

**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 FOR A
WIND ENERGY FACILITY IN
BON HOMME, CHARLES MIX, AND
HUTCHINSON COUNTIES,
SOUTH DAKOTA, FOR PREVAILING
WIND PARK ENERGY FACILITY**

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**APPLICANT’S MOTION TO
EXCLUDE LAY TESTIMONY, TO
QUASH SUBPOENAS AND TO
REQUIRE FURTHER LAY
DISCLOSURES**

EL18-026

INTRODUCTION

Prevailing Wind Park, LLC (“Prevailing Wind Park” or “Applicant”) submits this Motion to Exclude Lay Testimony, to Quash Subpoenas and to Require Further Disclosures (“Motion”).

As discussed further below, lay testimony relating to local land use decision-making processes should be excluded, and the subpoenas relating to local land use decision-making processes should be quashed to ensure the contested case proceeding focuses on admissible evidence that is probative of the material issues before the South Dakota Public Utilities Commission (“Commission”) in this docket. The testimony that should be excluded and the subpoenas to be quashed relate to the zoning “processes” in counties within the Prevailing Wind Park Project (“Project”) area. Neither the development of zoning ordinances nor any individual’s “involvement” in such processes is relevant to the criteria for a facility permit under SDCL Chapter 49-41B. Therefore, any testimony about local zoning development should be excluded as irrelevant and immaterial. The four subpoenas issued by the law firm of Davenport, Evans, Hurwitz & Smith, LLP (“Davenport law firm”), attorneys for Intervenors Gregg Hubner, Marsha Hubner, Paul Schoenfelder, and Lisa Schoenfelder (“Intervenors”), on September 7,

2018 also seek documents relating to zoning development and are therefore unreasonable and should be quashed.

Prevailing Wind Park also requests that the Commission require Intervenors to provide additional detail regarding the substance of their lay witnesses' testimony. Intervenors provided only one sentence for each witness in Intervenors' Disclosure of Lay Witnesses ("Disclosure"); this is inadequate information for Prevailing Wind Park to prepare rebuttal testimony due September 26, 2018 and cross-examination at the evidentiary hearing. Prevailing Wind Park requests that the Commission require Intervenors to provide, by no later than noon central time on September 24, 2018, a more detailed summary of the testimony each witness intends to provide at the evidentiary hearing.

Due to the limited time available to prepare rebuttal testimony in response to the requested updated lay witness disclosures, Prevailing Wind Park requests that the Commission hear this Motion on an expedited basis.

FACTUAL BACKGROUND

On September 7, 2018, the Davenport law firm served parties in this docket with copies of subpoenas *duces tecum* for Bon Homme County, Charles Mix County, Hutchinson County and Brian McGinnis, a Community Development Specialist with District III ("Subpoenas").

Attachment A. As of the date of this filing, no proof of service on the subpoenaed parties had been filed on the Commission's electronic docket. All four Subpoenas request:

1. All correspondence the County has had with Brian McGinnis, Ron Hornstra, Roland Jurgens, and any representative of Prevailing Winds, sPower, Prevailing Wind Park, LLC or any other entity involved with the proposed wind energy system currently being proposed in Charles Mix County that is the subject of the above-captioned proceeding.

The Subpoenas further request all meeting minutes and agendas relating to the Project, and documents relied upon by the counties to render any decisions they made on the Project.

The subpoena for Bon Homme County also seeks all documents relating to the county's November 3, 2015 adoption of Article 17 of the Bon Homme County Zoning Ordinance regulating wind energy systems.

On September 10, 2018, Intervenors submitted their Disclosure. The Disclosure identified 17 lay witnesses, including county commissioners from Bon Homme and Charles Mix counties.

LEGAL STANDARDS

Pursuant to SDCL § 1-26-19, “[i]rrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed.” Evidence may also be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” SDCL § 19-19-403.

“The commission on its own motion, or on a motion timely made, may quash a subpoena if it is unreasonable or oppressive, or the commission may require the party on whose behalf the subpoena is issued to pay in advance the reasonable cost of witness fees in accordance with SDCL 15-6-45(c) and of producing the records, books, papers, documents, or tangible things.” ARSD 20:10:01:17.01.

