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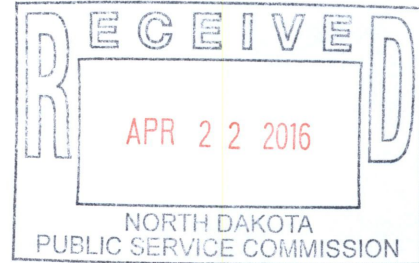
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**FABYANSKE
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April 22, 2016



VIA E-MAIL AND OVERNIGHT DELIVERY

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

Re: Brady Wind, LLC, Case Nos. PU-15-690 and PU-15-797

Dear Mr. Nitschke:

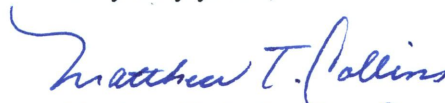

Enclosed for filing in the above-referenced matters are the original and ten copies of:

Intervenor Concerned Citizens of Stark County's

- Post-Hearing Brief; and
- Proposed Findings of Fact, Conclusions of Law, and Order

Pursuant to N.D. Admin. Code 69-02-04-10, I am serving same by U.S. Mail and e-mail to the other parties in this matter.

Very truly yours,


Matthew T. Collins 

MTC/KJ
Enclosures

cc: Judge Patrick Ward (via e-mail and US Mail) (w/enc.)
Zachary Pelham (via e-mail and US Mail) (w/enc.)
Brian Bjella (via e-mail and US Mail) (w/enc.)
Wade Mann (via e-mail and US Mail) (w/enc.)
Jerry Lein (via e-mail and US Mail) (w/enc.)
John Hamre (via e-mail and US Mail) (w/enc.)
Casey Furey (via e-mail and US Mail) (w/enc.)
Illona Jeffcoat-Sacco (via e-mail and US Mail) (w/enc.)
Timothy J. Dawson (via e-mail and US Mail) (w/enc.)

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Intervenor Concerned Citizens of Stark County's Post-Hearing Brief
Concerned Citizens of Stark County (CCSC)
Matthew Collins, Attorney

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STATE OF NORTH DAKOTA
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Commissioner

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

**INTERVENOR CONCERNED CITIZENS OF STARK COUNTY’S POST-HEARING
BRIEF**

INTRODUCTION

The North Dakota Century Code (“N.D.C.C.”) and North Dakota Administrative Code (“N.D.A.C.”) provide clear requirements for energy companies that intend to construct and operate energy facilities within the state. In its application for a certificate of site compatibility (“Application”) before the North Dakota Public Service Commission (the “Commission”), Brady Wind, LLC (“Brady Wind”) contends that it is entitled to a certificate of site compatibility for simply making the effort to comply with the applicable statutory and regulatory provisions. Brady Wind’s submissions to the Commission, however, improperly rely on missing information, explicit assumptions, and dubious caveats in order to allegedly satisfy North Dakota’s requirements for wind energy farms. Because Brady Wind’s Application is incomplete and contrary to North Dakota law, Intervenor Concerned Citizens of Stark County (“CCSC”) respectfully requests that Brady Wind’s Application be denied.

ARGUMENT

I. THERE IS NO DEMONSTRABLE NEED FOR THE BRADY WIND ENERGY CENTER.

In order to be awarded a certificate of site compatibility, an energy company must provide a statement explaining the need for the proposed facility and projected demand for the facility's products, including the most recent system studies supporting the analysis of the need. *See* N.D.C.C. § 49-22-08(1)(c); *see also* N.D.A.C. § 69-06-04-01(2)(c). Additionally, an application must discuss all feasible alternatives considered to the facility. *See* N.D.A.C. § 69-06-04-01(2)(d). An applicant's ability to satisfy this requirement underscores and emphasizes the need for an energy facility. *Id.*

