

**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**

**INTERVENORS' RESPONSE TO
APPLICANT'S MOTION TO
EXCLUDE LAY TESTIMONY,
TO QUASH SUBPOENAS AND
TO REQUIRE FURTHER LAY
DISCLOSURES**

EL 18-026

Intervenors Gregg Hubner, Marsha Hubner, Lisa Schoenfelder, and Paul Schoenfelder (“Intervenors”), by and through counsel, hereby submit this response to the Applicant’s Motion to Exclude Lay Testimony, to Quash Subpoenas and to Require Further Lay Disclosures.

I. Motion to Exclude Testimony

Applicant seeks to prevent the Commission from hearing testimony regarding the zoning of Charles Mix County, Bon Homme County, and Hutchinson County. This motion is rather bizarre given SDCL 49-41B-22 explicitly states the Commission should give due consideration to “the views of governing bodies of affected local units of government.” There is no better way to understand and consider those views than to hear them firsthand from county officials.¹

Moreover, the Applicant has the burden of showing the “proposed facility will comply with all applicable laws and rules.” County zoning ordinances are “applicable laws and rules” with which the proposed facility must comply. Again, there is no better way to learn whether the facility has or will comply with a county’s zoning ordinance than to hear firsthand from county officials charged with administering and enforcing those ordinances.

¹ Frankly, it is alarming the Applicant did not intend to call county officials as witnesses given the Applicant has the burden of proof in this proceeding. SDCL 49-41B-22 (“The applicant has the burden of proof . . .”).

Furthermore, the Applicant has made several assertions in its Application regarding the zoning controls in Bon Homme County, Charles Mix County, and Hutchinson County. *See* Application §§ 9.2, 16.0, 27.2.3. Intervenors, as parties to this proceeding, have the right to challenge those assertions, or at the very least verify the accuracy thereof. That is a basic tenet of due process. To do this, Intervenors intend to call those witnesses identified in their disclosures.

As a final point, in prior siting-permit proceedings Commissioners have expressed giving deference to the zoning ordinances established by counties when determining whether a facility “will not substantially impair the health, safety, or welfare of the inhabitants” or “pose a risk of serious injury to the . . . social and economic condition of inhabitants or expected inhabitants of the siting area.” SDCL § 49-41B-22(2)–(3). Before giving deference to county zoning ordinances, the Commission should understand the rationale for why a certain ordinance was adopted. Here, for example, Bon Homme County has a 1,000 feet setback from non-participating residences. If the Commissioners plan to defer to that setback, it is imperative the Commissioners hear from Bon Homme County why that specific setback exists and what information the county relied on when coming up with that setback. Otherwise, the Commission would be blindly relying upon Bon Homme County to establish a safe and appropriate setback for non-participating residences, effectively delegating its responsibility under SDCL 49-41B-22 to Bon Homme County. Doing so would be inappropriate.

For all of these reasons, the Applicant’s motion to exclude the testimony of Gregg Hubner, Paul Schoenfelder, Keith Mushitz, Michael Soukup, and Brian McGinnis and to limit the testimony of Sherm Feurens and Karen Jenkins should be denied.

II. Motion to Quash Subpoenas

Intervenors have served subpoenas duces tecum on Bon Homme County, Charles Mix County, Hutchinson County, and Brian McGinnis requesting information related to the Project and the zoning ordinances in the respective counties. *See* ARSD 20:10:01:17 (“Subpoenas requiring the attendance of witnesses and the production of records, books, papers, tariffs, agreements, contracts, and documents may be issued by an attorney consistent with SDCL 15-6-45(a)[.]”). For the reasons stated above, the information sought is both relevant to this proceeding and is also “reasonably calculated to lead to the discovery of admissible evidence.” SDCL 15-6-26(b) (explaining scope of discovery). Therefore, the subpoenas duces tecum are proper and should not be quashed. Indeed, quashing said subpoenas would violate Intervenors’ due process rights in this proceeding, as they have the right to engage in discovery in order to develop their case.

Applicant also argues the subpoenas are unduly burdensome. Applicant does not have standing to make that argument, as it is not the party responsible for responding to the subpoenas and therefore cannot know the burdensomeness of responding thereto. To the extent the requests are burdensome, those entities and persons to whom the requests are made are more than welcome to reach out to the undersigned to discuss ways in which to alleviate any purported undue burden. In fact, some already have. If a subpoena recipient determines responding to a subpoena is unduly burdensome, it has the ability to come to this Commission and so state. None have done so.

For these reasons, the Commission should deny Applicant’s motion to quash the subpoenas duces tecum.

