STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EMP-93, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Wilkinson Solar LLC for a Certificate of Public Convenience and Necessity to Construct a 74-MW Solar Facility in Beaufort County, North Carolina	))))	SECOND ORDER ON PETITIONS TO INTERVENE

BY THE PRESIDING COMMISSIONER: On October 11, 2017, the Commission issued an Order granting Wilkinson Solar, LLC (Applicant), a certificate of public convenience and necessity (CPCN) for the construction of a 74-MW solar photovoltaic (PV) electric generating merchant plant facility to be located in Beaufort County, North Carolina.

On November 29, 2017, the Applicant filed a letter with the Commission stating that the footprint of the facility has been expanded to the south and will incorporate additional land south of Terra Ceia Road, as shown on the revised site plan map attached thereto. The Applicant further states that, consistent with the Applicant's letter filed in this proceeding on October 9, 2017, the solar PV panels proposed to be located on the Respess property north of Terra Ceia Road have been removed from the site plan.

Considering the Applicant's November 29, 2017 letter and revised site plan as an application to amend the CPCN previously granted in this docket, the Commission issued an Amended Order Requiring Publication of Notice and Further Review by State Clearinghouse on December 6, 2017, requiring the Applicant to publish notice of the application and requesting further review by the State Clearinghouse. In its Order, the Commission stated that if a complaint is received within ten days after the last date of the publication of the notice, the Commission would schedule a public hearing to determine whether a certificate should be awarded, give reasonable notice of the time and place of the hearing to the Applicant and to each complainant, and require the Applicant to publish notice of the hearing in the newspaper in which the notice of the application was published.

On February 1, 2018, the Applicant filed its affidavit of publication stating that it had published notice of the application in The Washington (N.C.) Daily News on December 8, 15, 22, and 29, 2017, as required by the Commission's December 6, 2017 Order.

On February 7, 2018, based upon numerous letters of complaint that were filed in this docket in response to the proposed amendment subsequent to the initial newspaper

publication, the Commission issued an Order Scheduling Further Hearings, Requiring Filing of Testimony, Establishing Procedural Guidelines, and Requiring Public Notice, allowing any person having an interest in this proceeding to file a petition to intervene on or before March 9, 2018.

On March 9, 2018, the following individuals filed petitions to intervene in this proceeding, pro se: Deb VanStaalduinen, Kristina Beasley, and, Marshall and Joann Lilley (together, the Lilleys). None of these petitions to intervene included the verification required by Commission Rule R1-19.

On March 14, 2018, VanStaalduinen and Joann Lilley jointly filed a verified response to the Applicant's opposition to their petitions to intervene.

On March 15, 2018, the Commission issued an Order on Petitions to Intervene, allowing petitioner VanStaalduinen to intervene on the condition that she file a verification to her petition on or before 5 p.m. on March 19, 2018, the date of the public hearing,[1] and denying the petitions filed by Kristina Beasley and the Lilleys. In summary, the Commission found that unlike under the original application where VanStaalduinen's property would have been adjacent to footprint of the plant facility but not adjacent to property with installed solar panels, under the amended application her property would be adjacent to a portion of the facility with PV panels on it. Thus, even though VanStaalduinen had notice of the prior proceedings, which resulted in issuance of a CPCN for the Applicant's facility, and had not chosen to participate, the fact of the proposed addition of panels on property adjacent to hers persuaded the Commission that VanStaalduinen had alleged a sufficient interest in support of granting intervention. The Commission therefore generously allowed VanStaalduinen up to the close of business just prior to the scheduled public hearing to perfect her petition through proper verification. However, with respect to the Lilleys' petition, the Commission found that an inchoate interest in "willed" property as opposed to a vested ownership interest was insufficient to justify intervention by the Lilleys. Likewise, the Commission found that Kristina Beasley's

[1] Much of the dispute over compliance with the verification requirement of Commission Rule R1-19 in this proceeding has cast this requirement as a mere technicality. When the Commission acts on a petition to intervene, verification is required because the statements in the petition are treated as evidence. Just as a witness must be administered an oath or affirmation, the verification of a petition is necessary to ensure that the Commission's decision to grant or deny a petition to intervene is based upon competent evidence. The Commission's rules serve a purpose and do not exist as an arbitrary test of one's ability to follow rules and instructions. The parties and their counsel are admonished against being dismissive of the Commission's rules and orders as mere technicalities and deriding the Commission for requiring compliance with its rules. The Commission's rules and the equal application of them assures that the Commission's adjudicative process is not arbitrary or otherwise contrary to the requirements of due process. Notwithstanding the rules, the Commission has discretion to relax or waive requirements when it finds good cause to do so. In this proceeding, it should be noted that because VanStaalduinen was representing herself without the benefit of advice of counsel when she first sought to intervene, the Commission found cause to afford her leniency, allowing her ample time to verify her petition after-the-fact and giving her several opportunities at the public hearing to change her mind after missing the Commission's deadline and deciding she would not intervene. VanStaalduinen was informed of and understood the consequence of her decision. Aware that the timing of decision was important because an intervenor would not be allowed to testify as a public witness, she freely and knowingly chose to testify at the public hearing over being the only intervenor in the proceeding.

petition to intervene, which at best established interest in property not adjacent to and located some distance from the facility site, was not sufficient to support her intervention in this proceeding.

