

FILED

STATE OF NORTH CAROLINA

IN THE OFFICE OF

COUNTY OF PERQUIMANS

2016 FEB 22 PM 3:37

ADMINISTRATIVE HEARING

16 EHR 07012

OFFICE OF ADMIN HEARINGS

STEPHEN E. OWENS and
JILLANE G. BADAWI,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT
OF ENVIRONMENT AND NATURAL
RESOURCES, DIVISION OF
ENERGY MINERAL AND LAND
RESOURCES,

Respondent.

MOTION TO INTERVENE

Pasquotank County (the "County") moves pursuant to N.C. Gen. Stat. § 150B-23(d), 26 NCAC 03 .0117, and Rule 24 of the North Carolina Rules of Civil Procedure to intervene as a respondent in the above-captioned matter as a matter of right, or in the alternative, by leave of this tribunal. In support of this motion, the County shows as follows:

PRELIMINARY STATEMENT

1. For the last five years, the County has been working to make the Desert Wind Project (the "Project") a reality. *See* Exhibit A, Affidavit of Rodney Bunch. The County entered into an Economic Development Agreement to induce the Project to be sited partially in the County. *Id.* In exchange, the County expects that the Project and will produce a vast amount of renewable electricity, provide high-paying jobs to the County's residents, inject significant lease income into the local economy, result in the purchase of at least \$30 million of construction materials and services from county residents, and significantly increase the County's tax base.

Id. Construction on the Project is currently underway. *Id.* Accordingly, a ruling in this matter that is favorable to Petitioners would deprive the County of prospective tax revenue, substantially prejudice the County's rights regarding business development and the Economic Development Agreement, and impair or impede the County's significant interests in the development of the Desert Wind Project. Accordingly, the County respectfully requests that it be permitted to intervene as a matter of right or, in the alternative, in this tribunal's discretion.

PROCEDURAL MATTERS

2. Respondent North Carolina Department of Environmental Quality ("DEQ"), formerly known as the North Carolina Department of Environment and Natural Resources, consented to this motion on February 19, 2016 after counsel conferred by telephone and email.

3. Counsel for Petitioners and Counsel for the County conferred by telephone and email on February 19, 21, and 22, 2016. Petitioners Stephen E. Owens and Jillane G. Badawi ("Petitioners") have informed the County that, while they disagree with the County's characterization of the law and facts, they do not oppose the County's intervention with respect to the limited issue of the proper interpretation of Section 2 of Session Law 2013-51.

4. The County has attached its proposed prehearing statement as Exhibit B.

5. After this tribunal entered an order denying the DEQ's motion to dismiss, it entered a scheduling order in this case on January 14, 2015.

6. On February 15, 2016, the County's Board of Commissioners met and voted intervene in the case. *Id.*

INTERVENTION BY RIGHT

7. Any interested person may intervene in a contested case if (1) the standards in Rule 24 of the North Carolina Rules of Civil Procedure have been met or (2) the administrative law judge, in her discretion, deems it appropriate to allow intervention. N.C. Gen. Stat. § 150B-23(d).

8. Rule 24 allows a person to intervene as a matter of right if the intervenor claims an interest in the property or transaction that is subject to the action and an adverse disposition would impair or impede the intervenor's ability to protect its interests. N.C. R. Civ. P. 24(a)(2). The County is a legal person that may sue. N.C. Gen. Stat. § 153A-11.

9. As discussed above, the County has a significant interest in the completion of the Project. If Petitioners were successful in this contested case, the Project will be delayed or terminated. As a result, the County's efforts to develop the Project would be wasted, the local economy would suffer for lack of the quality jobs, lease revenue, and construction purchases the Project would produce, and the property taxes collected would be significantly less than if the Project were completed on schedule. *Id.*

10. In addition, the County's interests cannot be adequately represented by DEQ because it has very little at stake in this litigation. DEQ might easily settle this case, with little additional expense, simply by agreeing to revoke its April 29, 2015 and March 18, 2015 letters. *See, e.g., United Servs. Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 485 S.E.2d 337, 341 (1997) (holding that a defendant's interests are "fundamentally opposed to [an intervenor's] position in the underlying litigation" because, at any time, it could settle to the disadvantage of the intervenor). As a practical matter, even a settlement outcome in which DEQ avoided an interpretation of Session Law 2013-51 might have significant negative impacts on the County.

