STATE OF NORTH CAROLINA COUNTY OF PERQUIMANS	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 15 EHR 07012
STEPHEN E. OWENS and JILLANNE G. BADAWI, Petitioners, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.	MEMORANDUM IN OPPOSITION TO WEYERHAEUSER COMPANY'S MOTION TO INTERVENE

NOW COME Petitioners, Stephen E. Owens and Jillanne G. Badawi, by and through the undersigned counsel, and file this Memorandum of Law in Opposition to Weyerhaeuser Company's Motion to Intervene.

INTRODUCTION AND SUMMARY

On September 25, 2015, Stephen E. Owens and Jillanne Badawi – husband and wife – filed a petition for a contested case hearing with the Office of Administrative Hearings. In their petition, they alleged that they were aggrieved by Respondent DEQ's April 29, 2015 letter to Iberdrola Renewables. Specifically, Petitioners alleged that this letter constituted an *ultra vires* act and deprived Petitioners of the protections of the legislatively-enacted wind permitting process of Session Law 2013-51. *See* An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, ch. 51, 2013 N.C. Sess. Laws 51 (codified at N.C.G.S. §§ 143-215.115, et seq.) Hereinafter, Petitioners refer to this law as the "Wind Energy Act."

On November 3, 2015, Respondent North Carolina Department of Environmental Quality (hereinafter "Respondent DEQ") filed a motion to dismiss the petition for lack of subject matter jurisdiction and failure to state a claim. This Court denied that motion on December 14, 2015. The Court then issued a scheduling order on January 14, 2016, setting April 15, 2016 as the deadline for dispositive motions and April 12-13, 2016 as the hearing date.

On February 22, 2016, Weyerhaeuser Company (hereinafter "Weyerhaeuser" or the "Company") filed a motion to intervene pursuant to N.C.G.S. § 150B-23(d) and Rule 24 of the North Carolina Rules of Civil Procedure. Petitioners oppose Weyerhaeuser's intervention.

Weyerhaeuser seeks to intervene as a respondent-intervenor to oppose Petitioners and to be conferred all of the rights of a party to participate fully in all aspects of the above-captioned case. The Company seeks intervention as a matter of right, and in the alternative seeks permissive intervention or intervention to the extent deemed appropriate by this Court.

This case turns on the proper understanding of the Wind Energy Act. Petitioners have sought (1) a ruling from this Court finding the April 29, 2015 letter in error and not in accord with the law such that it aggrieves Petitioners and (2) an order from this Court requiring Respondent to retract its illegal letter of April 29, 2015, which constituted an action in violation of the Administrative Procedure Act. Weyerhaeuser has stated no proper reason that it should be allowed to intervene in this matter. For that reason, its motion to intervene should be denied in its entirety.

ARGUMENT

I. WEYERHAEUSER IS NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT

A movant seeking to intervene as a matter of right must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, *and* (3) there is inadequate representation of that interest by existing parties. Anderson v. Seascape at Holden Plantations, LLC, 232 N.C. App. 1, 8, 753 S.E.2d 691, 697 (2014). The movant "bears the burden" of demonstrating all three of these criteria. Charles Schwab & Co. v. McEntee, 225 N.C. App. 666, 672, 739 S.E.2d 863, 867 (2013).

This Court should deny Weyerhaeuser's intervention of right because (a) the Company has no sufficient interest relating to the property or transaction that is the subject of the action and (b) any alleged interest of Weyerhaeuser is adequately represented by existing parties. These are two independently adequate reasons to deny Weyerhaeuser's motion for intervention as of right.

A. Weyerhaeuser has no sufficient interest relating to the property or transaction that is the subject of this action to be granted intervention as a matter of right.

To be allowed intervention of right, an applicant must have "an interest relating to the property or transaction which is the subject of the action." N.C. R. Civ. P. 24(a)(2). Weyerhaeuser has not alleged that any statute confers upon them an unconditional right to intervene. Where, as here, no statute confers such an unconditional right to intervene, the interest of a third party seeking intervention as a matter of right "must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment...One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect...or* a *contingent* one cannot claim the right to defend." Virmani v. Presbyterian Health

Servs. Corp., 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999), *quoting* Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968)(citations omitted).

Weyerhaeuser lacks a sufficient interest relating to the property or transaction. The Company alleges an interest in "approximately $275,000 per year in payments from Atlantic Wind in connection with this project." Wey. Mem. Supp. Int. 6. But the question being litigated is not whether Weyerhaeuser can, will, or should receive its payments. The question being litigated is whether Respondent DEQ failed in its duty to properly implement the provisions of the Wind Energy Act. *If* this Court finds that Respondent DEQ so failed, the only result would be a requirement that Iberdrola engage in a permitting process. A permitting process is not a death knell to the project and there is no reason Iberdrola would sever its rental agreement with Weyerhaeuser. The only act that would directly affect Weyerhauser would be one taken by Iberdrola to abandon its project, something not caused by the mere necessity to complete a permitting process. Thus, Weyerhaeuser's alleged interest in this litigation is, at most, "indirect" and "contingent." Virmani, 350 N.C. at 459, 515 S.E.2d at 683. One alleging such an interest "cannot claim the right to defend." Id.