Although the Commission's Order on Petitions to Intervene was served on VanStaalduinen, she did not file verification of her petition as ordered and thus did not meet the Commission's condition of intervention. On March 19, 2018, this matter came on for hearing as scheduled for the purpose of receiving testimony from public witnesses regarding the application. VanStaalduinen attended the hearing and confirmed at the outset that she had not filed the verification and understood that as a result she would not be allowed to intervene, but could testify at the public hearing. She later was sworn in and took the stand as a public witness after several other public witnesses testified. Prior to providing testimony on the application, she again acknowledged that she no longer wished to intervene and agreed she wanted to withdraw her petition to intervene. After providing her sworn statement in opposition to the application, VanStaalduinen testified in response to a question from the Commission that she chose not to intervene because she did not want to be the lone intervenor in light of the fact that the Commission had denied the petitions of Kristina Beasley and the Lilleys.

On March 26, 2018, the Lilleys, now represented by counsel, filed a motion for reconsideration of the denial of their petition to intervene. In support of their request, the Lilleys stated that their use of the past tense of "willed" in the petition to intervene was intended "to signify that real property had in fact been devised and the will executed upon the passing of the decedent." The Lilleys argued that the Commission's decision to deny their petition was "based on a mistaken fact if not an incorrect application of the law" as it pertains to decedent's estates. Therefore, they requested that the Commission reconsider its denial of their petition to intervene.

Also on March 26, 2018, and as supplemented by an additional filing on March 27, 2018, VanStaalduinen, now represented by counsel, filed a new petition to intervene. In support of her petition, she argued that her March 14 response to the Applicant's opposition to her petition, which included a verification (but not a verification of the petition) demonstrates compliance with the condition for intervention imposed by the Order on Petitions to Intervene. Therefore, she repeated her request that she be allowed to intervene in this proceeding prior to the hearing scheduled in Raleigh for the purpose of receiving expert testimony.

On April 2, 2018, the Applicant filed a response to VanStaalduinen's March 26 and 27 filings, opposing VanStaalduinen's petition to intervene. In support of its opposition, the Applicant stated that VanStaalduinen failed to file the verification of her petition to intervene, as required by the Commission's Order on Petitions to Intervene, and that, at the March 19 hearing, VanStaalduinen acknowledged that she failed to file the verification form and stated that she desired to withdraw her petition. Thus, the Applicant argued that VanStaalduinen's March 26 and 27 filings constitute a "second petition to intervene," which is untimely, and which fails to show good cause as to why the petition was not filed within the time allowed by the Commission. The Applicant further argued that granting the

"second petition to intervene" would not serve justice. Finally, the Applicant argued that there were various other shortcomings in VanStaalduinen's filings, which made the filings non-compliant with the requirements of the Commission's Rules. The Applicant did not respond to the motion for reconsideration filed by the Lilleys.

On April 3, 2018, VanStaalduinen filed a reply to the Applicant's April 2 filing. In summary, VanStaalduinen, through her counsel, stated that the Applicant's reply amounts to "quibbles" over the form of VanStaalduinen's petition and verification thereof, and over failure to comply with the requirements of the Commission's rules when she was unrepresented by counsel. In addition, she argued that the provision in Commission Rule R1-19(b) requiring a petition to intervene be filed not less than 10 days prior to the hearing, unless the notice of hearing fixes the time for filing such petitions, suggests that 10 days is sufficient time to afford a party proper notice of other participants in proceedings. She further argued that the Applicant has not been prejudiced by insufficient notice of her desire to intervene. In sum, VanStaalduinen argued that good cause exists to allow her intervention based on the Commission's having recognized her interest in the subject matter of this proceeding, her attempts to rectify legal formalities, and her having eventually retained counsel. She further argued that denial of her petition based on a "technicality" would be an abuse of discretion.

The record in this case, as relevant here, has left the Commission to clarify the issues of fact and the controlling law. The Lilleys' petition, although now presented as a motion for reconsideration, does not neatly fit the circumstances for reconsideration as, despite argument to the contrary, there has been no misapprehension of fact or a change in circumstances since their initial filing to intervene. Similarly, as VanStalduinen filed a new petition requesting intervention, she is not seeking reconsideration but rather is in essence once again seeking the Commission's leniency in allowing her to participate as a party in this proceeding after having filed her new petition outside of the time limit for intervention established by the Commission's February 7 Order. Therefore, resolution of these pending petitions to intervene depends on whether the Commission, in its discretion, finds cause to allow the petitioners to intervene at this stage of the proceedings. As discussed below, after consideration of the foregoing and the entire record herein, the Presiding Commissioner concludes that the petitioners will be allowed to intervene.