The information provided by Brady Wind and Basin Electric Power Cooperative ("Basin") does not adequately demonstrate a need for the Brady Wind Energy Center (the "Facility"). As an initial matter, Brady Wind does not discuss any alternatives in its Application. Brady Wind's analysis of need is also shortsighted: in March 2007, the North Dakota Legislature established a goal to have ten percent (10%) of electricity used in the state generated from renewable sources by 2015. (Application, p. 2-1; *see also* House Bill 1506.) Brady Wind admits in its Application, however, that the ten percent renewable portfolio objective is already being met in North Dakota. (Application, p. 2-1) In order to create the appearance of need, Brady Wind then relies upon older numbers and older studies from 2009 and 2010 that do not accurately reflect the current energy conditions in North Dakota in 2016. Finally, Brady Wind incorrectly claims that there is an increased need for the Facility due to the Environmental Protection Agency's Clean Power Plan. Notably, on February 9, 2016, the United States Supreme Court stayed implementation of the Clean Power Plan, making it irrelevant for the

purposes of Brady Wind's Application. Without current, applicable support, Brady Wind's Application fails to adequately show that need exists for the Facility.

At the March 30, 2016 hearing, no Basin representative testified about the need for the Facility. Instead, Basin provided a letter to the Commission which has been accepted as a late filed exhibit. *See* Exhibit 13. Despite providing a three-page letter, Basin only addresses the Facility in the last paragraph. Based on the letter submitted by Basin, there is no evidence that Basin looked at a broader range of resources than just local wind or made any further needs analysis from a state or regional perspective. Moreover, Basin's expected growth of 600 MW is aggressive and unsupported by proof, especially given the state's current economic realities in the Williston Basin.

The Century Code does not state that need is to be dictated by Basin; it contemplates a broader need analysis by the Commission for the state and regional demands. If one utility is already overbuilt on wind or other resources, it does not make sense to have a neighboring utility build additional generation to meet its needs rather than utilizing the excess available from its neighbor. That just results in excess generation on a state or regional basis. The intent of the statute is to force a statewide or regional examinations of need in order to avoid such one-sided analysis by utilities. The Commission should require a current state and regional need analysis and the efficient use of existing and planned resources. Here, the need requirement is not met simply by relying on old studies, inactive laws, or one company's potential need for energy. Because Brady Wind has not and cannot demonstrate need for the Facility, its Application should be denied.

II. BRADY WIND'S APPLICATION SHOULD BE DENIED BECAUSE IT HAS NOT IDENTIFIED SPECIFIC LOCATIONS FOR WIND TURBINES.

North Dakota law requires Brady Wind to provide “[a] map identifying the criteria that provides the basis **for the specific location** of the proposed facility within the study area.” N.D.A.C. § 69-06-04-01(2)(g) (emphasis added). Additionally, in order to have a valid Application, Brady Wind must provide “[a] description of the merits and detriments of any location identified and a comprehensive analysis with supporting data showing the reasons why the preferred location is the best suited for the facility.” N.D.C.C. § 49-22-08(1)(f).

In Section 1.2 of the Application, Brady Wind states that “Brady Wind seeks a Certificate of Site Compatibility for the Project Area, as opposed to specific turbine locations.” (Application, pg. 1-4) In other words, Brady Wind wants the flexibility to move the turbine locations after the certificate of site compatibility is issued. While Brady Wind claims that it will submit a final site plan to the Commission before construction, Brady Wind makes no mention of public input on the new locations. (Application, pp. 1-4 and 1-5) There is no evidence that Brady Wind will conduct a shadow flicker analysis, wind analysis, noise assessment or wetland analysis using the actual, final locations of the turbines. There is no evidence that Brady Wind will reach out to all of the pertinent state and local agencies once the specific turbine locations are determined in order to verify that it still has state and local approval for construction of the Facility. Without final, specific site locations for the turbines, it is impossible to determine the actual impact of the Facility and Brady Wind's compliance with the applicable statutes and regulations.

