

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR MINNESOTA DEPARTMENT OF PUBLIC UTILITIES COMMISSION

In the Matter of the Application of Freeborn  
Wind Energy LLC for a Large Wind Energy  
Conversion System Site Permit for the 84 MW  
Freeborn Wind Farm

**MEMORANDUM IN SUPPORT OF  
MINNESOTA DEPARTMENT OF  
NATURAL RESOURCES' MOTION TO  
QUASH A HEARING SUBPOENA FOR  
KEVIN MIXSON AND, IN THE  
ALTERNATIVE, OBJECTION TO  
INTERVENOR'S HEARING SUBPOENA  
FOR KEVIN MIXSON**

OAH Docket No. 80-2500-34633  
MPUC IP-6946/ WS-17-410

**INTRODUCTION**

The Minnesota Department of Natural Resources (“DNR”) respectfully request this Court grant its Motion to Quash the Hearing Subpoena (“Subpoena”) of DNR employee Kevin Mixon because: (i) the request requires a non-party public official to travel outside the county where he resides, works or conducts business; and (ii) the request fails to compensate the non-party witness.

**FACTS**

On December 5, 2017, upon the request of Intervenor Association of Freeborn County Landowners (“Intervenor”), Administrative Law Judge (“ALJ”) LauraSue Schlatter issued the Subpoena to Mr. Kevin Mixon, who is a DNR employee. Affidavit of Kevin Mixon (hereinafter “Mixon Aff.”), dated February 8, 2018, at ¶ 3 and Ex. A. On December 11, 2017, the Brown County Sheriff’s Office served DNR employee Kevin Mixon by leaving a copy of the Subpoena with a receptionist at DNR’s New Ulm Office, located at 21371 Hwy 15 S, New Ulm, Minnesota

56073. *Id.* at ¶ 3, Ex. B. Mr. Mixon is also a resident of Brown County, and does not regularly conduct business elsewhere. *Id.* at ¶ 5.

The Subpoena commanded Mr. Mixon to appear at a venue yet to be determined in Freeborn County (Albert Lea), on Thursday, February 22, 2018, at 9:30 a.m. for the above-captioned matter. *Id.* at ¶ 3, Ex. A. It is the understanding of DNR, that Intervenor seeks testimony from Mr. Mixon on the natural resource impacts of the siting related to this action. Mr. Mixon’s involvement in the project included discussions pertaining to the natural resource issues, such as the appropriate wildlife surveys for the project. *Id.* at ¶ 2.

### ARGUMENT

Minnesota Rules 1405.1300, subpart 3 allows an ALJ to quash or modify a subpoena upon a finding that it “unreasonable or oppressive.” The Subpoena subjects Mr. Mixon, a state employee, to the undue and unnecessary burden of traveling to a county outside of where he resides or works, to serve as a witness for a private litigant, in a matter to which neither he nor DNR are parties.

**I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT REQUIRES A NON-PARTY PUBLIC OFFICIAL TO TRAVEL OUTSIDE THE COUNTY WHERE HE RESIDES, IS EMPLOYED OR REGULARLY TRANSACTS BUSINESS FOR NON-STATE BUSINESS.**

This Subpoena requires a state employee to act as an uncompensated witness for Intervenor. The Subpoena is unreasonable and oppressive because it subjects Mr. Mixon to the undue burden of traveling to a distant location that is located in a county different than the counties where he resides and works. *See In re Disciplinary Action Against Coleman*, 793 N.W.2d 296, 303 (Minn. 2011) (finding that it was appropriate to quash a subpoena that required an individual to travel more than 100 miles to a hearing outside of the county where the individual worked, lived or transacted business). The Subpoena imposes undue burden and expense on both Mr. Mixon and the State in an action where DNR is not a party.

Mr. Mixon will likely need to spend at least one day away from his place of business, traveling to this hearing on behalf of a private party. Mr. Mixon resides in Brown County and will need to travel approximately 200 miles roundtrip to attend. Mixon Aff. at ¶ 5. Minnesota Rules chapter 1400 is silent on what is considered an “unreasonable or oppressive” subpoena request. One may, however, look to the Minnesota Rules for Civil Procedure for guidance.<sup>1</sup> Minnesota Rule of Civil Procedure 45.03(c)(1)(B) indicates that a subpoena may be quashed if it “requires a person who is not a party or an officer of a party to travel to a place outside the county where that person resides, is employed or regularly transacts business in person.”

