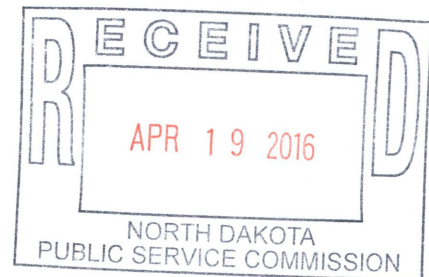


Brian R. Bjella
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, ND 58502-2798
701.223.6585
bbjella@crowleyfleck.com

April 19, 2016

Mr. Darrell Nitschke
Executive Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480



Dear Mr. Nitschke:

In re: Brady Wind, LLC
150 MW Wind Energy Center
PSC Case No. PU-15-690

Brady Wind, LLC
230 kV Transmission Line
PSC Case No. PU-15-797

Our File No. 35-218-026

Please find enclosed the original and 10 copies of Brady Wind's Reply to Motion to Furnish and Serve a Late Filed Exhibit in the above matter.

Please call should you have any questions.

Very truly yours,

Brian R. Bjella

bw
Enc.
cc: Patrick J. Ward
Zachary Pelham
Matthew T. Collins
Jerry Lein

71 **PU-15-797** Filed: 4/19/2016 Pages: 12
Reply to CCSC Motion to Furnish and Serve Late Filed Exhibit

Brady Wind, LLC

Brian Bjella, Crowley Fleck, PLLP

98 **PU-15-690** Filed: 4/19/2016 Pages: 12
Reply to CCSC Motion to Furnish and Serve Late Filed Exhibit

Brady Wind, LLC

Brian Bjella, Crowley Fleck, PLLP

STATE OF NORTH DAKOTA
NORTH DAKOTA PUBLIC SERVICE COMMISSION

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

REPLY TO MOTION TO FURNISH AND SERVE A LATE FILED EXHIBIT

Brady Wind, LLC, (“Brady Wind”), through undersigned counsel, hereby submits this Reply to Concerned Citizens of Stark County’s (“CCSC”) Motion to Furnish and Serve a Late Filed Exhibit (“Motion”).

Brady Wind respectfully requests that CCSC’s Motion be denied for two reasons. First, CCSC had ample opportunity to seek to admit the Brady Wind’s power purchase agreement (“PPA”) with Basin Electric Power Cooperative (“Basin”) into evidence and actually cross examined Brady Wind’s witness regarding the PPA at the hearing. CCSC having second thoughts two weeks after the hearing as to how it handled the PPA issue is not a sufficient basis to prejudice Brady Wind by delaying this proceeding. Second, the PPA should not be admitted because it is not relevant to the Public Service Commission’s (the “Commission”) jurisdiction under the Siting Act or to CCSC’s attempt to impeach Brady Wind’s witness. Finally, CCSC’s handling of the highly confidential PPA was contrary to the parties’ Confidentiality Agreement because it was filed with the Commission before CCSC filed a request for a protective order consistent with N.D.C.C. Chapter 69-02-09. Brady Wind requests that any granting of CCSC’s Motion be conditioned upon issuance of a protective order consistent with the Confidentiality Agreement between the parties. As explained below, however, there is no basis to allow CCSC

to circumvent the evidentiary and hearing process by admitting the PPA excerpt into the record at this late date and thereby delaying a timely decision in this proceeding.

FACTS

Brady Wind and CCSC engaged in preliminary discovery pursuant to which Brady Wind provided CCSC with a redacted copy of the PPA on March 18, 2016. Brady Wind provided the PPA as a highly confidential document subject to attorney's-eyes only review pursuant to a Confidentiality Agreement between the parties.

On March 22, 2016, Commission Staff, Brady Wind, and CCSC participated in a prehearing conference with Judge Ward, during which the parties discussed the handling of confidential material at the hearing. To ensure efficiency at the hearing and appropriate protection of confidential information, Brady Wind stated that it would work with CCSC to identify confidential materials that may be produced at the hearing and file a protective order if the parties expected confidential material to be admitted at the hearing. CCSC's attorney, however, stated that CCSC would not seek to admit into evidence confidential material that Brady Wind had provided in discovery. CCSC did not otherwise contact Brady Wind to indicate it would seek to admit confidential material into evidence until April 14, 2016, the date CCSC served its Motion.

