining whether a proposed project has met its burden under SDCL 49-41B-22. The South Dakota Supreme Court has already determined that the

[13] To the extent Appellants attack the validity of applicable county ordinances themselves, that is outside the scope of this appeal. Appellants challenge the Commission's decision – they did not appeal any of the approvals issued by a county, nor did they appeal or otherwise challenge the validity of the underlying ordinances.

Commission's conclusions under SDCL 49-41B-22 are reviewed under the "clearly erroneous" standard. *See Big Stone II,* 2008 S.D. 5, ¶ 29, 744 N.W.2d at 603 ("Our task in this appeal is to decide the narrow question of whether the [Commission's] conclusion that Big Stone II will not pose a threat of serious injury to the environment was clearly erroneous in light of all the evidence."). Thus, that is the standard of review that applies to these claims.

B. The Commission Did Impose Requirements Beyond Those Imposed at the County Level.

Appellants fail to acknowledge for the Court that the Commission did, in fact, impose greater requirements than those imposed at the local level. The Project is proposed in three counties: Bon Homme, Hutchinson, and Charles Mix. Only Bon Homme County has wind-specific ordinances. A comparison of the applicable county siting constraints and those imposed by the Commission is below; as shown on this table, the Commission did not defer to any county's ordinances:

Constraint/Setback	Bon Homme County	Charles Mix County[14]	Hutchinson County[15]	Commission Decision
Property Line Setback	500 feet or 1.1 times total system height	500 feet or 1.1 times total system height	500 feet or 1.1 times total system height	500 feet or 1.1 times the height of the tower (SDCL 43-13-24)
Non-Participating Residence	1,000 feet	3.5 times the system height or 2,000 feet	1,000 feet	
Participating Residence	500 feet or 1.1 times total	1,000 feet	500 feet or 1.1 times total	

[14] Charles Mix County does not have a zoning ordinance; the setbacks and other requirements noted in this table reflect commitments made by Prevailing Wind Park to Charles Mix County, rather than specific ordinance requirements. (AR at 010025-010028 (Ex. I-22).)

[15] Hutchinson County does not have wind energy facility-specific ordinance provisions; the setbacks noted in this table reflect voluntary commitments made by Prevailing Wind Park to Hutchinson County, rather than specific ordinance requirements. (*See* AR at 012787-012788 (Application) and 008488 (Ex. A7, Pawlowski Rebuttal).)

Constraint/Setback	Bon Homme County	Charles Mix County[14]	Hutchinson County[15]	Commission Decision
	system height		system height	
Public Road Rights-of-Way	500 feet or 1.1 times total system height	500 feet or 1.1 times total system height	500 feet or 1.1 times total system height	
Sound	45 dBA at occupied residences	43 dBA at existing non-participating residences; 45 dBA at existing participating residences	45 dBA at occupied residences	40 dBA within 25 feet of non-participating residence; 45 dBA within 25 feet of any participating residence
Shadow Flicker	30 hours per year/30 minutes per day	30 hours per year/30 minutes per day	30 hours per year/30 minutes per day	15 hours per year/30 minutes per day

In addition, there is nothing in the Commission's Decision that indicates that the Commission believed it was prohibited from imposing different setbacks or constraints (as noted above, the Commission did in fact impose different setbacks and constraints than those imposed at the local level). Rather, the record indicates that the Commission declined to impose greater siting constraints than it did because the record did not support doing so in this case:

> Intervenors requested a two-mile setback from non-participating residences. There is no credible evidence in the record supporting a two-mile setback from non-participating residences. The record demonstrates that the Project meets the Commission's siting requirements applying the current setbacks, as well as Prevailing Wind Park's voluntary commitments. Additionally, there is no reasonable basis in the record to support a 1,500-foot setback from property lines.

(Decision at ¶ 83 (internal citations omitted).)

