

September 19, 2018

VIA ELECTRONIC FILING

Ms. Patricia Van Gerpen
Executive Secretary
South Dakota Public Utilities Commission
500 E Capitol Ave
Pierre, SD 57501-5070

RE: 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 Docket EL18-026

Dear Ms. Van Gerpen:

In connection with the above-referenced matter, enclosed please find the following documents:

1. Applicant's Response to Intervenors' Motion to Have Witnesses Appear Telephonically; and
2. Certificate of Service.

If you have any questions, please let me know.

Sincerely,

/s/ Lisa Agrimonti

Lisa Agrimonti
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Enclosures

cc: Certificate of Service/Service List (*via e-mail*)

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

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

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.¹ 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

¹ 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.² 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.³ 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.⁴

² *Id.*

³ *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/el17-055/hessler.pdf>.

⁴ 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
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**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**

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CERTIFICATE OF SERVICE

EL18-026

Bridget Duffus, of Fredrikson & Byron, P.A., hereby certifies that on the 19th day of September, 2018, true and correct copies of the following documents were served electronically on the persons listed below:

1. Applicant’s Response to Intervenors’ Motion to Have Witnesses Appear Telephonically; and
2. Certificate of Service.

Ms. Patricia Van Gerpen Executive Director South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501 patty.vangerpen@state.sd.us	Ms. Kristen Edwards Staff Attorney South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501 Kristen.edwards@state.sd.us
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Mr. Jon Thurber Staff Analyst South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501 jon.thurber@state.sd.us	Ms. Mollie Smith - Representing: Prevailing Wind Park, LLC Fredrikson & Byron, P.A. 200 S. 6th St., Ste. 4000 Minneapolis, MN 55402 msmith@fredlaw.com
Ms. Bridget Canty - Representing: Prevailing Wind Park, LLC Permitting Project Manager sPower 201 Mission St., Ste. 540	Ms. Lisa M. Agrimonti - Representing: Prevailing Wind Park, LLC Fredrikson & Byron, P.A. 200 South Sixth Street, Suite 4000 Minneapolis, MN 55402-1425

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/s/ Bridget Duffus

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