The Application also fails to comply with important statutory requirements by not providing detailed maps showing all applicable criteria for each proposed turbine location. In particular, the maps provided by Brady Wind that depict the exclusion and avoidance areas

(other than the wetlands maps) are not shown in detail. Moreover, Brady Wind has not provided a merit/detriment analysis of each specific proposed turbine location which is required by statute. N.D.C.C. § 49-22-08(1)(f). Brady Wind should not be awarded a certificate of site compatibility for failure to comply with the requirements for site approvals.

III. A CERTIFICATE OF SITE COMPATIBILITY CANNOT BE ISSUED BECAUSE EXCLUSION AND AVOIDANCE AREAS ARE PRESENT WITHIN THE PROJECT AREA.

Brady Wind is required by N.D.A.C. § 69-06-04-01(2)(g) and (h) to provide a discussion of exclusion and avoidance areas and maps identifying exclusion and avoidance areas. Similarly, N.D.C.C. § 49-22-08(1)(h) also requires Brady Wind to provide an evaluation of the proposed site as it relates to exclusion and avoidance areas.

The Figure 5 map provided with the Application is not detailed enough, i.e., it needs to be zoomed in more to allow the PSC to properly analyze just how close each exclusion and avoidance area is to the O&M building, substation, turbines, collection lines and transmission line. In addition, one of the exclusion areas for wind energy projects is specific setback requirements. *See* N.D.A.C. § 69-06-08-01(2). Rather than provide detailed maps showing the setback requirements and proving that all locations comply, Brady Wind only offers a conclusory statement that the project complies with the requirements (Application, p. 4-2):

The Conditional Use Permit (CUP) from Stark County specifies that the Project turbines must not be located within 200 feet of a public road or within 2,000 feet of any existing residence. Brady Wind will comply with all applicable county setbacks.

A. Exclusion Areas Are Present.

Brady Wind is prohibited from considering exclusion areas for a site for an energy conversion facility. N.D.A.C. § 69-06-08-01(1). Brady Wind admits that the following

exclusion areas are present in the Project Area: archaeological sites and prime farmland. (Application, pp. 3-2 and 3-3, Table 6)

The current location of the proposed facilities and turbines do not affect these archeological sites, such sites are present in the Project Area (as defined in the Application) and there is potential to run into additional sites if the turbine locations are moved post-approval. Brady Wind's Application does not address this issue.

As to the second exclusion area, Brady Wind admits that four (4) acres of prime farmland will be permanently disturbed as a result of the wind farm project. (Application, p. 3-2, Table 6.) The only reason that prime farmland can be disturbed and excepted from the exclusion area category is if the Commission finds that the prime farmland that will be removed is of such small acreage as to be of negligible impact on agricultural productions. *See* N.D.A.C. § 69-06-08-01(1)(d). Brady Wind offers no evidence to support the blanket statement in the Application that "[t]his would be of negligible impact to agricultural production in the county." (Application, p. 7-21) In addition, the map provided by Brady Wind is of such a large scale that there is no way to tell exactly where the four acres is located (or if additional prime farmland is or may be affected). The Application should be denied because Brady Wind has not proven that it correctly calculated the prime farmland disturbances. The Commission may also deny the Application because of Brady Wind's failure to explain how it will avoid prime farmland "as much as practicable" without defining what this means. (Application, p. 7-21)

B. Avoidance Areas Are Present.

Brady Wind admits that the following avoidance areas are present in the Project Area: historical farmsteads, 100-year floodplain and woodlands and wetlands. (Application, p. 3-3, Table 7.) The only way that Brady Wind is allowed to construct the facility in an avoidance area

is if Brady Wind shows “there is no reasonable alternative.” N.D.A.C. § 69-06-08-01(3). “Economic considerations alone will not justify approval of [avoidance] areas.” *Id.* Brady Wind’s Application does not discuss reasonable alternatives to the proposed site. Brady Wind merely claims that it will be flexible with examining reasonable alternatives with landowners. (Application, p. 10-1) No mention is made in the Application, however, as to whether Brady Wind also intends to work with non-participating landowners to determine reasonable alternatives.

