



AlaFile E-Notice

13-CV-2013-900125.00

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF CHEROKEE COUNTY, ALABAMA

GENEVA SHAVER ET AL V. PIONEER GREEN ENERGY, LLC ET AL
13-CV-2013-900125.00

The following answer was FILED on 2/26/2014 5:44:20 PM

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4. Admitted.

5. Defendants state that the Fictitious Defendants A-E are not sufficiently described and they do not have sufficient information, belief or knowledge of the individuals and entities described as Fictitious Defendants A-E and, as such, are unable to answer this paragraph and it is denied.

6. The allegations in Paragraph 6 of the Complaint are denied. In further answer, Defendants state that no final plans have been made regarding the number of wind turbines that may be built, the approximate height of any wind turbine built, or whether Defendants will build wind turbines in Cherokee County at all.

7. Paragraph 7 is denied.

8. Paragraph 8 is denied.

In further answer, Defendants state that if constructed, the project is projected to annually produce roughly the same amount of electricity used in a year by over five thousand homes, or nearly half the households in Cherokee County. The electricity that would be generated by the wind project is indistinguishable in every way from electricity produced by “base load coal and gas fired generating plants,” but unlike coal and gas generation, wind generation produces no pollutants. In stark contrast, most electricity used in the U.S. and Alabama is generated by coal and natural gas plants, which emit harmful levels of pollutants such as carbon dioxide, mercury, sulfur dioxide, nitrogen oxides, particulate matter (or soot), carbon monoxide, lead, arsenic, and other harmful pollutants. The emissions from these pollutants lead to increased levels of smog, acid rain and toxic air and water pollution that can cause harm to people and communities through

increased levels of asthma, cancer, pulmonary diseases, acidification of lakes and streams, and damages to crops, forests, and soils. These damages, which can lead to billions of dollars in costs per year to communities and society as a whole, are generally not reflected in the cost to produce or consume electricity generated by fossil fuels.

Defendants' project will produce clean, renewable energy for many years and it is highly unlikely that the project would ever be abandoned. Defendants can find no record of any utility-scale wind project (a project consisting of wind turbines with a capacity of one megawatt or larger) constructed in the U.S. in the last fifteen years being abandoned and left to deteriorate. It simply would not make sense for project owners to do so, for several reasons.

First, substantial capital is required up-front for wind project construction, and after construction, wind projects have no fuel costs and the operating and maintenance costs are quite low compared to the revenue that the project generates. As a result, with modest maintenance, a wind project will operate profitably for many years. Additionally, wind projects can receive a federal production tax credit (PTC) for ten years that is based on the amount of electricity actually produced and sold by the project, thus providing a strong incentive for the project to operate at maximum efficiency. In short, a wind project only earns revenue by generating and selling electricity; therefore, a project owner who has already incurred the up-front costs and completed construction has every incentive to maintain the project in good working order to generate revenue and recoup the initial investment.

Furthermore, the ground lease with the landowner for Defendant's' project already

contains extensive restoration provisions requiring that the wind turbines be decommissioned and the land be restored at the end of the project's life. The lease even includes a bonding requirement providing a means to decommission the wind turbines in the event the tenant fails to do so. Therefore, the allegations that Defendants' project will be abandoned are false.

9. Paragraph 9 is denied.

In further answer, Defendants state that the federal production tax credit (PTC) was first introduced and adopted by Congress under President George H.W. Bush in 1992 and has been renewed by each Congress since with broad, bipartisan support. The PTC is a tax credit that is claimed by the project owner in its tax return and is not acquired through lobbying.

Fossil fuels have received government subsidies since at least 1916. Independent studies have concluded that federal government support for the oil and gas industry has been five times that for wind energy, and that support for the nuclear industry has been fifteen times that for wind energy, for comparable times in these industries' development. In addition, fossil fuels receive a massive hidden subsidy because the cost of damage to the environment and health impacts from fossil fuel combustion is not reflected in the price of the electricity generated by fossil fuels. All these factors create an uneven playing field for renewable energy, which Congress has chosen to address by establishing the PTC.