C. The Record Does Not Support Imposing Greater Setback.

The "evidence" relied upon by Appellants for their argument for greater setbacks is hypothetical and not relevant. Specifically, Appellants state that they relied upon a "research

article demonstrating that 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. Br. at 21.) Appellants fail to inform the Court, however, that the "research article" calculated these distances based on a *hypothetical* 20-megawatt turbine machine that does not exist. The Commission specifically considered and then properly rejected this article:

> The evidence presented in the record demonstrates that Project setbacks and the proposed permit condition regarding icing will protect human health and safety. Prevailing Wind Park provided testimony from Mr. Scott Creech, who has over a decade of experience working with wind turbines. Specifically, Mr. Creech testified that the farthest distance he is aware of ice being thrown from a turbine is approximately 250 feet. The Project is set back at least 649.61 feet (1.1 times the tip height of the tower) from non-participating property lines. In Hutchinson and Bon Homme Counties, the Project is set back at least 1,000 feet from non-participating residences. Per Prevailing Wind Park's commitments to Charles Mix County, Project turbines are set back at least 3.5 times the system height of 2,000 feet, whichever is greater, from non-participating residences in Charles Mix County. The closest participating residence to a turbine is more than 1,550 feet away. In addition, Prevailing Wind Park has agreed to the same turbine icing condition as the Commission imposed in the Dakota Range proceeding, which requires Prevailing Wind Park to use two methods to detect icing conditions on turbine blades. **Intervenors relied on an outdated article to assert that ice throw may occur as far as 6,500 feet away from a 20 MW wind turbine. Such a machine is not proposed for the Project, nor does it exist. As such, the document is irrelevant.** Rather, the real-world data and experience, coupled with the manufacturer recommendations and turbine control software, show that the Project as designed is appropriately siting and will minimize the potential for ice throw.

(Decision at ¶ 80 (emphasis added) (internal citations omitted).) Further, the Project's setbacks comply with the turbine manufacturer's recommendations. (*See* AR at 011099-011106 (Ex. A31, General Electric's Setback Considerations for Wind Turbine Siting).)

D. The Commission Applied South Dakota Statute Regarding Property Line Setbacks.

Appellants' argument with respect to property line setbacks is also misleading. The property line setback imposed by the Commission is codified in South Dakota statute:

> 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, whichever distance is greater, from any surrounding property line. However, if the owner of the wind turbine tower has a written agreement with an adjacent land owner allowing the placement of the tower closer to the property line, the tower may be placed closer to the property line shared with that adjacent land owner.

SDCL 43-13-24. The Commission did not commit an error of law by applying this statutory requirement. *See* SDCL 1-26-36 (setting forth scope of review and allowing for reversal if the decision is, among other things, "[i]n excess of the statutory authority").

IV. APPELLANTS' DUE PROCESS ARGUMENT LACKS MERIT.

Appellants claim that "SDCL 49-41B-25 [v]iolated Intervenors' [d]ue [p]rocess rights." (App. Br. at 22.) Appellants characterize their claim as "as-applied," but also appear to argue that the statute is facially unconstitutional. (*Id.*) As evidenced by Appellants' failure to cite any case law in support of their position,[16] neither position has merit.

A. Appellants Waived This Argument.

As an initial matter, Appellants failed to raise this issue before the Commission. In fact, Mr. Hubner affirmatively stated: "I have no objection to the schedule so I don't have anything else to say." (*See* AR at 1938 (Aug. 7, 2018 Meeting Tr.).) Appellants did not raise the issue later in the proceedings, nor did they assert to the Commission that their participation in the proceeding was limited in any specific way. Accordingly, Appellants have waived this

[16] Appellants cite two cases on pages 22-23 of their brief regarding the applicable legal standard, but they cite no case law supporting their arguments that they were not afforded with due process in this case. (App. Br. at 22.)

argument, and it should be rejected. *See App. of Am. St. Bank*, 254 N.W.2d 151, 155 (S.D. 1977) (holding that a claim regarding violation of due process was not preserved for appeal where it was not raised to the administrative agency until after the hearing);[17] *see also Matter of S. Lincoln Rural Water Sys. Application for Permit No. 4300-3*, 295 N.W.2d 743, 747 (S.D. 1980) (noting that the South Dakota Supreme Court has "consistently held that the constitutionality of a statute will be considered only when it has been properly presented in the lower court"); *see also Schlenker v. S. Dakota Dep't of Pub. Safety*, 318 N.W.2d 351, 353 (S.D. 1982).

