

Lein, Jerry R.

From: Matthew T. Collins <MCollins@fwhtlaw.com>
Sent: Wednesday, May 25, 2016 8:45 PM
To: Zachary E. Pelham
Cc: Lein, Jerry R.; Brian R. Bjella (bbjella@crowleyfleck.com); cfurey@crowleyfleck.com; 085892_001 _ Stark County_ ND _ Concerned Citizens of Stark County_ North Dakota_ a non_profit corp__ 10_ E_Mails_Voicemails _085892_001_
Subject: RE: Brady Wind, Case Nos. PU-15-690 & PU-16-797 [IWOV-Active.FID1141519]
Attachments: 5.25.16 ltr. to Z. Pelham.pdf

Attached.

Matthew T. Collins

Attorney at Law

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Mr. Pelham –

Please see the attached letter.

Thank you,

Matt Collins

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Attorney at Law

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CCSC Reply to Brady Wind's 17 May 2016 Response
Public Service Commission
Zachary Pelham, SAAG

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**FABYANSKE
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May 25, 2016

VIA E-MAIL

Zachary E. Pelham
Pearce & Durick
314 East Thayer Avenue
Bismarck, ND 58501

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

Dear Mr. Pelham:

On May 7, 2016, you asked whether Intervenor Concerned Citizens of Stark County ("CCSC") would be submitting a late filed exhibit regarding usage of drones in and around wind farms. CCSC will not be submitting a late filed exhibit on this topic.

On May 17, 2016, Brian Bjella submitted a response to the questions you posed to Brady Wind, LLC ("Brady Wind"). This letter addresses Mr. Bjella's May 17, 2016, letter.

First, Brady Wind again cites to the alleged "December 31, 2016, deadline under the project's Power Purchase Agreement." (See page 2 of the May 17, 2016 letter.) CCSC objects to the reference to the Power Purchase Agreement without the Public Services Commission ("PSC") having the opportunity to independently verify that the December 31, 2016, deadline exists and whether there are any exceptions to the deadline contained in the agreement. The PSC should require that Brady Wind submit the Power Purchase Agreement so that it can verify the representations that the Agreement contains such a deadline. The verification of the alleged deadline and whether any exceptions exists would allow the PSC to decide whether it is feasible for Brady Wind to move some of the turbines to alleviate the impact the project has on non-participating landowners.

Second, CCSC objects to the "updated shadow flicker analysis" provided with the May 17 letter. Brady Wind did not seek leave to file this exhibit. CCSC has been provided no opportunity to verify or challenge the contents of the "updated shadow flicker analysis." The accompanying map to the "updated shadow flicker analysis" is not sufficiently legible to critically evaluate the contents or representations in it. There is no meaningful way to distinguish structures that are occupied nor not occupied, much less determine their proximity to the wind turbines. CCSC requests that the PSC strike the "updated shadow flicker analysis" from the record or reopen the hearing pursuant to N.D.C.C. § 69-02-06-01 so that CCSC may have the opportunity to question Brady Wind on this new evidence it is purporting to have the PSC consider. If the PSC decides to consider this new information, CCSC requests the opportunity to file a petition to reopen the hearing.

Finally, in response to question no. 5, Brady Wind's May 17 letter seems to suggest that it would be illegal or somehow improper for the PSC to condition issuance of the certificate of site compatibility on increased or greater set back requirements for non-participating owner's property lines. North Dakota law does not support Brady Wind's position in this regard.

In *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 419 (N.D. 1969), the North Dakota Supreme Court held that it "does not have the power to determine administrative questions which are within the purview of the Public Service Commission." The Court went on to explain the limit of its review of a decision by the PSC:

That agency alone has the authority to make this determination, and such determination will not be disturbed on appeal unless it can be shown that such decision or determination is not in accordance with the law, or that it is violation of the constitutional rights of the appellant, or that any of the provisions of the law have not been complied with in the proceedings before the agency, or that the rules or procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact.

Id.

North Dakota Century Code Chapter 49-22, Energy Conversion and Transmission Facility Siting Act grants the PSC broad discretion to make conditions for the issuance of a certificate of site compatibility. For example, N.D.C.C. § 49-22-02 states that it is the intent of the legislature that the PSC issue certificates that "minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion." Requiring that Brady Wind meet certain conditions for the certificate, including greater set back requirements, is consistent with the legislative authority.

Section 49-22-07(1) provides that Brady Wind may not begin construction of the project until it obtains a certificate and Brady Wind must comply "with the certificate or permit and any terms, conditions, or modifications of the certificate or permit." N.D.C.C. § 49-22-07(1) (emphasis added). Because the legislature specifically stated that a certificate and any "terms, conditions, or modifications of the certificate" must be complied with by Brady Wind, the PSC has the authority to condition the certificate with compliance with greater set back requirements.

Section 49-22-08(5) of the North Dakota Century Code provides that the PSC must approve or deny Brady Wind's application based on, among other things, the factors identified in N.D.C.C. § 49-22-09. Section 49-22-08(5) states the following:

The commission may designate a site or corridor for a proposed facility following the study and hearings provided for in this chapter. Any designation shall be made in accordance with the evidence presented at the hearings, an evaluation of the information provided in the application, the criteria established pursuant to section 49-22-05.1, and the considerations set out in section 49-22-09 in a finding with reasons for the designation, and shall be made in a timely manner no later than six months after the filing of a completed application for a certificate of

site compatibility or no later than three months after the filing of a completed application for a certificate of corridor compatibility.

N.D.C.C. § 49-22-08(5).

Section 49-22-09 of the North Dakota Century Code provides that the PSC shall use the eleven "considerations" identified in the statute, but is not limited to the eleven considerations when evaluating and designating a site. Section 49-22-09 provides: "The commission shall be guided by, but is not limited to, the following considerations, where applicable, to aid the evaluation and designation of sites, corridors, and routes" N.D.C.C. § 49-22-09 (emphasis added). Thus, the legislature has expressly stated that the PSC may consider other factors – such as strong public opposition and population density – when deciding whether to approve an application. Given the PSC broad authority to condition the approval of an application and issue a certificate, the PSC may condition such approval on fulfillment of any conditions that the PSC determines will "minimize adverse human and environmental impact" N.D.C.C. § 49-22-02.

CCSC remains opposed to the current configuration of the proposed wind farm by Brady Wind. The application has failed to provide the required information to satisfy the statutory requirements and does not adequately address the objections of the non-participating landowners. Given the previously approved wind farms by the PSC, the proposed wind farm by Brady Wind is not compatible with its current location in Stark County based on the objections of the non-participating landowners and residents of Stark County as documented in the record.

Very truly yours,



Matthew T. Collins

MTC/

cc: Jerry Lein (via e-mail)
Brian Bjella (via e-mail)