ANALYSIS

I. Motion to Exclude Testimony.

An applicant for a facility permit has a statutorily dictated burden of proof as set forth in SDCL 49-41B-22:

Applicant's burden of proof. The applicant has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

The fourth factor requires the Commission to consider the views of governing bodies of affected local units of government. In the two counties within the Project area that have zoning, i.e., Hutchinson and Bon Homme counties, these governmental entities make their view known through their review and granting of necessary zoning approvals for the Project. In Charles Mix County, which does not have zoning, the County made its views known in the acceptance of the Applicant's affidavit and its August 22, 2018 letter to the Commission. **Attachment B.**

The underlying processes that led each county to enact or not enact zoning regulations are not relevant to the Commission's decision in this docket. How the counties made their decisions regarding the Project are also immaterial to this proceeding and inquiry into their reasoning would amount to a collateral attack on the counties' determinations. The broad net of discovery and proposed layperson testimony Intervenors propose will not inform the record; instead it will detract from the central issues outlined in the factors above and complicate the proceeding with extraneous documentation and commentary.

Applicant requests that the following witnesses be excluded from the evidentiary hearing because their testimony focuses solely on local zoning processes and would therefore be irrelevant and immaterial:

- Gregg Hubner: “Gregg Hubner is expected to testify about his experience with the Bon Homme County Commissioners and Zoning Board about zoning.” (Disclosure, p. 3.)
- Paul Schoenfelder: “Paul Schoenfelder is expected to testify about his experience with Charles Mix County’s zoning efforts.” (Disclosure, p. 3.)
- Charles Mix County Commission Chair Keith Mushitz: “Keith Mushitz is expected to testify about Charles Mix County’s zoning related to wind energy systems and specifically the Project.” (Disclosure, p. 3.)
- Bon Homme County Commission Chair Michael Soukup: “Michael Soukup is expected to testify about Bon Homme County’s zoning related to wind energy systems and specifically the Project.” (Disclosure, p. 3.)
- Brian McGinnis, District III: “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 and controls.” (Disclosure, p. 3.)

Prevailing Wind Park also requests that the Commission limit the testimony by Sherm Fuerness and Karen Jenkins by excluding any testimony relating to local zoning processes.

II. Motion to Quash Subpoenas.

The Intervenors’ Subpoenas similarly seek documents relating to the zoning processes of Charles Mix, Bon Homme and Hutchinson counties. The documents sought in the Subpoenas include correspondence between individuals and entities who are not parties to this proceeding and the counties, as well as Prevailing Wind Park, LLC.¹ For the reasons noted in above, the zoning development documents and communications requested are not relevant to this proceeding. Moreover, requiring the counties and Mr. McGinnis to respond to the Subpoenas

¹ Prevailing Wind Park, LLC and Prevailing Winds, LLC are not related entities. Prevailing Wind Park, LLC acquired the assets of Prevailing Winds, LLC. Application, p. 2-1.

would be unduly burdensome. The Subpoenas are therefore unreasonable and should be quashed.

III. Motion for Further Lay Disclosures.

When Commission Staff recommended lay witness disclosures in lieu of pre-filed testimony, Prevailing Wind Park agreed with the recommendation because it stated the disclosure would contain a “brief summary of what the witness intends to testify about” and noted the intent was “to make the process less onerous on both participating and non-participating landowners, while preserving the need for all parties to have sufficient information on others’ concerns to be able to address those concerns.” Staff’s Motion for Adoption of Procedural Schedule, p. 2.

The Disclosures that Intervenors provided do not provide the requisite information regarding the subject matter of the testimony or concerns. For example, Vickie May’s disclosure states she, a resident of Lynch, Nebraska, “is expected to testify about her experiences living 1-1/3 miles from the nearest of 200 turbines.” Disclosure, p. 1. Prevailing Wind Park can presume Ms. May will describe concerns because she is a witness for the Intervenors, but there is no information about the type of concerns she has. Similarly, Kevin Andersh’s disclosure states he “is expected to testify about his experience living close to the Beethoven Wind Farm and a registered cemetery on his property.” Disclosure, p. 3. Again, there is no information about what concerns Mr. Andersh may have about the Beethoven Wind Farm, the Project, or the cemetery.

Prevailing Wind Park requests that the Commission require Intervenors to supplement their disclosures to summarize the key points each witness intends to make and to expressly identify the issues of concern. To enable Prevailing Wind Park to respond as necessary to such

disclosures in rebuttal testimony, the Applicant requests that the Intervenor be required to make supplemental disclosures no later than noon central time on September 24, 2018.

CONCLUSION

For the reasons set forth above, Prevailing Wind Park requests that the Commission exclude the proffered testimony relating to county zoning because it is irrelevant and immaterial, and that the Commission quash the Subpoenas as unreasonable. For the lay witnesses who remain as potential witnesses, Prevailing Wind Park requests that the Intervenor be required to supplement their lay disclosure no later than noon central time on September 24, 2018. Prevailing Wind Park reserves the right to make further objections to proffered testimony and witnesses prior to or at the evidentiary hearing.

Dated this 14th day of September, 2018.

By /s/ Mollie M. Smith
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