App. of Am. State Bank, 254 N.W.2d 151 (S.D. 1977), is instructive. The appellants argued that their due process rights were violated by the admission into the record of a report prepared by the agency, arguing that they should have been allowed to cross-examine the unnamed individuals who prepared the report. *Id.* at 154. The court noted that the appellants did not object to admission of the report before the agency, that the report had been served upon appellants "two to three days prior to the hearing," and that appellants' witnesses were allowed to testify concerning the report. *Id.* at 154-55. The court rejected these appellants' claims, stating, "[h]aving acquiesced in the admission of the challenged materials at the hearing, they are estopped to object before an appellate court. There is no violation of due process under these facts." *Id.* at 155. The same facts exist in this case – Appellants did not object to the procedural schedule, and they had far more than two or three days to review materials and prepare for the hearing. Accordingly, under existing South Dakota law, Appellants' argument fails.

[17] *See also id.* at 155 ("Appellants' only claim to making a timely objection consists of a proposed finding of fact which was submitted to the Commission after the hearing, and rejected by the Commission. No authority is cited to support appellants' position. This court holds that an objection first formally made in a proposed finding to an administrative agency after a hearing does not preserve such objection for appeal.").

B. SDCL 49-41B-25 As-Applied: The Procedural Schedule Comported with Due Process.

Appellants assert that they "did not have sufficient time to meaningfully be heard on all issues" because, from the time their intervention applications were granted, they had 33 days to submit direct testimony and approximately two months to prepare for the evidentiary hearing. (App. Br. at 24.) As with prior arguments, Appellants' arguments here both misstate the record and the law.

In general, due process requires "adequate notice and an opportunity for meaningful participation." *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 28, 891 N.W.2d 377, 387. "To establish a due process violation, an individual must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law." *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 14, 802 N.W.2d 905, 911. The South Dakota Supreme Court has identified the following factors to consider "what process is due in a particular case":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Daily, 2011 S.D. 48, ¶ 18, 802 N.W.2d at 912 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. The Procedural Order Complies with South Dakota Statute.

The Commission's Procedural Order is consistent with existing South Dakota statute; Appellants do not assert otherwise. In other cases, South Dakota courts have found no due process violation when agency action complied with governing statutes. *E.g.*, *Matter of Zar*, 434

N.W.2d 598, 602 (S.D. 1989) ("In light of the Board's failure to follow the procedural requirements of SDCL ch. 1-26. . . ."); *I.T.C., Inc. v. Pub. Util. Comm'n of S.D.*, 518 N.W.2d 749, 757 (S.D. 1994) (holding that "South Dakota statutes set out 'due process' to be followed when one telephone company desires to extend its service area . . ." and remanding where agency failed to follow the statutory process).

2. Appellants Had Numerous Opportunities to Be Heard, and They Utilized Those Opportunities.

Intervenors fail to acknowledge that Prevailing Wind Park's application and direct testimony was filed on May 30, 2018, which is 124 days before their testimony was submitted. In addition, Appellants' implication that their involvement in proceedings related to the Project only began when their intervention petitions were granted is misleading. Appellants have been actively opposing the Project for several years – indeed, since before Prevailing Wind Park was formed. (AR at 012328-012329 (Evid. Hrg. Tr.) (describing attending numerous county meetings and advocated for a two-mile setback).)

Appellants had more than adequate time to develop their case and extensively participated in these proceedings. Specifically, Appellants:

- Participated with full party status (with representation by legal counsel);
- Submitted pre-filed written testimony and attachments from three experts (totaling more than 700 pages);[18]
- Were allowed to submit lay witness disclosures (*i.e.*, a list of lay witnesses with brief summaries of their proposed testimony topics), rather than being required to prepare detailed written testimony in advance of the hearing;
- Issued four sets of discovery requests to Prevailing Wind Park;

[18] As noted previously, Appellants chose to withdraw the testimony of Dr. Alves-Pereira at the hearing without explanation.

- Issued discovery requests to Staff;
- Responded to discovery requests from Prevailing Wind Park and Staff;
- Issued subpoenas to third parties for both documents and individuals to testify at the evidentiary hearing;
- Testified themselves at the evidentiary hearing;
- Presented their expert witnesses by video conference;
- Cross-examined Prevailing Wind Park's witnesses;
- Cross-examined Staff's witnesses;
- Submitted a post-hearing brief; and
- Spoke individually at the Commission meeting regarding issuance of the permit.