Brady Wind did provide detailed wetlands maps and a delineation report to the Commission; however, the results of the report and depictions on the maps are very troubling. The maps show that collection lines (underground), the transmission line (overhead), transmission line poles, crane paths and the disturbance areas for these items run directly through wetlands and that some turbines will be placed very close to wetlands. The proximity of certain turbines to wetlands raises the concern of whether Brady Wind has provided a buffer zone of a reasonable width as is required by N.D.A.C. § 69-06-08-01(3). Brady Wind offered no evidence of “no reasonable alternative” to these locations. *See id.* Instead, Brady Wind only offered a vague statement that it is “committed to avoiding and minimizing impacts to potentially jurisdictional wetlands and other [Waters of the United States], as practicable.” There are so many qualifiers in this statement that it is rendered meaningless. Brady Wind has not explained or justified its plans to construct the Facility on Stark County’s wetlands.

Brady Wind also admits that “[o]f [the 39] delineated wetlands, 30 would be impacted by currently planned Project infrastructure . . .” (Wetland Delineation Report, p. 11, § 3.1.) That means that 76.9% of present wetlands will be impacted by this Facility. Brady Wind also admits that eight (8) streams have a collection line, transmission line pole or crane path running through

them and that three (3) ponds have a transmission line pole or crane path running through them. (Wetland Delineation Report, pp. 24–26, §§ 3.3.1 and 3.3.2.) Brady Wind offers no evidence of what efforts it used to avoid these areas.

In its Wetland Delineation Report, Brady Wind discusses in great detail whether its actions will or will not require certain notifications to or permits from various governmental agencies. This should not matter to the Commission’s analysis here—the statutory criteria is whether Brady Wind has shown that there is “no reasonable alternative” to the proposed location. *See* N.D.A.C. § 69-06-08-01(3). Brady Wind has not done this. As the Commission knows, economic considerations alone will not justify disturbance of these avoidance areas. *See id.* Brady Wind has not met its burden of proof with respect to this aspect of the approval process. As such, the Commission cannot award a certificate of site compatibility to Brady Wind.

III. APPLICATION OF THE STATUTORY FACTORS IN N.D.C.C. § 49-22-09 WARRANTS THE DENIAL OF BRADY WIND’S APPLICATION.

Pursuant to N.D.C.C. § 49-22-09, the Commission must be guided by the following relevant considerations to aid the evaluation of Brady Wind’s Application: the economic impacts of the Facility; the effect of the Facility on the public health and welfare; and the effects of the Facility on the local environment and wildlife. When these factors are considered in light of Brady Wind’s Application and testimony at the Hearing, it is apparent that Brady Wind has not fully addressed the potential impacts of its proposed wind facility. The many significant shortcomings in Brady Wind’s Application under N.D.C.C. § 49-22-09 should require its denial by the Commission.

A. Brady Wind's Application Fails To Fully Account For The Economic Impacts Of The Facility.

The proponents of Brady Wind's Facility claim that the Project will result in significant, positive economic impacts on the local economy. As an initial matter, Brady Wind's numbers are inconsistent and incomplete. For example, on page 7-2 of its Application, Brady Wind claims that the Facility will create 10 permanent, full-time jobs in Stark County. Later, on page 7-3 of the Application, the number of permanent employees suddenly becomes "6 to 10 full-time employees, *most of which are expected to reside locally*" as opposed to the 10 positions initially promised on page 7-2. Moreover, Brady Wind's Application omits key information about the permanent full-time jobs that this Facility promises. Nowhere in its Application materials does Brady Wind identify the actual positions for the full-time employees; the requirements for these positions and whether they can be filled by local residents; and the salaries for these employees.

Similarly, the numbers for construction workers are also unsubstantiated. Brady Wind claims that 200 construction jobs will be generated during the course of the Project. Upon further review, however, Brady Wind's promises are filled with caveats and no guarantees. For example, on page 7-2 of the Application, Brady Wind states "*To the extent that local contractors are used for portions of the construction...*" Like the positions for permanent employees, Brady Wind has not offered any evidence of the types of construction jobs available and whether local contractors can fill these positions.