See Pet. Memo. Opp. Mot. Dismiss 13 (arguing that “Petitioners would have multiple legal and political options if Iberdrola failed to seek a permit, regardless of whether [DEQ] took enforcement action.”).

11. Accordingly, the County should be allowed to intervene as a matter of right.

PERMISSIVE INTERVENTION

12. In the alternative, the tribunal should allow permissive intervention.

13. Rule 24 allows a person to intervene, in the court’s discretion, if the intervenor’s defenses have questions of law or fact in common with the underlying dispute. N.C. R. Civ. P. 24(b).

14. The issues raised by the County’s defense (i.e., the proper construction of the Session Law 2013-51 as applied to the Project) are identical to the issues between Petitioners and DEQ.

15. The discretion to deny a motion to intervene is limited. An “administrative law judge *shall allow* intervention upon a proper showing under this Rule [*i.e.*, timeliness; effect on movant], unless the administrative law judge finds that the movants interest is adequately represented by one or more parties participating in the case.” 26 NCAC 03 .0117 (emphasis added).

16. “In considering whether a motion to intervene is timely, the trial court considers ‘(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances.’” *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001); *see also* 26 NCAC 03 .0117(a) (“Timeliness will be

determined by the administrative law judge in each case based on the circumstances at the time of filing.”)

17. The status of this case weighs in favor of intervention. An Amended Scheduling Order was entered just over a month ago. Under that Order, dispositive motions are not due until March 24, 2016, and a hearing in this matter is not scheduled until April 12, 2016—nearly two months from now. The County will comply with all the deadlines contained in the Amended Scheduling Order and all subsequent orders of this tribunal.

18. There is plenty of time for the parties to complete any discovery in this case. The only issues here are whether, by sending Atlantic Wind a letter on April 29, 2015 interpreting Session Law 2013-51, DEQ exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law. Because issues of statutory construction predominate over any issues of fact in this contested case, the County does not anticipate that extensive discovery will be necessary. Accordingly, the County’s intervention will not expand the discovery period.

19. There is no possibility of prejudice to DEQ or the Petitioners. The County’s intervention will not delay any of the deadlines established in the Amended Scheduling Order, and the County’s intervention will do nothing to delay or impede a disposition of this matter.

20. The reason for the delay also weighs in favor of intervention. Respondent’s motion to dismiss was not denied until December 14, 2015, and the Amended Scheduling Order was not entered until January 14, 2016. The County’s Board of Commissioners, a deliberative body representing the residents of the County, met to consider and debate whether to intervene. The Board voted to intervene on February 15, 2016. It then immediately engaged counsel. Counsel, in turn, immediately prepared this motion.

21. The County would be deeply prejudiced if this motion were denied. The County is powerless to prevent DEQ from settling this case, and DEQ has less of an incentive to invest its resources in defending this action. The County, by contrast, has much at stake, as evidenced by the Economic Development Agreement that might be negatively impacted by the outcome of this case. As discussed above, an adverse disposition of this case would have significant negative impacts on both the local economy and the County's tax revenues.

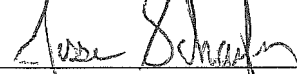
22. The unusual circumstances of this case also weigh in favor of intervention. The Project will be the largest wind energy project in North Carolina. Planning and permitting for the Project has been in progress for five years. The Governor of North Carolina has endorsed the Project. The General Assembly appears to have intended to exempt the Project, which was the only wind power project that had an FAA Determination at the time, from the new permitting requirements of the Wind Act. The Project involves international experts in green power generation, and it represents the cutting edge of green energy in North Carolina amidst concerns of climate change. With all of these significant interests in play, the addition of an interested party without any delay to the proceedings can only help to hone the issues for this tribunal's consideration.

WHEREFORE, the County respectfully requests that this tribunal grant its Motion to Intervene as a matter of right pursuant to Rule 24(a) of the North Carolina Rules of Civil Procedure or, in the alternative, allow permissive intervention pursuant to Rule 24(b) or N.C. Gen. Stat. § 150B-23(d).