Defendant's project will benefit all of Cherokee County. A Jacksonville State University study projects that over thirty years, the project will generate approximately

\$6,750,000 in total tax revenue for county schools, roads, services, parks, etc., over \$45,000,000 for the state and county in economic activity, approximately thirty-eight local jobs and one hundred twenty-three in-state jobs from construction and operations, and cause an increase in tourism to the area. Additional benefits include clean energy produced domestically, diversified energy sources, a decrease in future use of fossil fuel power generation, and a hedge against spikes in volatile fossil fuel prices.

Communities across the U.S. are already enjoying benefits from wind projects, such as increases in jobs, investment, tax base and tourism. A wind project must pay property tax revenue to its host jurisdiction, which may then be used to improve schools, fix roads, or even reduce the taxes paid by citizens of the jurisdiction. For example, the township of Sheldon, New York reduced its property tax rate all the way to zero due to the wind farm built near the town.

Plaintiffs' claim that turbines will "litter the landscape" is addressed in the response to Paragraph 8 above.

10. Paragraph 10 is denied. In further answer, see Defendants' answer to Paragraph 8 above.

11. Paragraph 11 is denied. In further answer, see Defendants' answer to Paragraph 9, 12, and 13.

12. Paragraph 12 is denied. Specifically, Defendants deny each of the so-called detriments to the Plaintiffs that will be caused by Defendants' proposed wind turbine development enumerated in this paragraph as follows:

- (a) The overwhelming negative impact to the scenic beauty;

In further answer, Defendants state that it is well documented that, in locales where wind turbines have existed for many years, residents and visitors alike do not find them objectionable. Complaints by persons of “fastidious tastes” that the wind turbines will be unsightly and interfere with Plaintiffs’ enjoyment of the natural scenery located on land that the Plaintiffs do not own are not a proper basis for a Court to enjoin Defendants’ wind turbine project. See *Alabama Power Co. v. Stringfellow*, 228 Ala. 422, 425 (Ala. 1934).

(b) The constant noise;

In further answer, Defendants state that sound emissions from wind turbines have been studied extensively, that the available evidence does not support Plaintiffs’ claim, and that sound levels produced by wind turbines will not affect ordinary or reasonable persons.

Reviews of the scientific literature on sound impacts from wind turbines have overwhelmingly concluded that wind turbines do not produce direct physiological effects. In fact, “to date, no peer reviewed scientific journal articles demonstrate a causal link between people living in proximity to modern wind turbines, the noise (audible, low-frequency noise, or infrasound) they emit and resulting physiological health effects.” *Health effects and wind turbines: a review of the literature*, Environmental Health, 2011, Knopper and Ollson. According to the U.S. Department of Energy, “an operating wind farm at a distance of 750’-1000’ is no louder than a kitchen refrigerator or moderately quiet room.” *Wind Energy Guide for County Commissioners*.

(c) The adverse impact on tourism, recreation, and home construction because of noise, flashing of the blades when the sun strikes at a particular angle (“shadow flicker”) and adverse impact on wildlife resources;

In further answer, Defendants cite a recent study and evidence of ongoing tourism and recreation at wind energy developments as proof that wind turbines will have a positive effect on tourism.

A survey commissioned by the British Wind Energy Association analyzing tourism impacts near wind farms found that only eight percent of respondents who were aware of the presence of wind turbines in the area felt they negatively affected the area as a place to visit; however, forty-three percent felt they had a positive effect, and forty-three percent felt they made no difference. Ninety-one percent of respondents said wind turbines would have no impact on their likelihood of visiting the area again, four percent were more likely to return, and only two percent were less likely to return.

Furthermore, interest in wind turbines has increased tourism and recreation activity in some areas after construction of wind energy developments. Educational and commercial wind farm tours are available at multiple wind farms in at least twelve American states and several countries around the world.