Moreover, the time and energy of public officials should be preserved for official state business. In *Ellingson & Assoc. Inc. v. Keefe*, 396 N.W.2d 694, 697–97 (Minn. Ct. App. 1986), the court affirmed that

[P]ublic policy requires that the time and energies of public officials be conserved for the public’s business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants’ access to responsible governmental officials as sources of routine pre-trial discovery would result in a severe disruption of the government’s primary function.

(citing *Cnty. Fed. Savings & Loan v. Fed. Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C. 1983).) DNR will lose the services of one of its employees for an entire day for matters unrelated to Mr. Mixson’s duties. Allowing DNR’s employees to provide testimony for private parties without adequate compensation is unreasonable and oppressive. For these reasons, the Subpoena should be quashed.

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<sup>1</sup> Minnesota Rules 1400.6600 states that “[i]n ruling on motions where parts 1400.5100 to 1400.8400 are silent, the judge shall apply the Rules of Civil Procedure for the District Court for Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding.”

**II. THE SUBPOENA SHOULD BE QUASHED BECAUSE INTERVENORS FAILED TO ARRANGE FOR ADEQUATE COMPENSATION OF A NON-PARTY WITNESS.**

DNR also requests that this Court quash the Subpoena due to Intervenor's failure to arrange for appropriate compensation of a non-party witness and failure to tender a statutorily-required witness fee and mileage reimbursement to Mr. Mixon.

Minnesota Rules of Civil Procedure 45.03(d) governs the compensation of certain non-party expert witnesses, such as Mr. Mixon:

a witness who is not a party to the action . . . who is required to give testimony . . . relating to a profession . . . or relating to knowledge, information, or facts obtained as a result of activities in such profession . . . is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony . . . .

Minn. R. Civ. P. 45.03(d). When a non-party witness is entitled to compensation under Rule 45.03(d), the party who issued the subpoena must arrange for reasonable compensation prior to the date the testimony is to be given. *Id.* As of February 8, 2018, Intervenor has not given any indication that it intends to compensate Mr. Mixon for his expenses.

Further, it would be improper for a DNR employee to be compelled to testify as a witness for the benefit of a non-state party in litigation not involving DNR.<sup>2</sup> Mr. Mixon had limited involvement in this matter and his role was only to provide his experience and knowledge on the appropriate wildlife surveys for the project area. *See* Mixon Aff. ¶ 2. Here, the interest of DNR in its employees being turned into involuntary experts for a private litigant outweighs the interest of Intervenor and require that Intervenor obtain this information elsewhere, through private consultants or other means less disruptive to Mr. Mixon and DNR.

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<sup>2</sup> DNR will incur substantial expenses sending Mr. Mixon to Freeborn County, including travel expenses and the lost services of one of its employees. Such expenses, absent a showing of substantial need for the testimony or undue hardship, are grounds for granting a motion to quash. Minn. R. Civ. P. 45.03(c)(2)(C).

Furthermore, Intervenor failed to tender the required fees for Mr. Mixson's attendance and reimbursement for Mr. Mixson's mileage as required by law. *See* Minn. R. 1400.7000, subp. 2 (“[t]he cost of service, fees, and expense of any witnesses subpoenaed shall be paid by the party at whose request the witness appears”); *see also* Minn. R. Civ. P. 45.02(a) (“ . . . if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law”). DNR is not a party to this matter and its employees should not be utilized by private parties for free expert opinions. Therefore, DNR respectfully requests the Court quash Mr. Mixson's Subpoena.

### CONCLUSION

For the reasons stated above, DNR respectfully requests that the Subpoena to compel the attendance and testimony of Kevin Mixson be quashed and/or canceled.

Dated: February 9, 2018.

Respectfully submitted,

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**MINN. STAT. § 549.211 ACKNOWLEDGMENT**

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211.

Dated: February 9, 2018.

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