BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY PREVAILING WIND PARK, LLC FOR A PERMIT OF A WIND ENERGY FACILITY IN BON HOMME COUNTY, CHARLES MIX COUNTY AND HUTCHINSON COUNTY, SOUTH DAKOTA, FOR THE PREVAILING WIND PARK PROJECT	)	**STAFF'S RESPONSE TO APPLICANT'S MOTION TO EXCLUDE LAY TESTIMONY, TO QUASH SUBPOENAS, AND TO REQUIRE FURTHER LAY DISCLOSURES** **EL18-026**

COMES NOW Commission Staff by and through its undersigned counsel files this Response to Applicant's Motion to Exclude Lay Testimony, to Quash Subpoenas, and to Require Further Lay Disclosures.

I. Motion to Exclude Lay Testimony

Applicant argues that several witnesses should be excluded from testifying because their testimony purports to focus solely on local zoning processes. Applicant's assertion is essentially that the existence of zoning ordinances and agreements speak for themselves, and the underlying processes are, therefore, irrelevant. Staff disagrees.

SDCL 49-41B-22 requires the Commission to ensure that due consideration is given to local units of government. It does not mandate one hundred percent, unquestioned deference. Surely, that would render much of SDCL 49-41B-22 meaningless by delegating authority to the counties entirely. Rather, it is within the Commission's discretion to weigh the evidence and determine how much deference satisfies the requirement of due consideration. That is a subjective determination, and each party has the right to argue and present evidence for the Commission to rely upon in making that determination. Because the statute references *due consideration,* thus the parties have the right to argue about what level of consideration is due.

In addition, this Commission has not previously had the opportunity to consider an agreement like that entered into by Charles Mix County and Applicant. As compared to an ordinance or conditional use permit, an agreement could provide less opportunity for public scrutiny and input. Thus, the testimony could prove relevant. After hearing the testimony, it is within the Commission's prerogative to give it the weight it deserves.

Staff recommends denial of this portion of the motion. Staff reserves the right to object on relevance or other grounds should this or any other testimony go down a path that is not relevant. However, based on the information we have today, this subject matter falls within that upon which parties have a right to make their record and argue the weight in post-hearing briefs or closing arguments.

II. Motion to Quash Subpoenas

Other than a general statement, Applicant fails to provide any support for the assertion that compliance with the subpoenas is unduly burdensome. There is no affidavit asserting that the documents are voluminous and would take an exorbitant amount of time to compile. There is no showing that the production of the requested documents would be costly or that it would fail to lead to the discovery of relevant or admissible evidence. Thus, Staff does not believe this assertion is convincing.

Further, Staff notes that Applicants served a discovery request on intervenors that include a very similar request. (See Attachment 1, question 1-11) If this request is not overly burdensome for an individual, even when extended to include communications with all government agencies, it is difficult to see how it could be overly burdensome for one government body, particularly when that body is subject to open records laws.

Most important, Applicant placed the county processes at issue by relying on completion of those processes as evidence of satisfaction of its burden of proof under SDCL 49-41B-22. Two specific areas in which this was done are noise and shadow flicker.

When analyzing shadow flicker, Applicant presented testimony and studies to show that it relied upon and could satisfy the Bon Homme County requirement of not more than thirty hours per year and thirty minutes per day of shadow flicker on a habitable residential dwelling.[1] Applicant chose to demonstrate compliance with the Bon Homme County regulation, rather than provide studies and testimony supporting the assertion that thirty hours per year and thirty minutes per day protects the health and safety of the inhabitants. If the Applicant chooses to rely on the county ordinance as support for satisfying an element of its burden of proof, other parties have a similar right to investigate and argue whether such support is misplaced, as the Commission is ultimately the arbitrator of whether or not a project does not significantly impact the health, safety, and welfare of the inhabitants of the area.[2]

Another such example is sound, discussed in Section 15.3.2 of the Application. Applicant provided testimony about compliance with county sound levels of 45 dBA, rather than an in-depth showing that an audible noise level of 45 dBA does not have a significant impact on the health, safety, and welfare of the inhabitants. Again, Staff acknowledges and supports other parties' right to challenge whether compliance with the ordinance sufficiently complies with Applicant's burden.

[1] See Application at Section 15.5.1.
[2] See SDCL 49-41B-22(3).

Because they were issued by a party to the proceeding, the subpoenas are proper under ARSD 20:10:01:17. Discovery is a very broad tool, and its allowance in no way guarantees use or admissibility at hearing.

Staff takes no position on whether the scope of the subpoenas should be limited, as we lack the information to ascertain why travel logs, cash flow statements, etcetera were included in the definition of "document".

III. Motion to Require Further Lay Disclosures

Staff supports this portion of Applicant's Motion and will work with all parties to determine whether the issue can be resolved prior to the September 21 motion hearing.

Dated this 19th day of September 2018.

Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us