In further answer, see Defendants’ answer to Paragraph 13.

(d) Disturbance of underground spring-fed lakes and ponds;

In further answer, see Defendants’ answer to Paragraph 13(k) below.

(d)(sic) A significant danger from broken blades, lightning strikes and collapsing towers.

In further answer, Defendants state that all forms of energy production experience equipment failures, including wind energy. However, the failures that occur in wind energy are extremely rare and, when they have occurred, have been categorically less harmful than those associated with other energy generation. For instance, the fossil fuel industries have suffered oil and natural gas pipeline explosions, coal mining accidents, and oil spills from drilling rigs and tankers, resulting in extreme damage to property, injury, and in some cases loss of life and extreme environmental disaster. Earlier this year, a chemical used to wash coal leaked into the Elk River near Charleston, West Virginia, affecting the drinking water of over three hundred thousand nearby residents. Similarly, less than one month later, a coal plant in North Carolina spilled over fifty thousand tons of coal ash and approximately twenty-seven million gallons of water into the Dan River, affecting the water quality of thousands of people living downstream and damaging the habitats on which wildlife depend for survival. In the Alabama/Tennessee region, the Kingston, Tennessee coal ash dike ruptured in 2008 and released over one billion gallons of coal ash slurry into the Clinch and Emory Rivers, and Alabama experienced a crisis last year when a train carrying crude oil derailed in Pickens County. The clean-up following these types of accidents cost local tax-payers hundreds of millions of dollars, and the impact of such accidents on water and air quality and wildlife populations will be felt for years to come. By contrast, there has never been a “wind spill.”

Equipment failures from fossil fuels far outweigh the rare equipment failures related to wind energy. It is estimated that over two hundred twenty-five thousand wind turbines were operating around the world at the end of 2012. As such, any reports of broken blades or lightning strikes affect only a tiny percentage of installed turbines.

Defendants deny that the negative aspects claimed by Plaintiffs to result from Defendants' wind energy project will occur and deny that the wind energy project will have a significant impact on the Plaintiffs' property values.

In further answer, see Defendants' answer to Paragraph 13(d) below.

13. Paragraph 13 is denied. Specifically, Defendants deny each of the so-called detriments to the Plaintiffs that will be caused by Defendants' proposed wind turbine development enumerated in this paragraph as follows:

(a) Shadow flicker;

Shadow flicker is a function of the sun's altitude, wind turbine height, rotor radius, and the height, direction and distance to the viewing point. Modeling at a Maine wind energy project concluded that the total annual shadow flicker experienced by the closest receptor would not exceed two hours and fifty-five minutes. The closest receptor at that project was located approximately two thousand two hundred feet from a turbine, a distance closer than any known Plaintiff's residence to the current planned locations of wind turbines at Defendants' project. In further answer, all analysis completed to date

indicates that shadow flicker, flash, glint, or reflection from Defendants' project will not affect any of the Plaintiffs' residences.

(b) Low frequency noise;

In further answer, Defendants state that low frequency sound and infrasound are common in the environment and any such sound produced by Defendant's wind turbines will not cause injury of any kind.

Low frequency sound, or sound at frequencies between 10 HZ and 200 HZ, "is not unique to wind turbines but is ubiquitous in the environment due to natural and man-made sources, meaning that people living near wind turbines were exposed to infrasound prior to turbine operation....Given the low sound pressure levels of infrasound emitted from wind turbines and the ubiquitous nature of these sounds, the hypothesis that infrasound is a causative agent in health effects does not appear to be supported." Knopper and Ollson, *Health effects and wind turbines: a review of the literature*, Environmental Health, 2011. Sources of low frequency sound include wind, rivers, waterfalls and other natural sources, as well as road traffic and other man-made sources, and even blood circulation in the human body. Colby et al., *Wind Turbine Sound and Health Effects: An Expert Panel Review*, 2009 (4-9). If low frequency sound at the levels produced by wind turbines were harmful to health "city dwelling would be impossible due to the similar levels of ambient sound levels normally present in urban environments." Colby et al., *Wind Turbine Sound and Health Effects: An Expert Panel Review*, 2009 (4-1).