III. Motion for Further Lay Disclosures

Applicant requests the Commission require Intervenor to supplement their disclosures of lay witnesses. For the reasons stated below and in light of the additional information provided, Intervenor oppose this request.

The August 9, 2018 Commission Order provided a September 9, 2018 deadline for Intervenor to provide disclosure of intervenor lay witnesses. Intervenor complied with that Order; they disclosed their lay witnesses. Nothing more is required under the Order.

Nevertheless, Intervenor are providing additional information regarding the identified lay witnesses. *See* Intervenor's First Amended Disclosure of Lay Witnesses attached hereto.

To the extent Applicant desires additional information, there are methods by which it can obtain that information. Some of which are quite simple; for example, the Applicant can simply contact non-party witnesses directly and ask them questions about the subject-matter identified in Intervenor's disclosures. Rather than do that, the Applicant filed its motion² (knowing Intervenor would have to spend time/resources responding) and seek an Order from the Commission that would require even further time and resources from Intervenor. It seems the Applicant's strategy in this matter is to inundate Intervenor and their counsel with more and more work while at the same time stifling their access to and ability to present relevant information. That is troubling.

As a final point, Intervenor were granted party status on August 7, 2018. They had 33 days to work with counsel, analyze the information in this docket, develop a strategy for this proceeding, locate lay witnesses willing to testify, locate experts willing to testify, work with

² Applicant filed its motion before even contacting Intervenor and asking, informally, for additional information. A meet and confer did take place *after* Applicant filed its motion at the request of PUC Staff.

experts to prepare prefiled testimony, respond to data requests, serve data requests, serve subpoenas, and now respond to this motion.³ Applicants were certainly aware of the burden such time constraints placed on Intervenor, but rather than attempt to resolve the issues identified in Applicant's motion informally through a good faith meet and confer process (as is required in the rules of civil procedure), Applicant filed its formal motion instead. Such a tactic, viewed in the context of Applicant's pending motion, shows Applicant's intent is to unduly burden Intervenor, attempt to deprive them of their due process rights, and discourage others from intervening in similar proceedings in the future.

For these reasons, Intervenor request the Commission deny the Applicant's motion for further lay disclosures.

Dated this 19th day of September, 2018.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.



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³ Given the time restraints imposed on Intervenor in this proceeding and the fact that the Applicant has an unlimited amount of time to prepare for this proceeding before it files its application, Intervenor find Applicant's complaints of not having adequate time to prepare for the evidentiary hearing laughable.

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**INTERVENORS' FIRST
AMENDED
DISCLOSURE OF
LAY WITNESSES**

EL 18-026

Intervenors, Gregg Hubner, Marsha Hubner, Paul Schoenfelder, and Lisa Schoenfelder

("Intervenors"), through their counsel, hereby submit this First Amended Disclosure of Lay

Witnesses:

1. Vickie May
88737 500th Avenue
Lynch, Nebraska 68746
402-569-2130

Vickie May is expected to testify about her experiences living 1 3/8 miles from the nearest of 200 turbines in a wind farm located in Holt County, Nebraska (Grand Prairie Wind, developed by Geronimo). In particular, she will testify about symptoms she began experiencing after the project became operational (e.g., sleep deprivation, ringing of ears, ear pain, anxiety) and how her quality of life has decreased.

2. Scott Rueter
905 Lakeside Avenue
Lake Park, Iowa 51347
712-260-6678

Scott Rueter is expected to testify about his experience living 900 feet from a turbine in a wind farm located in Iowa. He can testify about symptoms he experienced after the project became operational and how he was forced to move from his home. He has also witnessed the malfunctioning of a turbine, during which the turbine caught fire and the blades became separated from the tower and fell to the ground.

3. Lori Fuerniss
40263 293rd Street
Delmont, South Dakota 57330

Lori Fuerniss is expected to testify about her experience living a little over a mile from the closest turbine in the Beethoven Wind Farm. There are five turbines within 2 miles of her residence.

Since the Beethoven Wind Farm went operational, she has experienced the following: trouble falling asleep; difficulty staying asleep for more than 4 hours; headaches; and stress. These issues have had a detrimental impact on her quality of life and her relationships.

4. Sherm Fuerniss
40263 293rd Street
Delmont, South Dakota 57330

Sherm Fuerniss is expected to testify about his experience living a little over a mile from the closest turbine in the Beethoven Wind Farm. There are five turbines within 2 miles of his residence.