The public hearing was held as scheduled on March 30, 2016. Toward the end of the hearing, Commissioner Kalk asked Brady Wind witness, Jason Utton, a question regarding Brady Wind's liability to Basin in the event the project is not approved by the Commission. Mr. Utton responded that under the PPA, Brady Wind is required to pay damages to Basin if the project is not approved. Counsel for CCSC, Matthew Collins, questioned Mr. Utton if there was a force majeure clause in the PPA. Mr. Utton responded that the PPA did contain a force majeure

clause. CCSC then asked Mr. Utton if the force majeure clause contained language triggering the clause regarding government non-approval, and Mr. Utton replied it did not.

Now, two weeks after the hearing, CCSC attempts to enter into the record a late-filed exhibit containing portions of the highly confidential PPA regarding the force majeure clause. CCSC's request should be rejected for all of the reasons outlined below.

ARGUMENT

1. CCSC's Motion Should be Denied Because CCSC Had the Opportunity to Move to Admit the PPA into the Record at Hearing, and There Is No Basis Under North Dakota Law for Admitting the PPA into the Record at this Stage.

a. Brady Wind Should Not Be Prejudiced by CCSC's Decision Not to Seek to Admit the PPA into Evidence at the Hearing.

The PPA is not new evidence. Mr. Collins received a copy of the PPA prior to the hearing on March 18, 2016, and had adequate time to review the document prior to the hearing. CCSC was afforded the opportunity to move for admission of the PPA into the record during the hearing, but chose not to do so. After Commissioner Kalk raised the issue of damages under the PPA during questioning of Mr. Utton, CCSC's attorney in fact followed up with his own questioning of Mr. Utton on that provision. There is no basis for providing CCSC a "do-over" of a portion of the hearing.

Even assuming that CCSC's attorney was somehow caught off guard by the PPA being raised, CCSC could have requested a short recess at the hearing to review the PPA or otherwise take appropriate procedural steps to further address the PPA, but took no such actions. CCSC may in retrospect wish it had handled the issue differently at the hearing, but CCSC should not be permitted to rectify its errors two weeks *after* the hearing.

Given the late timing of the Motion, granting CCSC's Motion at this point will prejudice Brady Wind by circumventing the intended evidentiary function of a hearing. Had CCSC raised

the issue at the hearing, Judge Ward could have considered whether to admit the PPA into evidence, the witness could have reviewed the PPA if it was admitted into evidence, and Brady Wind could have conducted necessary redirect. None of these options are available at this point. CCSC has presented no basis for prejudicing Brady Wind's procedural rights because of CCSC's decision not to pursue the issue at the appropriate time.

b. CCSC Proposes to Use the Incorrect Standard of Review of the Motion.

CCSC incorrectly relies on N.D. Admin. Code § 69-02-04-07 as a justification of authority to enter its late filed exhibit. Section 69-02-04-07 delegates the authority of the hearing officer and provides that the hearing officer may, "[a]uthorize any party to furnish and serve *designated late filed exhibits* within a specified time after the close of hearing." (emphasis added). During the hearing, Judge Ward never *designated* CCSC to enter the PPA as a late filed exhibit. CCSC had the ability to move to enter the PPA as an exhibit at the hearing. CCSC even had the ability to request Judge Ward allow CCSC enter the PPA as a late-filed exhibit, but CCSC took no such action. As a result, the PPA was never *designated as a late-filed exhibit*, and filing pursuant to N.D. Admin. Code § 69-02-04-07 is therefore inappropriate.

In fact, Brady Wind submits that the appropriate standard of review to apply when reviewing CCSC's motion is N.D.C.C. § 28-32-45. This statute governs supplementation of the record after an appeal has been filed. Although not directly applicable, this statute is instructive because it provides the framework for considering whether evidence not raised at the hearing should be considered as part of the record. Under N.D.C.C. § 28-32-45, in considering whether to allow evidence not included on record with the administrative agency, the Court looks to whether the party had a "justifiable reason for failure to present the evidence at the administrative hearing." *See In re Beckler*, 2005 ND 33, ¶ 18, 692 N.W.2d 483. When records "were known to and available to [Plaintiff] at the time of the hearing" but were not submitted,

the Court has held no reasonable grounds exist for the failure to offer evidence in the administrative hearing, and the information is not allowed to supplement the record on appeal. *Id. See Larsen v. Comm'n on Med. Competency*, 1998 ND 193, ¶ 23, ¶ 43, 585 N.W.2d 801. (“[Plaintiff] and his counsel had a meaningful opportunity to be heard and present evidence at the administrative hearing, but chose not to do so.” “[Plaintiff] failed to prove reasonable grounds for failure to adduce the evidence at the administrative hearing as required.”).

