

**STATE OF NORTH DAKOTA**  
**NORTH DAKOTA PUBLIC SERVICE COMMISSION**  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Julie Fedorchak  
Randy Christmann  
Brian P. Kalk

Chairman  
Commissioner  
Commissioner

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**Brady Wind, LLC**  
**150 MW Wind Energy Center – Stark County**  
**Siting Application**

**Case No. PU-15-690**

**Brady Wind, LLC**  
**230 kV Transmission Line – Stark County**  
**Siting Application**

**Case No. PU-15-797**

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**MOTION TO FURNISH AND SERVE A LATE FILED EXHIBIT**

Pursuant to N.D. Admin. Code 69-02-04-07, the Concerned Citizens of Stark County (“CCSC”), through undersigned counsel, hereby respectfully move Administrative Law Judge Patrick Ward to allow CCSC to furnish and serve a late filed exhibit with the North Dakota Public Service Commission (the “Commission”). CCSC seeks to furnish a serve a copy of four pages of the 43-page Brady Wind, LLC’s (“Brady Wind”) power purchase agreement with Basin Electric Power Cooperative (the “PPA”) for the 150 MW Brady Wind Energy Center located in Stark County and the associated 230 kV transmission line (the “Project”). CCSC’s motion should be granted because the four pages of the PPA are relevant to the merits of this matter and Brady Wind’s credibility before the Commission.

**RELEVANT FACTUAL BACKGROUND**

Prior to the March 30, 2016, hearing before the Commission, CCSC and Brady Wind engaged in preliminary discovery. In its initial Requests for Production of Documents, CCSC asked Brady Wind to produce the power purchase agreement with Basin Electric Power Cooperative for the Project. Because Brady Wind considered the PPA a “Highly Confidential” document, Brady

Wind agreed to provide CCSC with a copy of the PPA upon the execution of a confidentiality agreement.

The parties entered into a confidentiality agreement on March 18, 2016 (the “Confidentiality Agreement”). The Confidentiality Agreement provided that the parties could use and rely upon “Highly Confidential” documents at the March 30, 2016, hearing before the Commission as long as the parties complied with N.D. Admin. Code 69-02-09. *Id.* at ¶ 2. The parties agreed that if any “Highly Confidential” document were used as an exhibit, the document must be contained in a sealed envelope marked PROTECTED INFORMATION – PRIVATE. Additionally, the parties stipulated that any “Highly Confidential” document used as an exhibit would only be viewed by the Commission and would not be disclosed to the public.

At the end of the March 30, 2016, hearing at approximately 11:15 p.m., Commissioner Kalk asked Brady Wind witness Jason Utton one last question. Commissioner Kalk asked Mr. Utton the penalty or damages that Brady Wind would suffer if the wind farm was not approved. Mr. Utton testified that Brady Wind would be obligated to pay damages to Basin Electric under the PPA if the wind farm was not approved. After Mr. Utton testified regarding the damages Brady Wind would be required to pay, the attorney for CCSC requested the opportunity to ask a follow-up question. Judge Ward granted the request and CCSC’s attorney asked Mr. Utton whether there was a *force majeure* provision in the PPA that would eliminate Brady Wind’s liability for damages as a result of government non-approval of the wind farm. Mr. Utton testified under oath that the PPA did not contain such a *force majeure* provision.

CCSC now moves to furnish and serve the four pages of PPA that pertains to the *force majeure* provision in the PPA as an exhibit for consideration by the Commission because it directly pertains to Brady Wind’s potential losses or damages arising from a delay or denial of the site application for the Project. The information contained in the four pages of the PPA impeaches the

testimony of Mr. Utton. Finally, the four pages that CCSC requests to be a late filed exhibit do not contain any proprietary or confidential information, but only boilerplate contractual terms. For those reasons, CCSC's motion should be granted.

### **ARGUMENT**

Section 69-02-04-07 of the North Dakota Administrative Code allows the hearing officer to authorize any party to furnish and serve a late filed exhibit within a specified time after the close of the hearing. The Administrative Code also authorizes the hearing officer to admit any evidence offered by a party to the hearing which complies with the North Dakota Rules of Evidence. N.D. Admin. Code 69-02-05-01. Because the evidentiary rules warrant the admission of the four pages of the PPA, CCSC should be allowed to furnish and serve it as a late filed exhibit in this matter.

#### **A. The PPA Is Relevant.**

Under Rule 401 of the North Dakota Rules of Evidence, evidence is relevant if it contains facts of consequence in determining an action, and relevant evidence is generally admissible. N.D. R. Evid. 401(b), 402. During the March 30, 2016, hearing, Brady Wind offered testimony evidence about the consequences that it would face if the Commission denied or delayed approval of its site compatibility application. The PPA contains the actual contractual provisions which detail the extent of the potential financial consequences in the event that the construction of the Project is denied or delayed. Brady Wind has raised these facts as relevant during the hearing. The Commission should have the opportunity to consider the actual contractual provisions that address *force majeure* events, including the grant or denial of governmental approvals and the alleged financial consequences in rendering its determination on Brady Wind's site compatibility application. The PPA, therefore, is relevant evidence that should be admitted.

**B. The Commission Should Consider Whether Justin Utton's Testimony At The March 30, 2016 Hearing Directly Contradicts The Plain Terms of the PPA.**

Under the North Dakota Rules of Evidence, evidence of a witness's prior inconsistent statements is admissible. *See* N.D. R. Evid. 801(d)(1); 613(b). During the March 30, 2016 hearing, Mr. Utton testified that Brady Wind will incur significant financial damages if its site compatibility application is delayed or denied by the Commission. In addition, Mr. Utton testified that there was no contractual clause in the PPA that would exempt Brady Wind from the alleged dire financial consequences if the Commission did not approve the wind farm. The PPA contains a *force majeure* provision that should be considered by the Commission when deciding whether Brady Wind would be liable for any liquidated damages based on governmental action or inaction. The Commission should independently determine whether the PPA contradicts the testimony of Mr. Utton. The PPA is not only relevant evidence of Brady Wind's financial obligations, but also goes directly to the credibility of Brady Wind and its siting application. For these reasons, the excerpts from the PPA should be admitted as a late filed exhibit.

**C. CCSC Will Comply With The Confidentiality Agreement And N.D. Admin. Code 69-02-09.**

Finally, in filing this motion, CCSC does not seek to avoid its obligations to Brady Wind under the Confidentiality Agreement in its filing of the PPA as a late exhibit. CCSC also recognizes that N.D. Admin. Code 69-02-09-09 requires parties to protect protected information offered as exhibits before the Commission. Therefore, if CCSC is allowed to furnish and serve the PPA as a late filed exhibit, CCSC will submit the exhibit in a sealed envelope marked PROTECTED INFORMATION – PRIVATE to ensure that it will only be viewed by the Commission and not members of the public.

To avoid any delay, CCSC is sending seven copies of the four pages of the PPA to the Commission by overnight delivery in a sealed envelope marked PROTECTED INFORMATION –