This the 22nd day of February, 2016.

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

By: _____


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EXHIBIT A

STATE OF NORTH CAROLINA
COUNTY OF PERQUIMANS

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AFFIDAVIT OF RODNEY BUNCH

I, Rodney Bunch, being competent to testify, do depose and say:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I am the County Manager for Pasquotank County (the "County").
3. In 2010, the County began discussions with Iberdrola Renewables and its affiliated companies regarding constructing the Desert Wind Project (the "Project") in the County.
4. The Project is sited partially in Pasquotank County and partially in Perquimans County.
5. As part of the County's efforts to attract the Project, the County entered into an Economic Development Agreement ("EDA") with Atlantic Wind, LLC, an affiliate of Iberdrola Renewables (collectively, "Iberdrola"), on April 26, 2011. In the EDA, the County agreed to provide certain economic incentives in order to induce Iberdrola to site the Project partially in the County.

6. To attract the Project, the County amended its zoning ordinances to allow the land uses necessary for the Project. These uses were not contemplated by the previous version of the zoning ordinance.

7. The County conducted a seven-hour public hearing to discuss and determine whether to grant Iberdrola a conditional use permit in accordance with the zoning ordinance. The County granted the conditional use permit in order to attract the Project.

8. As the planning for the Project progressed, the County's representatives engaged in many meetings with representatives from Iberdrola.

9. In 2014, the County and Iberdrola entered into an amended the EDA to extend some deadlines in the original EDA. These amendments were made to induce Iberdrola to site the Project in the County.

10. Iberdrola has informed the County that, were it not for the County's economic incentives and other efforts to attract the Project, the Project would not have been sited in Pasquotank County.

11. The County estimates that the Project will increase the assessed value of the property within the County by approximately \$200 million.

12. As a result, the County expects to receive more than \$250,000 per year in additional net tax revenue for the life of the Project.

13. The County expects that Iberdrola will become the County's largest taxpayer in 2017 as a direct result of the Project.

14. When the Project is complete, the County expects that it will create at least 8 full-time jobs with annual wages in excess of \$80,000 per year, which is significantly above the

median wages in the County. In fact, the EDA provides the County security that these jobs will exist for at least four years.

15. The County expects that construction of the Project will create at least 200 construction jobs for a period of approximately nine months. In accordance with the EDA and to the extent it is appropriate, Iberdrola will employ people from the County to construct the facility.

16. In order to construct the Project, the County also expects Iberdrola will purchase other materials and services from the local community, including gravel, concrete, rebar, equipment rentals, fuel, meals, and accommodations. The EDA provides security that this initial investment will not be less than \$30,000,000.

17. Further, the County expects that the land used to site the wind turbines will be purchased or leased from County residents. The County has reason to believe that many landowners participating in the Project will receive significant lease income during the life of the Project. This income will bolster the local economy.

18. The County has acknowledged that construction on the project began in September 2015. The County has renewed the conditional use permit to allow the Project to proceed with construction.

19. If the Project is delayed or terminated as a result of this Contested Case, the County will experience neither the increase to its tax base and revenues nor the positive impacts to its economy from high-quality jobs, lease revenues, and purchase of construction materials and services.

20. At a regularly scheduled meeting on February 15, 2016—only one month after the administrative law judge entered a scheduling order in this case—the County's Board of

Commissioners voted to intervene in this action in order to ensure that its interests were appropriately safeguarded.

Further affiant sayeth not.

This the 22nd day of February, 2016.




Rodney Burch

Pasquotank County, North Carolina

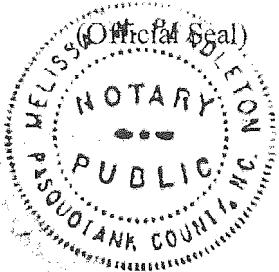
Sworn to and subscribed before me this day by Rodney Burch.

Date 2/22/2016



Notary Public

My commission expires: 7/15/2017



CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **MOTION TO INTERVENE** in the above-captioned action upon all parties by depositing a copy of same in the United States Mail, first-class postage prepaid, addressed as follows:

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This the 22nd day of February, 2016.

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

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