Finally, the payments to participating landowners are misleading. While Brady Wind will be making payments to local landowners, Brady Wind has not established the exact amounts of those payments. Moreover, the Application does not make mention of what potential resources and other sources of income local landowners are giving up (i.e., licenses, mineral/oil rights, etc.) in their easement agreements with Brady Wind. Notably, Brady Wind does not

distinguish between absentee property owners and resident property owners. To the extent that most of the easements concern absentee property owners, the payments being made to those landowners will not trickle down into the local economy.

In fact, the Facility may negatively impact Stark County's land-based economies and real estate values. Brady Wind maintains that there will be no adverse impact on Stark County's agricultural and farming communities, but again, its Application is filled with caveats. For example, Brady Wind issues a series of statements which equivocate what the actual impacts will be on local farms despite stating that the wind turbines will have a negligible impact to agricultural production: "Actual impacts to agricultural production will be determined once turbine and road locations are finalized." (Application, pg. 7-21) "The extent of impacts will not be known until final turbine locations are determined in conjunction with the landowners." *Id.* If the actual impact cannot yet be determined, Brady Wind cannot claim that its Facility will not impact agricultural production.

Brady Wind's claims any adverse impact is mitigated: "As noted earlier, wind lease payments will provide farmers with a supplemental source of income, helping assure that farmers can continue to operate financially viable farms and thus helping to assure the continuation of farming in Stark County." (Application, pg. 7-21) Brady Wind, however, offers no support to show how the lease payments offset the loss of farmland or any other adverse impacts to farmland. Moreover, Brady Wind's Application makes no mention about landowners not receiving lease payments and how the locations of these turbines will impact their farms and livelihoods.

Brady Wind has not established the Facility's actual positive and negative economic impacts on Stark County.

B. Brady Wind's Facility Will Harm Stark County Citizens' Use And Enjoyment Of Their Land.

Beginning on page 7-18 of its Application, Brady Wind highlights Stark County's recreational opportunities and resources, which include: hunting, fishing, wildlife observation, the Old Red/Old Ten Scenic Byway, the Dickinson Reservoir-Edward Arthur Patterson Lake and the Enchanted Highway. These recreational opportunities and resources are a vital part of Stark County citizens' quality of life.

Brady Wind's efforts to assuage concerns about the Facility's impact on Stark County's landscape fall short. Brady Wind claims that recreational impacts will be "auditory and visual in nature and limited to individuals using public or private property in and near the Project Area for hunting, fishing, or nature observation." (Application, pg. 7-19) Brady Wind offers no evidence that "auditory and visual impacts" will not adversely impact local animal populations—both for hunting and for wildlife observation. In its Application, Brady Wind does not offer a mitigation plan to address negative impacts on Stark County citizens' ability to enjoy their local surroundings as a result of Brady Wind's Facility.

With regard to the Dickinson Reservoir-Edward Arthur Patterson Lake, the Old Red/Old Ten Scenic Byway, and the Enchanted Highway, Brady Wind acknowledges that the turbines will be visible at these scenic sites. In order to alleviate concerns, Brady Wind's Application relies on creative wordsmithing, observing that the turbines' visibility "will be limited"; "not be noticeable to the casual observer"; "appear as subordinate features in the landscape." Despite these written assurances, Brady Wind does not provide any further detail about the visibility of the turbines at these various locations. Brady Wind should be required to provide more information in its Application about the height of the turbines vis a vis the tree line, the location

of the turbines by different vantage points, and potential mitigation efforts that could be made for adding the turbines to the natural landscape.

The omissions and lack of support in Brady Wind's Application should require a denial.

C. Brady Wind's Application Does Not Resolve Concerns About The Facility's Impact On The Health And Safety Of Stark County Residents.

Notably, Brady Wind's analysis of the noise impacts on the Project appears to be incomplete and reactive rather than proactive. (*See* Application, pgs. 7-14 to 7-15) For example, Brady Wind identifies 89 occupied structures in the Project Area that are subject to increased received sound levels as a result of the Project. Without final locations for the turbines, however, Brady Wind cannot prove the extent to which participating and non-participating owners will be subject to increased noise.

In addition to these long-term noise concerns, Brady Wind's Application fails to address short-term noise increases. Brady Wind acknowledges that construction will cause short-term but unavoidable noise impacts. Brady Wind states that "[r]easonable efforts will be made to minimize the impact of noise resulting from construction activities." (Application, Page 7-15) Absolutely no information or details are provided as to what those efforts will be, however.

Unless and until Brady Wind can fully address concerns with noise generated by the Project and the Facility, the Commission should not approve Brady Wind's Application.

D. Brady Wind's Facility Will Adversely Impact The Environment And Local Wildlife.

1. Brady Wind's Facility will harm Stark County's wetlands.

At the March 30, 2016 hearing, Brady Wind's representatives offered no evidence that they attempted to avoid 76.9% of Stark County's wetlands and water bodies in the design of the Facility. By intruding into nearly all of Stark County's wetlands, Brady Wind's Facility will adversely affect the animals, plants, and ecosystem of these vulnerable areas.

2. Brady Wind has not yet completed a Phase I Environmental Site Assessment.

Brady Wind wants the Commission to approve a Certificate of Site Compatibility, without the benefit of reviewing the Phase I Environmental Site Assessment. (Application, pp. 7-11 and 7-12) A post-approval Phase I does not provide the Commission with the information it should have when making an initial decision on the Application. If any environmental issues are disclosed by the Phase I, then Brady Wind should be required to submit the Phase I for the Commission's review and for public review and comment—such review by the Commission and the public should happen before the Commission makes its decision on the Application.

3. Brady Wind's Application does not adequately address wildlife concerns.

Although Section 7.15 of Brady Wind's Application supposedly addresses wildlife, the Application primarily concerns birds and bats. As an initial matter, the Application makes no mention of the Project's impacts on any other wildlife in Stark County. The construction of Brady Wind's Facility will impact other species, like deer, coyotes, wolves, and other animals which (a) contribute to the Stark County ecosystem and (b) are part of the hunting activities which occur. Brady Wind's omitted discussion or study of any other wildlife underscores its incomplete and insufficient Application.

Because Brady Wind's Application and related materials do not fully or adequately address the impact of the Facility on Stark County's environment and wildlife, the Commission should deny Brady Wind's Application.

CONCLUSION

Based on the foregoing, the Concerned Citizens of Stark County request that the Commission deny Brady Wind, LLC's Application for a Certificate of Site Compatibility for the Brady Wind Energy Center and related transmission line.

DATED: April 22, 2016

**FABYANSKE, WESTRA, HART &
THOMSON, P.A.**

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Julie Fedorchak
Randy Christmann
Brian P. Kalk

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Case No. PU-15-797

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Kathy Jensen, being first duly sworn on oath, deposes states that she is over the age of eighteen years and not a party to the above-entitled matter. That on April 22, 2016, she served the following documents:

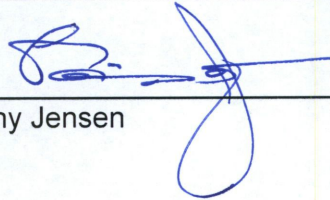
Intervenor Concerned Citizens of Stark County's

- Post-Hearing Brief; and
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by e-mailing and mailing a true and correct copy thereof, postage prepaid, by US Mail to:

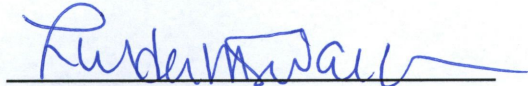
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Kathy Jensen

Subscribed and sworn to before me
this 22nd day of April, 2016.



Notary Public