The opportunities for Appellants to participate in this proceeding exceeded the minimum requirements of the Due Process Clause. *See, e.g.*, *Dail v. S.D. Real Estate Comm'n*, 257 N.W.2d 709, 713 (S.D. 1977) (no due process violation in revocation of real estate license where individual "was given the right to hear the witnesses against him, and to fully cross-examine them and to present his own testimony and that of his witnesses"); *Matter of Zar*, 434 N.W.2d at 601 (holding that violation of due process occurred where appellants were not allowed to present briefs and oral argument to agency in violation of statute); *Schroeder v. Dep't of Social Servs.*, 1996 S.D. 34, ¶ 14, 545 N.W.2d 223, 229 (finding no due process violation where agency followed statutory process and held two-day hearing, and individual submitted testimony on her behalf); *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160-61 (finding no due process violation where opponents were given five minutes to speak at a county meeting and failed to "actually articulate any such allegedly suppressed information, let alone assert that the exclusion of such information prevented GCCC

from participating in any meaningful way");[19] *Hollander v. Douglas Cnty.*, 2000 S.D. 159, ¶ 18, 620 N.W.2d 181, 186 (finding no due process violation where individual received notice of the hearing, appeared with an attorney, and had the opportunity to cross examine witnesses and present his own evidence).

Overall, the record demonstrates that Appellants' opportunities to participate in this proceeding and be heard were in compliance with statutory requirements and exceeded the requirements of the Due Process Clause.

C. Appellants Have Not Met Their "Heavy Burden" of Proving Beyond a Reasonable Doubt That SDCL 49-41B-25 is Unconstitutional.

Although Appellants state that they are making an as-applied challenge, the bulk of their arguments assert that the statute itself is unconstitutional. (App. Br. at 23 n.8 ("Intervenors are not criticizing the Commission for the procedural schedule it adopted.").) They cite no legal authority for this position. In South Dakota, statutes are presumed constitutional, and the person challenging the constitutionality of a statute bears a heavy burden: "it is well settled in this state that a legislative enactment is presumed reasonable, valid, and constitutional. Thus, the party attacking [the enactment] bears the heavy burden of overcoming this presumption of validity by showing the [enactment] is both unreasonable and arbitrary." *City of Pierre v. Blackwell*, 2001 S.D. 127, ¶ 9, 635 N.W.2d 581, 584 (internal citations omitted); *see also Wuest v. Winner Sch. Dist. 59-2*, 2000 S.D. 42, ¶ 32, 607 N.W.2d 912, 919 ("There is a strong presumption that the laws enacted by the legislature are constitutional and that presumption is rebutted only when it

[19] *See also id.* ("GCCC misunderstands what due process requires. 'Due process requires adequate notice and an opportunity for meaningful participation.' GCCC has offered no authority for the conclusion that, under South Dakota law, 'meaningful participation' is defined as 'equal time.' Despite its claim that one of its members 'was not permitted to present all of the information she desired at the hearing[,]' GCCC fails to actually articulate any such allegedly suppressed information, let alone assert that the exclusion of such information prevented GCCC from participating in a meaningful way.").

clearly, palpably and plainly appears that the statute violates a constitutional provision. Further, the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision.") (internal citations omitted).

In support of their arguments, Appellants refer to testimony from Commissioner Gary Hanson before the South Dakota Legislature, as well as statements by individual Commissioners during deliberations. (App. Br. at 24-25, 26.) Neither is relevant to the decision here. Commissioner Hanson's legislative testimony post-dates the Commission decision, is outside the record, and should not be considered. *See In re B.Y. Dev., Inc.*, 2000 S.D. 102, ¶ 9, 615 N.W.2d at 608-09. Further, Commissioner Hanson is not an attorney or a judge and, although his opinion on the procedures enacted by the Legislature may be informative to the Legislature for policy reasons, these opinions are not relevant in determining whether a duly-enacted statute comports with the Due Process Clause. *See Wuest*, 2000 S.D. 42, ¶¶ 30, 32, 607 N.W.2d at 918, 919 (describing standard for analyzing due process claims and stating that the presumption that a statute is constitutional "is rebutted only when it clearly, palpably and plainly appears that the statute violates a constitutional provision"); *see also Matter of Estate of Washburn*, 1998 S.D. 11, ¶¶ 18-19, 575 N.W.2d 245, 249-50 (describing standard for analyzing due process claims).