For additional support see answer to Paragraphs 12 (b) above and 13 (f) below.

(c) Flash and glint;

In further answer, see Defendants' answer to Paragraph 13 (a) above.

(d) Loss and/or diminution of property value;

In further answer, Defendants cite a Lawrence Berkeley National Laboratory study on the effect of wind energy developments on surrounding home values which found no statistically significant evidence that home values near turbines were affected in the post-construction or post-announcement/pre-construction periods. This study of fifty thousand home sales in twenty-seven counties in nine states confirms "previous published and academic research on this topic [that] has tended to indicate that wind facilities, after they have been constructed, produce little or no effect on home values." Ben Hoen et al., *A Spatial Hedonic Analysis of the Effects of Wind Energy Facilities on Surrounding Property Values in the United States*, 2013.

(e) Reflections inside the home;

In further answer, see Defendants' answer to Paragraph 13(a) above.

(f) "Wind turbine syndrome;"

In further answer, Defendants state that peer-reviewed medical literature indicates "wind turbine syndrome" (WTS) is not a recognized medical condition. Symptoms attributed to WTS are in fact the result of annoyance (a subjective state), and only a minority of persons find sound from wind turbines annoying.

WTS is a term applied to a list of symptoms claimed to result from the interaction of infrasound from wind turbines with the human body. However, as noted above, "to date, no peer reviewed scientific journal articles demonstrate a causal link between people

living in proximity to modern wind turbines, the noise (audible, **low-frequency noise**, or **infrasound**) they emit and resulting physiological health effects.” Knopper and Ollson, *Health effects and wind turbines: a review of the literature*, Environmental Health, 2011, emphasis added.

Furthermore, multiple studies have concluded that data and conclusions of certain WTS theorists are suspect, and the “limitations to the design employed make it impossible for this work to contribute any evidence to the question of whether there is a causal association between wind turbine exposure and health effects. Given this, the very term ‘Wind Turbine Syndrome’ is misleading as it implies a causal role for wind turbines in the described health symptoms.” Massachusetts Department of Environmental Protection, Massachusetts Department of Health, *Wind Turbine Health Impact Study: Report of Independent Expert Panel*, 2012.

In fact, “the similarity between the symptoms of noise annoyance and those of ‘wind turbine syndrome’ indicates that this ‘diagnosis’ is not a pathophysiological effect” Colby et al., *Wind Turbine Sound and Health Effects: An Expert Panel Review*, 2009 (4-10) but is instead attributable to annoyance which “is a subjective response that varies among people to many types of sounds. It is important to note that although annoyance may be a frustrating experience for people, it is not considered an adverse health effect or disease of any kind. Certain everyday sounds, such as a dripping faucet – barely audible – can be annoying. Annoyance cannot be predicted easily with a sound level meter.” Colby et al., *Wind Turbine Sound and Health Effects: An Expert Panel Review*, 2009.

Studies “have shown that a minority of persons report annoyance at relatively low levels of exposure to wind turbine noise....” Dani Fiumicelli, *Wind Farm Noise Dose Response*, Acoustics Bulletin, 2011. Evidence indicates annoyance results from non-sound factors, most prominently aesthetic attitudes to turbines. “In the peer reviewed studies, annoyance tends to peak in the >35 dB(A) range but tends to be more strongly related to subjective factors like visual impact, attitude to wind turbines in general (benign vs. intruders) and sensitivity to noise rather than noise itself from turbines.” Knopper and Ollson, *Health effects and wind turbines: a review of the literature*, Environmental Health, 2011.

For additional support see answer to Paragraphs 12 (b) and 13 (b) above.

(g) “Space and motion discomfort;”

In further answer, Defendants state that “space and motion discomfort” is not a recognized medical condition or physiological disorder.