Similar to the framework under N.D.C.C. § 28-32-45, CCSC’s motion should be denied because CCSC possessed information regarding the PPA at the administrative hearing, and failed to offer any justifiable reason for failing to offer the evidence at that time.

2. CCMC’s Motion Should Be Denied Because the PPA is Irrelevant to Consideration of Brady Wind’s Application.

Under N.D.R.Ev. 401, “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” The PPA does not have the tendency to make a fact more or less probable in this matter because CCSC is attempting to prove the meaning of a contract provision, when contract interpretation is not within the jurisdiction of the Commission; the PPA is not “of consequence in determining the action” because need is not a factor to be considered in this matter by the Commission under N.D.C.C. § 49-22-09; and the PPA is irrelevant to CCSC’s attempt to impeach Brady Wind’s witness. Therefore, the PPA is irrelevant and should not be admitted.

a. The PPA is Irrelevant Because Interpreting the Force Majeure Clause is Outside the Scope of Commission Jurisdiction.

CCSC claims it seeks to admit the PPA into evidence because the PPA’s terms are relevant to whether Brady Wind will suffer financial consequences if it does not obtain Commission approval or that approval is delayed. Making such a determination requires

interpretation of contract terms, which is outside the scope of the Commission's jurisdiction. The Commission has no power to construe and enforce or adjudicate the validity of a contract between private parties unless given jurisdiction to do so. There is no such grant of jurisdiction to the Commission. *Williams Electric Cooperative v. Montana-Dakota Utilities Co.*, 79 N.W.2d 508, 517 (N.D. 1956). See also *City of Grafton v. Otter Tail Power Co.*, 86 N.W.2d 197, 205 (N.D. 1957) (Enforcement of utility contract would not be either directly or indirectly within the jurisdiction of the Public Service Commission and the Commission would have no power to issue orders with respect to its enforcement), and *Northwestern Bell Telephone Co. v Hagen*, 234 N.W. 841, 845 (N.D. 1975), (The Commission's jurisdiction does not extend into enforcement of contracts between public utility companies, a judicial function that is rooted in tradition, constitution and statute). Because the Commission's enforcement of private contracts is outside the scope of this proceeding, interpretation of a term of a PPA (which itself is not relevant to the Commission's determination in this case) is irrelevant to proceeding and the PPA excerpt should not be admitted into evidence.

b. The PPA is Irrelevant Because it Speaks to the Direct Issue of "Need" for the Project, and Project "Need" is not a Factor for the Commission's Consideration Under N.D.C.C. § 49-22-09.

CCSC's motion should be denied because the information sought to be entered is irrelevant under the Siting Act, N.D.C.C. Chapter 49-22. CCSC's request to enter portions of the PPA into the record is an attempt to interject the issue of "need" into this proceeding.

The North Dakota Supreme Court case *In the Matter of the Application of Nebraska Public Power District*, 330 N.W.2d 143 (N.D. 1983), discussed whether "need" is a criteria to be considered by the Commission under the Siting Act. The Court stated that "need" is not listed in N.D.C.C. § 49-22-09, which lists factors the PSC is to use as guidance when evaluating a

corridor application. *Id.* at 148. The Court concluded that since, “the PSC does not have the authority or duty to determine need, [the PSC] *acted properly by controlling the proceedings to suppress such evidence.*” *Id.* at 149. (emphasis added).

In the *Nebraska Public Power* case, the opponents of the project questioned the reason for a statement of need in § 49-22-08 if it is not to be used to determine if a need for the project actually exists. The Court stated that “according to the PSC the information is to be used by itself, the public, and the legislature in planning and scheduling, and is used to help the PSC understand the nature of the applicant’s project. Until the legislature specifically directs the PSC to use this information to evaluate the need for a line, the PSC believes it does not have the authority to do so.” *Id.* at 148. The Court then stated “we have found no direction in the siting act or in its legislative history giving the PSC the authority to determine if a need has been shown.” *Id.* at 149. The Court noted that while other states allow the Public Service Commission to consider need, North Dakota does not. The court stated “. . . we have concluded the PSC does not have the authority or duty to determine need . . .” *Id.*

The statutes cited by the Court, N.D.C.C. §§ 49-22-08 and 49-22-09, have not been amended with respect to the substantive terms considered by the Supreme Court. As a result, “need” is not a criterion for determine by this Commission in deciding whether to approve or deny an energy conversion project. As a result, the PPA is irrelevant to this proceeding.

c. The PPA Is Irrelevant to CCSC’s Purported Justification of Impeaching Brady Wind’s Witness.

