

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

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**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**

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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.<sup>1</sup>

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.

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<sup>1</sup> 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 Intervenors to supplement their disclosures of lay witnesses. For the reasons stated below and in light of the additional information provided, Intervenors oppose this request.

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

Nevertheless, Intervenors are providing additional information regarding the identified lay witnesses. *See* Intervenors' 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 Intervenors' disclosures. Rather than do that, the Applicant filed its motion<sup>2</sup> (knowing Intervenors would have to spend time/resources responding) and seek an Order from the Commission that would require even further time and resources from Intervenors. It seems the Applicant's strategy in this matter is to inundate Intervenors 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, Intervenors 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

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<sup>2</sup> Applicant filed its motion before even contacting Intervenors 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.<sup>3</sup> Applicants were certainly aware of the burden such time constraints placed on Intervenors, 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 Intervenors, attempt to deprive them of their due process rights, and discourage others from intervening in similar proceedings in the future.

For these reasons, Intervenors 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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<sup>3</sup> Given the time restraints imposed on Intervenors 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, Intervenors find Applicant's complaints of not having adequate time to prepare for the evidentiary hearing laughable.