Since the Beethoven Wind Farm went operational, he has experienced the following: trouble falling asleep; difficulty staying asleep for more than 4 hours; waking with clenched jaw, shoulders hunched, and head off of the pillow; vertigo; wooziness; and anxiety. These issues have had a detrimental impact on his quality of life, including causing him to be short tempered and short with family members.

Sherm Feurness is also expected to testify regarding his involvement in the zoning process in Charles Mix County, including what he observed during public hearings and communications with county officials.

Moreover, Sherm Feurness is an intervenor in this proceeding.

5. Richard Daugherty
29499 Leola River Road
Pollock, South Dakota 57648-6105
605-889-2336

Rich Daugherty is expected to testify about his experience living near the Campbell County Wind Farm, including the shadow flicker and noise caused the turbines.

6. Josh Larson
29554 113th Street
Pollock, South Dakota 57648
605-230-0372

Josh Larson is expected to testify about his experiences living 1,400 feet from a wind turbine in the Campbell County Wind Farm, including the noise he deals with inside his home.

7. Jerome Powers
40427 294th Street
Wagner, South Dakota 57380
605-491-1161

Jerome Powers is expected to testify about his experience living near the Beethoven Wind Farm. There are seven turbines within 2 miles of his residence.

Since the Beethoven Wind Farm went operational, he has experienced the following: headaches; constant ear ringing; loss of sleep; agitation; and difficulty concentrating.

He is also expected to testify about his observations with ice building up on turbines and ice throws. He has seen ice shards approximately 1,000 feet from a turbine and 600 feet from another turbine.

He also has a pheasant hunting business (Dakota Plains Hunting – 40427 294th Street, Wagner, SD 57380) that is located in and around the proposed Prevailing Wind Park. He anticipates he will lose \$15,000 to \$20,000 per year if the Project is built as planned. He spoke with 50 regular clients; 25 said they will not come back if this project is built.

He is also expected to testify regarding his involvement in the zoning process in Charles Mix County, including what he observed during public hearings and communications with county officials.

8. Kelli Pazour
29668 402nd Avenue
Wagner, South Dakota 57380

Kelly Pazour is expected to testify about her daughter that wears a BAHA (Bone anchored hearing aid) and the concerns she has regarding Prevailing Wind Park.

9. Karen Jenkins
28912 410th Avenue
Tripp, South Dakota 57376

Karen Jenkins is expected to testify about her experience living near Beethoven Wind Farm and her experiences with the County Commissioners in all three counties of Bon Homme, Charles Mix and Hutchinson.

Karen Jenkins is also an intervenor in this proceeding.

10. Travis Krumvieda
37658 238th St.
Wessington Springs, South Dakota 57382
605-770-5529

Travis Krumvieda is expected to testify about his experience as a participating landowner in a wind project, including the noise created by the project.

11. Gregg Hubner
29976 406th Avenue
Avon, South Dakota 57315

Gregg Hubner is expected to testify about his experience with the Bon Homme County Commissioners and Zoning Board about zoning.

12. Paul Schoenfelder
40228 296th Street
Wagner, South Dakota 57380

Paul Schoenfelder is expected to testify about his experience with Charles Mix County's zoning efforts.

13. Keith Mushitz
37024 289th Street
Geddes, South Dakota 57342

Keith Mushitz is expected to testify about Charles Mix County's zoning related to wind energy systems and specifically the Project.

14. Michael Soukup
29630 416th Ave.
Scotland, South Dakota 57059

Michael Soukup is expected to testify about Bon Homme County's zoning related to wind energy systems and specifically the Project.

15. Brian McGinnis
PO Box 687
Yankton, South Dakota 57078

Brian McGinnis is expected to testify about his involvement with zoning issues related to the Project and with the pertinent counties' adoption of zoning regulations or controls.

16. Kevin Andersh
40128 294th Street
Wagner, South Dakota 57380

Kevin Andersh is expected to testify about his experience living close to the Beethoven Wind Farm and a registered cemetery on his property (Section 15-96-62, Charles Mix County).

17. Hutchinson County Representative
140 Euclid Street
Olivet, South Dakota 57052

A Hutchinson County representative may be called to testify about Hutchinson County's zoning related to wind energy systems and specifically the Project.

Dated this 19th day of September, 2018.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.



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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Intervenor Gregg C. Hubner, Marsha Hubner, Paul M. Schoenfelder and Lisa A. Schoenfelder, certifies that a true and correct copy of the foregoing was served on September 19, 2018, via email, upon the following persons listed on the South Dakota Public Utilities Commission's docket service list:

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Dated this 19th day of September, 2018.



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