B. Any alleged interest of Weyerhaeuser is adequately represented by the existing parties, and therefore Weyerhaeuser should not be granted intervention as a matter of right.

A potential intervenor "bears the burden" of demonstrating that its interests are not adequately represented by the existing parties. Charles Schwab & Co. v. McEntee, 225 N.C. App. 666, 672, 739 S.E.2d 863, 867 (2013). It meets this burden by "alleg[ing] facts which would indicate that its interest [is] not adequately represented by the [existing parties]." Charles Schwab, 225 N.C. at 674, 739 S.E.2d at 868 (holding that a nonprofit organization failed to

establish its right to permissive intervention in an estate dispute because it failed to allege facts indicating that its interest was not adequately represented by the estate's personal representative).

Even were this Court to find that Weyerhaeuser had an interest relating to the property or transaction, there is no reason to think that the existing parties inadequately represent that interest. In the words of Weyerhaeuser, the issue in this litigation is as follows:

> "This contested case involves [Petitioners] Stephen E. Owens and [Jillanne] G. Badawi's...challenge of the April 29, 2015 decision made by [Respondent DEQ] that a wind project being developed by Atlantic Wind, LLC..., an affiliate of Iberdrola Renewables..., on land partially owned by Weyerhaseuser is not subject to the permitting requirements for N.C. Session Law 2013-51, An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, codified at N.C. Gen. Stat. §§ 143-215.115, *et seq.*" Wey. Mem. Supp. Int. 2.

Petitioners agree with Weyerhaeuser as to the nature of the issue in this litigation. The issue, as stated above, is exactly the issue being litigated between the Petitioners and Respondent DEQ. Respondent DEQ is represented by counsel from the North Carolina Department of Justice – the very same counsel who successfully challenged a petitioner's standing in a case addressing the same issues in the fall of 2015 before this very same Court. Weyerhaeuser has presented no evidence that Respondent DEQ's counsel is in any way unmotivated to fully and successfully defend their client.

Weyerhaeuser "bears the burden" of establishing that Respondent DEQ cannot adequately represent its interests in this action. Charles Schwab & Co. v. McEntee, 225 N.C. App. 666, 672, 739 S.E.2d 863, 867 (2013). The Company has come nowhere close to bearing this burden. For this reason, Weyerhaeuser's motion for intervention of right should be denied.

II. WEYERHAEUSER IS NOT ENTITLED TO PERMISSIVE INTERVENTION

Weyerhaeuser alternatively requests permissive intervention pursuant to North Carolina Rule of Civil Procedure 24(b)(2). Intervention is permitted under this rule "when an applicant's claim or defense and the main action have a question of law or fact in common" and the intervention does not "unduly delay or prejudice the adjudication of the rights of the original parties." N.C. R. Civ. P. 24(b)(2).

Weyerhaeuser has not identified a single claim or defense that it plans to assert as a Respondent, despite its statement that its defenses "clearly have common questions of law and fact with those in this action." Wey. Mem. Supp. Int. 7. In fact, it is entirely unclear what claims or defenses Weyerhaeuser could possibly raise. The issue in this case, as stated by Weyerhaeuser, is whether Respondent DEQ has improperly implemented the Wind Energy Act. There is no claim or defense of which Petitioners are aware that could be made by Weyerhaeuser that bears on this issue. For this reason, Weyerhaeuser's request for permissive intervention should be denied.

III. THE COURT SHOULD NOT GRANT DISCRETIONARY INTERVENTION TO WEYERHAEUSER

The Office of Administrative Hearings (OAH) has broad discretion to allow intervention in contested case petitions. Holly Ridge Associates, LLC v. N. Carolina Dep't of Env't & Nat. Res., 176 N.C. App. 594, 600, 627 S.E.2d 326, 332 (2006), rev'd on other grounds, 361 N.C. 531, 648 S.E.2d 830 (2007). The discretion of the presiding Administrative Law Judge is in fact "without limitation." State ex rel. Com'r of Ins. v. N. Carolina Rate Bureau, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980). The presiding Administrative Law Judge may exercise this discretion to limit an intervenor's involvement to only the "extent deemed appropriate by the administrative law judge." N.C.G.S. § 150B-23(d).

Petitioners offer that such discretionary intervention is unnecessary and would only result in consumption of the court's time to no added benefit, as the sole issue that could possibly affect Weyerhaeuser is being fully litigated between the current parties to this action. However, if the Court does, in its discretion, allow Weyerhaeuser to intervene, Petitioners respectfully ask the Court to limit Weyerhaeuser's involvement in this matter to briefing the Court on the proper understanding of N.C. Session Law 2013-51 and N.C.G.S. § 150B-23.

CONCLUSION

For the foregoing reasons, Weyerhaeuser's motion to intervene should be denied in its entirety.

Respectfully submitted this the 23rd day of February, 2016.

By: _____

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*Admitted to practice in this case by the Oct. 28, 2015 order of this Court granting *pro hac vice* admission.

CERTIFICATE OF SERVICE

I certify that the attached MEMORANDUM IN OPPOSITION TO WEYERHAEUSER COMPANY'S MOTION TO INTERVENE has been served on the following persons by depositing a copy with the United States Postal Service with sufficient postage, addressed to:

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This the 23rd day of February, 2016.

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