Similarly, statements of individual Commissioners do not constitute the Commission's decision here – only the written order reflects the action of the Commission as a whole. *E.g.*, *Hutchinson Cty. v. Fischer*, 393 N.W.2d 778, 783 (S.D. 1986) (agency decisions must be in writing).

As noted previously, the statute provides sufficient time for intervenors to participate in proceedings in numerous ways, including submitting testimony and cross-examining witnesses.

Under both federal and South Dakota law, this is sufficient to comport with due process. (*See* cases cited in Section IV(B) above.)

Similarly, Appellants fail to acknowledge that it is not uncommon for states to impose time requirements on permitting and other proceedings. For example: Kentucky imposes a 120-day or 180-day timeline; Nebraska imposes a 180-day timeline; Nevada imposes a 120-day or 150-day timeline. *See* Ky. Rev. Stat. 278.710(1); Neb. Rev. Stat. 70-1013(1); Nev. Rev. Stat. 704.8905(1)(a), (b). Under Appellants' arguments, these statutes would also be unconstitutional. However, they cite no legal authority for this position.

Overall, Appellants make policy arguments regarding why they believe a longer permitting timeframe would be preferable. (App. Br. at 26 ("It would also potentially lead to a more streamlined evidentiary hearing. . . .").) These types of policy considerations are for the Legislature to consider; they do not implicate the Due Process Clause. *See, e.g.*, *S. Dakota v. U.S. Dep't of Interior*, 775 F. Supp. 2d 1129, 1139 (D.S.D. 2011) (noting that the Due Process Clause "establishes a constitutional floor, not uniform standard") (citations omitted). Appellants have thus not met their "heavy burden" of demonstrating that SDCL 49-41B-25 is unconstitutional, and their arguments should be rejected.

CONCLUSION

The Commission's Decision in this matter is based on an administrative record that consists of more than 18,000 pages. Appellants ask the Court to second-guess the Commission, but Appellants' arguments are not supported by the substantial record in this matter or the law. Accordingly, Prevailing Wind Park respectfully requests that the Court affirm the Commission's Decision.

REQUEST FOR ORAL ARGUMENT

Prevailing Wind Park respectfully requests that the Court hold oral argument in this matter. SDCL 1-26-33.3(7).

Dated this 8th day of March, 2019.

By: */s/ Lisa M. Agrimonti*

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STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BON HOMME	FIRST JUDICIAL DISTRICT

GREGG AND MARSHA HUBNER; SHERMAN FUERNISS; KELLI PAZOUR; AND KAREN JENKINS, Appellants, vs. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION; PREVAILING WIND PARK, LLC; SOUTH DAKOTA PUBLIC UTILITIES COMMISSION STAFF; PAUL SCHOENFELDER; LISA SCHOENFELDER; AND CHARLES MIX COUNTY, SOUTH DAKOTA, Appellees.	Case No. 04CIV18-000084 CERTIFICATE OF SERVICE

Mary Ann Monahan, of Fredrikson & Byron, P.A., hereby certifies that on the 8th day of March, 2019, true and correct copies of Prevailing Wind Park, LLC's Response Brief and this Certificate of Service were filed and served via the Odyssey File & Serve system upon the following:

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And that on the 8th day of March, 2019, true and correct copies of Prevailing Wind Park, LLC's Response Brief and this Certificate of Service were served via First Class U.S. Mail, postage prepaid, upon the following:

Mr. Paul M. Schoenfelder 40228 - 296th St. Wagner, SD 57380	Ms. Lisa A. Schoenfelder 40228 - 296th St. Wagner, SD 57380
Mr. Keith Mushitz Chairperson Charles Mix County Commission PO Box 490 Lake Andes, SD 57356	Ms. Diane Murtha Auditor Hutchinson County 140 Euclid, Rm. 128 Olivet, SD 57052
Ms. Sara Clayton Auditor Charles Mix County PO Box 490 Lake Andes, SD 57356	Ms. Tamara Brunken Auditor Bon Homme County PO Box 605 Tyndall, SD 57066

/s/ Mary Ann Monahan
Mary Ann Monahan

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