

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE</b>	*	<b>APPLICANT’S RESPONSE TO</b>
<b>APPLICATION BY PREVAILING WIND</b>	*	<b>INTERVENORS’ MOTION TO</b>
<b>PARK, LLC FOR A PERMIT FOR A</b>	*	<b>HAVE WITNESSES APPEAR</b>
<b>WIND ENERGY FACILITY IN</b>	*	<b>TELEPHONICALLY</b>
<b>BON HOMME, CHARLES MIX, AND</b>	*	
<b>HUTCHINSON COUNTIES,</b>	*	
<b>SOUTH DAKOTA, FOR PREVAILING</b>	*	
<b>WIND PARK ENERGY FACILITY</b>	*	

**EL18-026**

---

**INTRODUCTION**

Prevailing Wind Park, LLC (“Applicant”), submits this Response to the Motion to Have Witnesses Appear Telephonically (“Motion”). On September 13, 2018, Intervenors Gregg Hubner, Marsha Hubner, Paul Schoenfelder and Lisa Schoenfelder (together “Intervenors”) filed the Motion requesting that their expert witnesses, Richard James, Jerry Punch, and Mariana Alves-Pereira (“Expert Witnesses”) be allowed to appear telephonically or via video conference for the Evidentiary Hearing scheduled to begin on October 9, 2018. Applicant, and ultimately the South Dakota Public Utilities Commission (“Commission”), would be at a disadvantage if the Expert Witnesses are allowed to testify electronically because the ability to assess their credibility will be significantly limited by a phone appearance. Accordingly, Applicant respectfully requests that the Commission deny Intervenors’ Motion.

**DISCUSSION**

The trial court—in this instance, the Commission—has broad authority to determine the manner in which a witness testifies.<sup>1</sup> The South Dakota Supreme Court in *People ex rel. O.S.* ruled that the trial court did not abuse its discretion in excluding telephonic testimony of an

---

<sup>1</sup> See *People ex rel. O.S.*, 701 N.W.2d 421, 427 (S.D. 2005) (quoting *State v. Alidani*, 609 N.W.2d 152, 157 (S.D. 2000)).

expert.<sup>2</sup> The Supreme Court affirmed the trial court's consideration of timeliness and ability to judge the witness's credibility in deciding not to allow telephonic testimony.

Here, Intervenors request that the only witnesses for whom they filed pre-filed testimony be allowed to testify by phone. Applicant is not unsympathetic to the costs of presenting expert testimony. However, the matters to which these witnesses will testify appear to be the crux of Intervenors' case-in-chief. As a matter of due process, Applicant must have a reasonable opportunity to fully cross-examine expert witnesses which is challenging when an expert testifies by phone and Applicant cannot evaluate facial expressions or documents potentially being referenced.

Intervenors' reliance on the telephonic appearance of David Hessler in Docket EL17-055 as support for their Motion is misplaced. In that docket, the issues Mr. Hessler addressed were not in dispute. Further, the applicant and Commission Staff submitted a stipulation agreeing that examination of Mr. Hessler would most likely be minimal and that no parties would be prejudiced by taking testimony of this witness telephonically.<sup>3</sup> Here, there is no such agreement—Applicant will be challenging the content of the Expert Testimony and objects to the telephonic appearance. In the face of such objection, the Commission is empowered to deny a request of a party to have its witnesses appear telephonically.<sup>4</sup>

---

<sup>2</sup> *Id.*

<sup>3</sup> *In the Matter of the Application by Crocker Wind Farm, LLC for a Permit of a Wind Energy Facility and a 345 kV Transmission Line in Clark County, South Dakota, for Crocker Wind Farm*, EL17-055, Stipulation and Request for Telephonic Testimony of David Hessler, <https://puc.sd.gov/commission/dockets/electric/2017/e117-055/hessler.pdf>.

<sup>4</sup> The Commission has previously denied motions to allow an expert witness to appear electronically, giving weight to the objection of a party to the case. *See, e.g., In the Matter of the Complaint by Oak Tree Energy LLC against NorthWestern Energy for refusing to enter into a Purchase Power Agreement*, EL11-006, Order Denying Motion to Allow Electronic Testimony (March 14, 2012).

**CONCLUSION**

For the reasons set forth above, Applicant respectfully requests that the Commission deny Intervenor's Motion to Have Witnesses Appear Telephonically.

Dated this 19th day of September, 2018.

By /s/ Lisa M. Agrimonti  
Mollie M. Smith  
Lisa A. Agrimonti  
FREDRIKSON & BYRON, P.A.  
200 South Sixth Street, Suite 4000  
Minneapolis, MN 55402  
Phone: (612) 492-7270  
Fax: (612) 492-7077  
*Attorneys for Prevailing Wind Park, LLC*

64861044