In the Commission's Order on Petitions to Intervene, the Commission denied the Lilley's petition to intervene because the pro se petition failed to allege facts sufficient to show or establish on its face that the Lilleys had a vested interest in property affected by the amended application. However, in their verified March 26 filing filed with the assistance of counsel, the Lilleys alleged (and verified) the death of the testator/decedent establishing that the property is not "willed" property but instead is property owned by the Lilleys by the passing of title upon the death of the decedent. The March 26 filing also established that the Lilleys property is adjacent to the proposed facility as shown by the revised site plan filed by the applicant in support of an amendment to the CPCN. Thus, the Lilleys' interest in this proceeding is demonstrated by the same factual allegations that the Commission found sufficient in conditionally granting VanStaalduinen's petition,

namely, that they have a vested interest in the real property adjacent to a portion of the facility site that will now be used for the siting of solar PV panels under the amended application. Accordingly, the Lilleys have now alleged sufficient facts to demonstrate that their interest in this proceeding is more than an incidental or casual interest in the subject matter of this proceeding. These facts existed when the initial petition was filed and are not new, but inasmuch as the petitioners were pro se at that time and did not understand that the term “willed” property was legally insufficient to establish ownership and at best ambiguous, the Commission will look upon the Lilleys actions and filings with leniency. In its response, the Applicant did not oppose the granting of the Lilleys’ petition. Therefore, the Presiding Commissioner, in her discretion, determines that, under the circumstances where the Commission would have granted the Lilleys’ initial petition had it clearly stated that the petitioners had a vested ownership interest in property adjoining a portion of the facility site that will now be used for the siting of solar PV panels under the amended application, good cause exists to grant the Lilleys’ petition to intervene.

With respect to petitioner VanStaalduinen, as made clear in the Commission’s Order on Petitions to Intervene, the Commission was prepared to allow VanStaalduinen’s participation as a party in this proceeding, if she met the Commission’s condition to comply with Commission Rule R1-19. The Commission allowed this leniency based upon her status as a pro se litigant. After the deadline for meeting the condition established in the Order, VanStaalduinen appeared at the hearing held in Washington and confirmed that she did not intend to intervene in this proceeding, realizing that the Commission would allow her to testify at that hearing so long as she was not intervening as a party to the proceeding. VanStaalduinen in fact was sworn in and gave testimony at the public hearing. Nevertheless, under the circumstances further discussed below, after much consideration of this matter and the entire record as a whole, including the fact that VanStaalduinen began this journey representing herself, the Presiding Commissioner determines that cause exists to allow her to intervene going forward. However, consistent with the Commission’s March 15 Order on Petitions to Intervene, VanStaalduinen will not be allowed to testify for a second time in this proceeding.

In its Order on Petitions to Intervene, the Commission already determined that VanStaalduinen had satisfactorily demonstrated an interest in this proceeding. She is in the nearly identical position as the Lilleys, as an owner of land adjacent to the facility site that will now be used for the siting of solar PV panels under the amended application. Inasmuch as the Lilleys are being allowed to intervene and their interests are very closely aligned to VanStaalduinen’s, allowing VanStaalduinen to intervene, provided she is not permitted to testify for a second time, will not cause undue harm or prejudice to the Applicant in this matter. The Applicant has heard VanStaalduinen’s prior testimony, will not be surprised or unprepared by her position in the case, and will face the nearly same position(s) from the Lilleys (who are represented in this proceeding by the same attorney as VanStaalduinen). Now that she is represented by counsel, the Commission expects

that any future filings on behalf of VanStaalduinen will strictly comply with the requirements of the Commission's rules and other applicable law.[2]

IT IS, THEREFORE, ORDERED as follows:

1. That the petition to intervene filed by Deb VanStaalduinen shall be, and is hereby, granted; provided, that she shall not testify at the hearing scheduled for April 11, 2018, in Raleigh, North Carolina; and

2. That the petition to intervene filed by Marshall and Joann Lilley shall be, and is hereby, granted.

ISSUED BY ORDER OF THE COMMISSION.

This the 6th day of April, 2018.

NORTH CAROLINA UTILITIES COMMISSION

Janice H. Fulmore, Deputy Clerk

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[2] Based on the record in this is proceeding, in particular the transcript of the hearing held May 22-23, 2017, where counsel of record also appeared, and VanStaalduinen's April 3 filing, counsel are put on notice that this Commission, like any other court or judicial tribunal, expects the lawyers appearing before it to treat opposing counsel with courtesy and respect, avoid conduct that undermines the integrity of the adjudicative process, and avoid expressions of personal opinion regarding subjects that are not proper for argument to the Commission in its role as the trier of fact. See 27 NCAC 02 Rules 0.1(m), 3.3, and 3.4. The Presiding Commissioner, therefore, expects the cooperation of counsel in the conduct of an orderly hearing on April 11, 2018. The Commission expects counsel will conduct themselves with the civility and professionalism befitting officers of the court, to the end that this proceeding will lead to a just decision based upon the evidence adduced in the proceeding and the relevant law.