For additional support, see answers to Paragraphs 12(b), 13(b) and 13(f) above.

(h) Threat to the integrity of Native American historical value of surrounding sites;

In further answer, Defendants state that they have already conducted historical and archeological studies in the areas that will host project infrastructure, and such studies indicate no Native American historical sites will be disturbed during construction or operations.

(i) Blasting;

In further answer, Defendants state that blasting may or may not occur at the site, pending completion of their construction plans. If blasting does occur, it will be performed in accordance with applicable law by certified and experienced construction and engineering firms who have successfully built currently operating wind projects in the U.S. Blasting is a normal and accepted form of excavation and Defendants believe it is extremely unlikely that anyone, including Plaintiffs, would sustain great and irreparable injury, or any injury at all, from blasting.

(j) Water run-off;

In further answer, Defendants state that upon completion of the final construction plan for the project, they will be required to obtain the National Pollutant Discharge Elimination System (NPDES) permit issued by the Alabama Department of Management (ADEM) which is required of all construction projects in Alabama that impact more than one acre. This permit will address the project's compliance with water run-off requirements under state and federal law.

(k) Damage to existing water lines and water systems;

In further answer, Defendants state that any construction or blasting will be performed in accordance with applicable law by certified and experienced construction and engineering firms who have successfully built currently operating wind projects in the U.S. Defendants believe it is extremely unlikely that existing water line and/or water systems will sustain great and irreparable injury, or any injury at all.

(l) Increase in traffic throughout the area;

In further answer, Defendants state that traffic increases will occur temporarily during the construction period over a period of approximately four to six months. Traffic increases during the long-term operation of the project will be minimal. All equipment deliveries and traffic control practices will be performed in accordance with applicable law and subject to approvals obtained from the Alabama Department of Transportation.

(m) Flight path intrusions;

In further answer, Defendants state that under federal law, any proposed structure over two hundred feet in height from ground level to the tip of the structure (i.e., radio tower, TV antenna, wind turbine) must obtain approvals from the Federal Aviation Administration (FAA) prior to being constructed. After months of rigorous study that included a public circularization comment period for local citizens, divisions of the FAA, local airports and military operations, Defendants have obtained approvals from the FAA that indicate Defendants' project will cause no future impact to nearby air space, radar or military operations. Therefore, the FAA approvals demonstrate that Defendants' project will not cause intrusions to flight paths.

(n) Threat to natural wildlife.

In further answer, Defendants state that the greatest threat to wildlife, as recently reported by the National Wildlife Federation, is from climate change, caused by pollution generated from fossil fuel combustion. Similarly, a study by the New York State Energy Research and Development Authority (NYSERDA) concluded that natural wildlife is threatened more from the generation of electricity from fossil fuels than from electricity generated from renewable energy sources such as wind.

Defendants have conducted extensive natural resource studies (i.e., eagle surveys, bird surveys, bat surveys, threatened and endangered species surveys, etc.) pursuant to the National Environmental Policy Act (NEPA) and do not anticipate this project will cause significant impacts to wildlife.

14. Paragraph 14 is denied. In further answer, Defendants adopt their answers to Paragraphs 8, 12 (a) and (b) and 13 (a) and (b) above.

15. Paragraph 15 is denied. In further answer, Defendants state that there will be no interference with the Plaintiffs' use and enjoyment of their land if Defendants' wind turbine project is built.

16. Paragraph 16 is denied. In further answer, Defendants deny that Plaintiffs will suffer any damages because of their wind turbine development.

17. Paragraph 17 is denied.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief may be granted.

SECOND DEFENSE

The Plaintiffs' claims are not ripe for adjudication because no final decision has been made by Defendants to construct a wind turbine project in Cherokee County. Therefore, Plaintiffs' Complaint is not only anticipatory and speculative with no basis in fact, but the alleged nuisance is illusory.