CCSC claims that on its face the force majeure term in the PPA shows that Brady Wind’s witness’ statements regarding the term are false, and CCSC therefore seeks to use the PPA to impeach Brady Wind’s witness. CCSC’s argument rests on two faulty assumptions. First, CCSC incorrectly assumes that only its interpretation of the language contained in the PPA is

correct. In reality, the PPA's force majeure clause is subject to varying interpretations, including reasonable interpretations supporting Mr. Utton's testimony.

3. Second, CCSC assumes that Mr. Utton's testimony could serve as a basis for impeaching him on this issue. In addition to this assumption being subject to the fallacy above – that CCSC's interpretation is singularly correct -- Mr. Utton is not a lawyer, and was not offered as an expert in contract interpretation. Instead, he was merely a fact witness and his testimony was provided based on his unrefreshed memory of the PPA. CCSC's counsel did not elicit a prior inconsistent statement from Mr. Utton, nor did he provide Mr. Utton with an opportunity to review the PPA during cross-examination as is customary when a witness is questioned on a readily available document. Instead, CCSC's attorney utilized "gotcha" questioning and now seeks to rely on that questioning to create a false and misleading basis for impeaching Mr. Utton. This is improper and should not be allowed. **CCSC's Handling of the Highly Confidential PPA Was Contrary to the Parties' Confidentiality Agreement.**

CCSC's handling of the highly confidential PPA excerpt was contrary to the parties' confidentiality agreement. Brady Wind provided the PPA to CCSC pursuant to a Confidentiality Agreement that stated confidential material would be viewed by CCSC's attorney only, absent prior written consent by Brady Wind. The agreement contemplated providing confidential material at the hearing, stating that "[d]isclosure at the Hearing of materials or information designated "Confidential" or "Highly Confidential" must be pursuant to N.D. Admin. Code Chapter 69-02-09 and must be contained in a sealed envelope marked PROTECTED INFORMATION – PRIVATE."

N.D. Admin. Code § 69-02-09-01 provides that a party seeking to protect confidential information must first file an application for protection with the Commission. CCSC did not do so and thus has violated Confidentiality Agreement, putting Brady Wind's confidential material at risk of disclosure. Brady Wind therefore requests that any granting of CCSC's Motion be conditioned upon issuance of a protective order pursuant to the Confidentiality Agreement between the parties.

CONCLUSION

CCSC's Motion seeks to introduce irrelevant evidence into the record more than two weeks past the hearing date. CCSC had a full opportunity to request that the PPA be admitted into evidence at the hearing, but either because of CCSC's oversight or litigation strategy, CCSC did not do so. Brady Wind should not be required to litigate the terms of the PPA outside of an evidentiary hearing, which would prejudice Brady Wind and result in a delay of this proceeding. For the reasons outlined in this Reply, Brady Wind respectfully requests that CCSC's Motion to Furnish and Serve a Late Filed Exhibit be denied.

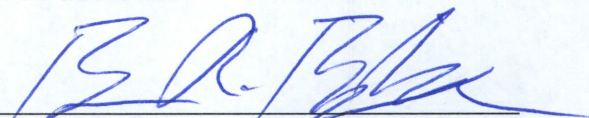
Dated this 19th day of April, 2016.

Respectfully submitted,

BRADY WIND, LLC

CROWLEY FLECK PLLP
Attorney for Applicant
100 W. Broadway, Suite 250
Post Office Box 2798
Bismarck, North Dakota 58502-2798
Phone: 701-223-6585

By: _____

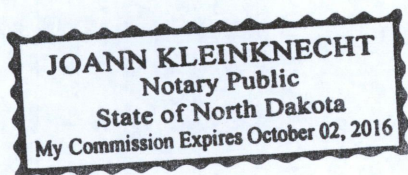

Brian R. Bjella (Bar ID 03549)
bbjella@crowleyfleck.com
Casey A. Furey (Bar ID 08035)
cfurey@crowleyfleck.com

Mr. Zachary Pelham
Pearce & Durick
314 E. Thayer Ave.
Bismarck, ND 58501

To the best of affiant's knowledge, the addresses above given are the actual post office addresses of the parties intended to be served.

Beth Wald
Beth Wald

Subscribed and sworn to before me this 19th day of April, 2016.



Joann Kleinknecht
Joann Kleinknecht, Notary Public
Burleigh County, North Dakota
My Commission Expires: