

Matthew T. Collins
Attorney

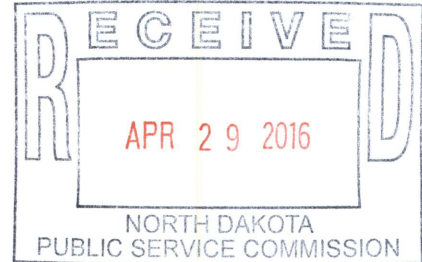
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**FABYANSKE
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April 29, 2016



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 Reply Brief and Affidavit of Service.

Very truly yours,

A handwritten signature in blue ink that reads "Matthew T. Collins". Below the signature is a small, stylized flourish or mark.

Matthew T. Collins

MTC:kl
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's Post-Hearing Reply Brief
Concerned Citizens of Stark County (CCSC)
Matthew Collins, Attorney

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Matthew Collins, Attorney

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

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
REPLY BRIEF**

INTRODUCTION

Intervenor Concerned Citizens of Stark County (“CCSC”) respectfully submits this post-hearing brief in response to three discrete arguments made in Brady Wind, LLC’s (“Brady Wind”) post-hearing brief.

Brady Wind first contends its application for a certificate of site compatibility (the “Application”) is sufficient given the information in the Application itself and the testimony offered by CCSC at the March 30, 2016 hearing before the North Dakota Public Service Commission (the “Commission”). Brady Wind’s argument improperly confuses its evidentiary burden of proof and its failure to meet that burden under North Dakota law.

Perhaps recognizing that it has not properly addressed the need for the Brady Wind Energy Center (the “Facility”), Brady Wind also argues that the testimony offered by CCSC should be discounted since need is not a specific criterion for the Commission to consider.

Despite indications to the contrary, Brady Wind is not automatically entitled to a certificate of site compatibility. While need is not a specific consideration provided by statute, the Commission's consideration of Brady Wind's Application in light of the factors outlined in N.D.A.C. § 69-06-08-01(5) and N.D.C.C. § 49-22-09 necessarily balances those factors with the state's energy needs.

Finally, Brady Wind improperly objects to the CCSC's late filed exhibits. Those exhibits, however, have already been admitted into evidence and should be considered by the Commission.

Ultimately, Brady Wind's arguments do not cure the defects in its Application and its inability to satisfy North Dakota's statutory and regulatory requirements for wind farms. CCSC respectfully requests that Brady Wind's Application be denied.

ARGUMENT

I. BRADY WIND ALONE HAS THE BURDEN OF PROVING THAT IT SATISFIED THE STATUTORY REQUIREMENTS FOR A CERTIFICATE OF SITE COMPATIBILITY.

In its brief, Brady Wind suggests that its Application should be approved because CCSC did not offer testimony to "undermine the substantial evidence" that the Facility and related transmission line would be sited in accordance with the applicable North Dakota statutes. As an initial matter, the rules of evidence apply to Brady Wind's Application before the Commission. *See* N.D.A.C. § 69-02-05-01. According to well established principles of North Dakota law, one who asserts the existence of a fact material to an issue in a case or proceeding assumes the burden of proof. *Sorum v. Schwartz*, 411 N.W.2d 652, 654 (N.D. 1987); *see also Midland Oil & Royalty Co. v. Schuler*, 126 N.W.2d 149, 152 (N.D. 1964) (noting that the party who asserts a claim or request has the burden of proving it). The burden of proof has two components: the

burden of going forward with the evidence and the burden of persuasion. *Matter of Stone Creek Channel Improvements*, 424 N.W.2d 894, 898 (N.D. 1988) (explaining a moving party's burden of proof in an administrative proceeding). The burden of persuasion, or risk of nonpersuasion, does not shift: it remains with the party having the burden of proof. *Helbling v. Helbling*, 541 N.W.2d 443, 445 (N.D. 1995). A party meets its burden of proof only when it offers evidence that is legally sufficient to support its position. *See, e.g., Guild v. More*, 155 N.W. 44, 45 (N.D. 1915).

Here, Brady Wind is the only party seeking affirmative relief from the Commission—the award of a Certificate of Site Compatibility. As such, Brady Wind is the only party to this proceeding who must satisfy its burden of proof, and as previously detailed in CCSC's post-hearing brief, Brady Wind simply has not met its burden of proof in its Application. Instead of offering substantive evidence, the Application omits and obfuscates relevant evidence germane to Commission's consideration as to the Facility's impact on the environment and the welfare of Stark County's citizens. Specifically, Brady Wind's Application omits required information about the turbine locations, mitigation plans, and the Environmental Phase I Assessment. Brady Wind's Application also obscures pertinent evidence about the actual economic and environmental impacts of the Facility by couching its plans and promises with phrases like "to the extent practicable." These omissions and caveats do not constitute substantive evidence. Furthermore, information contained in Brady Wind's Application establishes that the Facility will actually violate the statutory requirements for wind farms because it will be constructed in avoidance and exclusion areas. In its Application and at the March 30, 2016 hearing, Brady Wind repeatedly failed to offer evidence that it had no other reasonable alternatives to

construction in these protected areas. Brady Wind has not met its burden of proof under North Dakota law. Therefore, CCSC respectfully requests that Brady Wind's Application be denied.

II. NEED IS AN INTRINSIC CONSIDERATION IN THE COMMISSION'S ANALYSIS OF BRADY WIND'S APPLICATION UNDER THE SITING CRITERIA.

While Brady Wind correctly observes in its post-hearing brief that need is not a specific criterion for the Commission to consider, need is an intrinsic part of the Commission's consideration of site compatibility applications. Notably, contrary to the information set forth in Brady Wind's Application, Brady Wind's ability to satisfy the site criteria factors in N.D.A.C. § 69-06-08-01(5) and N.D.C.C. § 49-22-09 does not automatically mandate the approval of the Application. *Compare* Application at pg. 3-3 ("a site shall be approved") *and* N.D.A.C. § 69-06-08-01(5) ("a site may be approved"). In other words, there is no statutory directive that the Commission must approve an Application if all of the statutory and regulatory considerations are satisfied. Instead, according to the statute, the Commission must exercise its discretion to weigh the adverse human and environmental impact of a proposed Facility in light of the state's energy needs by a preponderance of the evidence. N.D.C.C. §§ 49-22-02, 49-22-09. Because need necessarily informs the Commission's evaluation and analysis of Brady Wind's Application, the arguments and testimony offered by CCSC regarding need should be considered in light of the factors outlined in N.D.A.C. § 69-06-08-01(5) and N.D.C.C. § 49-22-09.

III. THE COMMISSION SHOULD CONSIDER CCSC'S LATE FILED EXHIBITS.

While Brady Wind continues to object to the admission of CCSC's late filed exhibits E through J, Judge Ward already admitted these exhibits at the March 30, 2016 hearing before the Commission. Both parties have filed late exhibits which were not exchanged during the course

of discovery. They have been admitted, and the Commission should consider them in its evaluation of 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 29, 2016

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

By: /s/Matthew T. Collins
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**ATTORNEYS FOR CONCERNED CITIZENS
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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

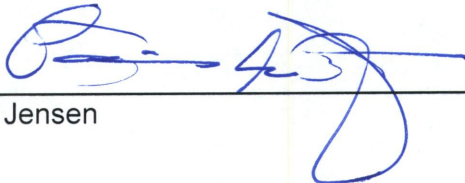
Kathy Jensen, being first duly sworn on oath, deposes states that she is over the age of eighteen years and not a party to the above-entitled matter. That on April 29, 2016, she served the following documents:

Intervenor Concerned Citizens of Stark County's Reply Brief

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


Judge Patrick Ward Administrative Law Judge PO Box 1695 Bismarck, ND 58502 pward@zkslaw.com	Zachary Pelham Pearce Durick 314 East Thayer Avenue PO Box 400 Bismarck, ND 58502 zep@pearce-durick.com
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<p>Timothy Dawson Public Service Commission 600 E. boulevard, Dept. 408 Bismarck, ND 58505 tdawson@nd.gov</p>	



Kathy Jensen

Subscribed and sworn to before me
this 29th day of April, 2016.



Notary Public