THIRD DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief may be granted because the suit seeks an injunction for an alleged, yet unproven, anticipatory nuisance wherein Plaintiffs have failed to allege, nor can they allege, egregious harm to them that is certain to result from the development of the wind project.

FOURTH DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief may be granted because the inconvenience complained of is merely fanciful and would not affect ordinary or reasonable persons but would affect only persons of fastidious tastes and is not actionable. *See Ala. Code §6-5-120.*

FIFTH DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief may be granted because the harm complained of, being purely speculative in nature, cannot be proven until and unless the wind turbine project is completed. Mere fear that the act complained of will result in the alleged injury to Plaintiffs is insufficient. This is especially so where the injury apprehended is doubtful, contingent or problematical. *Johnson v. Bryant*, 350 So.2d 453 (Ala. 1977).

SIXTH DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief may be granted because the Complaint does not describe reasonably certain harm the

Plaintiffs will incur but instead has alleged only a litany of conceivable negative impacts that may result from the Defendants' wind project development. As such, Plaintiff's

Complaint for Injunctive Relief is not actionable:

In cases seeking injunctive relief against an anticipated nuisance, our authorities are to the effect that a very strong case must be made out. ... If there be a reasonable doubt as to the probable effect of an alleged nuisance, either on the proof, affidavits, or on the construction of the facts stated in the bill, there will be no interference until the matter is tested by experiment in the actual use of the property. There must be such a clear, precise statement of facts that there can be no reasonable doubt, if the acts threatened are completed, grievous injury will result.

Nevins v. McGavock, 106 So. 597 (Ala. 1925).

SEVENTH DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief may be granted because the focus of Plaintiffs' Complaint is that the wind turbines will be unsightly and interfere with Plaintiffs' enjoyment of the natural scenery of the area. Such claims are not a proper basis for a Court to enjoin a building project. See *Alabama Power Co. v. Stringfellow*, 228 Ala. 422, 425 (Ala. 1934).

EIGHTH DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief may be granted because many of the damages and injuries Plaintiffs have alleged they will suffer as a result of Defendants' wind turbine project are claims for a public nuisance for which Plaintiffs have not alleged any special damages they will incur that are different

from the general public at large. Such claims are listed on Page 2 of the Amended Complaint.

- (1) overwhelming negative impact to the scenic beauty;
- (2) adverse impact on tourism, recreation and home construction;
- (3) adverse impact on wildlife resources;
- (4) disturbance of underground spring-fed lakes and ponds;
- (5) loss and/or diminution of property value;
- (6) threat to the integrity of Native American historical value of surrounding sites;
- (7) increase in traffic throughout the area;
- (8) damage to existing water lines and water systems;
- (9) flight path intrusions; and
- (10) threat to natural wildlife.

A public nuisance gives no right of action to an individual unless it creates a special damage to the individual. *Barnes v. Kent*, 296 So.2d 881 (Ala. 1974). Since no special damages to the Plaintiffs have been alleged for the anticipated results from Defendants' wind project development that are listed above, Plaintiffs' claims with respect to the above-listed damages must be dismissed. "To assert a claim of public nuisance, the plaintiffs must have sustained an injury different from and in addition to the one suffered by the public at large." *Funliner of Ala., L.L.C. v. Pickard*, 873 So. 2d 198, 210 (Ala. 2003); Ala. Code § 6-5-123.

NINTH DEFENSE

The benefits of the wind turbine project, should it be constructed, vastly outweigh any harm or inconvenience to the Plaintiffs.

TENTH DEFENSE

Defendants Pioneer Green and Noccalula Wind have at all times complied with industry custom and practice.

ELEVENTH DEFENSE

Defendants reserve the right to amend this Answer and assert additional defenses as applicable.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2014, a copy of the foregoing pleading was electronically filed with the Clerk of the Court using the AlaFile System which sends notification of such filing to counsel of record in this cause and that those not registered with AlaFile for electronic notification have been served by U.S. Mail.

/s/ Charles D. Stewart

OF COUNSEL