

Lyle W. Kirmis
Lance D. Schreiner, P.C.
Patrick J. Ward*++
Lawrence E. King, P.C.**^^
Constance N. Hofland**
John E. Ward++
Justin M. Balzer



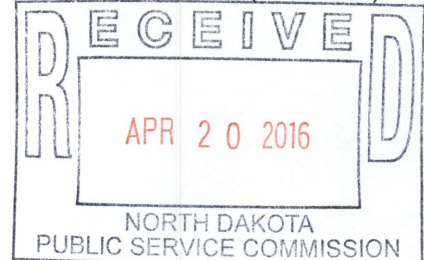
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316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502-1695
p: 701.223.2711
f: 701.223.9619
www.zkslaw.com
pward@zkslaw.com



April 20, 2016

John Hamre
North Dakota Public Service Commission
600 East Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

RE: Brady Wind Farm Siting - Energy Center
PU-15-690

Dear Mr. Hamre:

Enclosed please the final exhibit list in PU-15-690 and Order Denying Intervenor's Request to Furnish and Serve A Late Filed Exhibit. Also enclosed is a hard copy of the email Request for Extension to file brief and order granting the extension is enclosed as well.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Patrick J. Ward'.

Patrick J. Ward

Enclosures

c: Brian Bjella
Zach Pelham
Matt Collins
Ilona Jeffcoat-Sacco

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Patrick Ward, ALJ - Office of Administrative Hearings

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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

**ORDER DENYING INTERVENOR'S REQUEST TO FURNISH AND
SERVE A LATE FILED EXHIBIT**

This Order is issued in regard to the Motion to Furnish and Serve a Late Filed Exhibit which was filed by Intervenor Concerned Citizens of Stark County (“CCSC”) on April 14, 2016. The Exhibit marked Late Filed Z, was offered as four pages of the Basin Electric Cooperative Power Purchase Agreement (“PPA) regarding a force majeure clause discussed in the testimony of company witness, Jason Utton. The company, Brady Wind LLC, filed its reply to the Motion to Furnish and Serve a Late Filed Exhibit on April 19, 2016, as ordered. Intervenor has also attempted to lodge the actual exhibit with the Public Service Commission which pursuant to this order *will not be permitted.*

The Power Purchase Agreement between Basin Electric Cooperative and Brady Wind was considered by Brady Wind to be a highly confidential document. This document was provided to the Intervenor’s counsel pursuant to a confidentiality agreement in advance of the March 30, 2016, Commission hearing.

Intervenor now wishes to use the exhibit in its briefings to impeach and counter the testimony offered by company witness Jason Utton near the close of the hearing on March 30, 2016, regarding whether or not Brady Wind would suffer contact damages if the wind farm was not approved by the PSC.

Intervenor argues that the PPA is relevant, that the Commission should be able to consider whether Justin Utton's testimony at the hearing contradicted the plain terms of the PPA, and that it would continue to comply with the confidentiality agreement in North Dakota Administrative Code 62-02-09. The CCSC requests that the administrative law judge grant their motion and allow them to furnish and serve the four pages of the PPA.

Brady Wind requests that CCSC's Motion be denied for the following reasons: First, CCSC had ample opportunity to seek to admit the Brady Wind's 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, Brady Wind argues 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.

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 this ALJ, 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, and went from 9:00 a.m. to 11:15 p.m. 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.

DECISION

- 1. CCSC's Motion Is 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. CCSC's Decision Not to Seek to Admit the PPA into Evidence at the Hearing Cannot be Corrected by Submitting it After the Hearing was Adjourned.**

The PPA is not new evidence. Counsel for CCSC 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 had the opportunity to move for admission of the PPA or selected excerpts 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. The impeachment of Mr. Utton with the document should have occurred at that time.

Even assuming that CCSC's attorney was somehow caught off guard by the PPA being raised by a Commissioner, CCSC could have requested a short recess at the hearing to review the PPA or otherwise take appropriate procedural steps to further offer the PPA as a late filed exhibit. Neither was done. CCSC may in retrospect wish it had handled the issue differently at the hearing, but CCSC will not be permitted to now file this document as a late filed exhibit.

Given the timing of the Motion, granting CCSC's Motion at this point would circumvent the intended evidentiary function of a hearing. Had CCSC raised the issue at the hearing, the ALJ 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 or extend the hearing process because of CCSC's decision not to pursue the issue at the appropriate time. To rule otherwise could lead to indefinite attempts to supplement a closed hearing record for tactical reasons.

B. PSC Rules on Late Filed Exhibits Do Not Authorize This Filing.

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). Those exhibits to be late filed were identified and, in essence, offered at the hearing. This ALJ never *designated* CCSC to enter the PPA as a late filed exhibit because it never was brought up. CCSC had the ability to move to enter the PPA as an exhibit at the hearing. CCSC even had the ability to request this ALJ 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.

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 to the district court after an appeal from an administrative agency 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 cannot now correct its decision not to offer the evidence at that time.

C. 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.

D. 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.

Brady Wind argues that 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).

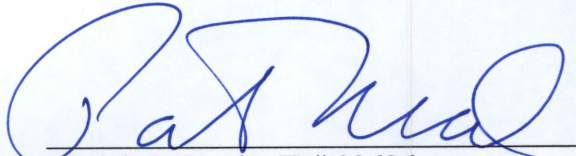
In the *Nebraska Public Power* case, the opponents of the project questioned the reason for a statement of need in § 49-22-08 if it is not to be used to determine if a need for the project actually exists. The Court stated that "according to the PSC the information is to be used by itself, the public, 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 determination by this Commission in deciding whether to approve or deny an energy conversion project. As a result, the PPA is irrelevant to this proceeding and whether Mr. Utton was right or wrong in his speculation as to the terms of the PPA is not germane to the analysis of siting factors within the jurisdiction of the Commission.

CONCLUSION

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, especially as to an issue not directly germane to the jurisdictional siting criteria. For the reasons state above CCSC's Motion to Furnish and Serve a Late Filed Exhibit is denied.

Dated this 20th day of April, 2016.



Patrick J. Ward ID# 03626
Administrative Law Judge

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

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230 kV Transmission Line – Stark County Siting Application

Case No. PU-15-797

The undersigned certifies that true and correct copies of the **ORDER DENYING INTERVENOR'S REQUEST TO FURNISH AND SERVE A LATE FILED EXHIBIT** was mailed, regular mail, on the 20th day of April, 2016, to:

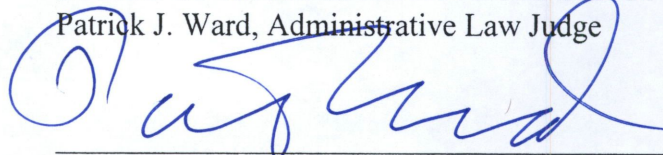
Brian Bjella
Attorney at Law
PO Box 2798
Bismarck, ND 58502-2798

Zach Pelham
Attorney at Law
PO Box 400
Bismarck, ND 58502-0400

Matt Collins
Attorney at Law
333 South 7th St., Ste 2600
Minneapolis, MN 55402

Illona Jeffcoat-Sacco
ND Public Service Commission
600 East Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

OFFICE OF ADMINISTRATIVE HEARINGS
Patrick J. Ward, Administrative Law Judge



Patrick J. Ward