STATE OF NORTH CAROLINA COUNTY OF WAKE	GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 10244
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., Petitioner, v. NORTH CAROLINA DEPARTMENT OF REVENUE, Respondent.	AMICUS CURIAE BRIEF OF NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION

TO THE HONORABLE NORTH CAROLINA SUPERIOR COURT:

The North Carolina Sustainable Energy Association hereby submits this amicus curiae brief in connection with the briefing schedule established by this Court in its January 5, 2021 *Scheduling Order* in the above-captioned matter.

I. Introduction

The North Carolina Sustainable Energy Association ("NCSEA") is a 501(c)(3) membership-based nonprofit organization based in Raleigh that was originally founded in 1978 as the North Carolina Solar Energy Association. Throughout its 42-year history, NCSEA has promoted sustainable energy opportunities and solutions for North Carolina's

energy consumers, energy systems, energy utilities, and state and local economy through education, public policy, and economic development. NCSEA's current membership is comprised of individual professionals and students, businesses, non-profits, public and private academic institutions, some municipal utilities, and local government entities. NCSEA has historically engaged in limited legislative lobbying activities allowable by and in compliance with state and federal law.

NCSEA is providing this amicus curiae brief to share potentially unique information and insight into the issues. NCSEA played a leading role in all facets of the policymaking process for most clean energy laws adopted from 2005 to today, including collaborative policy research and analysis, policy design, policy advocacy, and lobbying for 2009's House Bill 512 ("H.B. 512"),[1] which amended North Carolina's renewable energy investment tax credit ("REITC") law to allow the REITC to offset gross premiums taxes. NCSEA engaged with the legislative and executive branch, as well as a diverse array of interested and potentially impacted stakeholders, in the process that led to H.B. 512 becoming law. To ensure we were being responsible, evidence-based advocates, NCSEA

[1] S.L. 2009-548 (House Bill 512), 2009 N.C. Sess. Laws.

worked with tax attorneys to ensure we advocated for a policy that was consistent with the historical and current (at the time) legislative intent motivating consideration of a tax credit expansion and extension. Based on NCSEA's direct and extensive involvement with enactment of the tax credit law at the center of this dispute, NCSEA believes the North Carolina Department of Revenue ("DOR") and the Administrative Law Judge ("ALJ") below misunderstood and misapplied the statute. Therefore, NCSEA urges this Court to reverse the ALJ's decision.

In addition, NCSEA transparently collected statewide clean energy market data and provided historical analysis of market data and forward market projections for clean energy market activity and impacts on employment, investment, clean energy supply, installed technology costs, tax revenues, and compliance with existing State clean energy laws. NCSEA applied our data and expertise to assess likely economic and fiscal outcomes under different tax credit policy scenarios being considered by the General Assembly in 2009.

In years prior to H.B. 512, NCSEA pioneered the first state-based survey methodology to measure the clean energy industry[2] and built the first dataset tracking all public and private renewable energy installations in North Carolina. NCSEA's industry census has now become a nationwide standard practice for both private market analysis firms and the United States Department of Energy.[3]

NCSEA's objective in the mid-2000's was, and remains, to provide evidence-based metrics to identify whether and how the legislative intent of North Carolina's various clean energy policies was being realized across economic development regions and rural and urban areas of North Carolina's economy and at what cost or savings to consumers and State and local fiscal budgets. After reviewing the analysis of the Office of Administrative Hearing ("OAH") and its conclusion in this case,[4] we were compelled to share what we know here. We believe OAH's finding is contrary to the General Assembly's intent when the General Assembly proactively decided to expand REITC applicability to include the gross

[2] N.C. SUSTAINABLE ENERGY ASSOCIATION, N.C. RENEWABLE ENERGY AND ENERGY EFFICIENCY INDUSTRY CENSUS 2008 (Oct. 2008), *available at:* https://energync.org/wp-content/uploads/2017/03/NCSEA_Annual_Report_2008.pdf.

[3] DEPARTMENT OF ENERGY, U.S. ENERGY AND EMPLOYMENT REPORT, *available at:* https://www.energy.gov/downloads/us-energy-and-employment-report.

[4] *N.C. Farm Bureau Mut. Ins. Co. Inc.*, 19 REV 00430 at 6 (Office of Administrative Hearings Aug. 17, 2020) [hereinafter OAH Decision].

premiums tax.[5] In fact, NCSEA has always understood the opposite of OAH's brief analysis of the State's REITC policy.

II. Discussion

A. Policy History

The General Assembly and advocates, including NCSEA, intended for insurers with gross premiums tax liability to invest in renewable energy projects and claim the State's REITC, regardless of whether such investors constructed, purchased, or leased the renewable energy property being invested in. This policy of the State was established through consistent and clarifying policy actions building on one another from 1977 to 2009.

Utilizing tax credits to encourage investment in solar and other renewable energy resources was the consistent policy of the State from 1977 to 2016, spanning numerous gubernatorial administrations and legislative majorities of both major parties. In 2005, the General Assembly extended the REITC for five more years, from January 1, 2006 to January 1, 2011, and increased the business (or "nonresidential") tax credit from $250,000 to $2.5 million per renewable energy installation,

[5] S.L. 2009-548 (House Bill 512), 2009 N.C. Sess. Laws.

keeping pace with the cost of renewable energy projects that were growing larger in size.[6] In 2007, lawmakers made two important policy changes in Session Law 2007-397 ("S.B. 3"). First, S.B. 3 allowed donors to nonprofits to claim the REITC if their donations were used to install renewable energy systems, a policy markedly similar to the policy adopted in H.B 512 to allow the REITC to offset gross premiums taxes.[7] NCSEA worked with stakeholders and lawmakers on the extensive language of this section to ensure nonprofits would be able to feasibly implement this policy with their donors. We had no such concern about private sector businesses to navigate the 2009 expansion to gross premiums tax because the intent and need was clear. Second, S.B. 3 adopted North Carolina's Renewable Energy and Energy Efficiency Portfolio Standard ("REPS").

S.B. 3 was the culmination of a two-year process to examine North Carolina's renewable energy policy. By the end of 2005, renewable energy projects, enabled by the REITC, had proven to regulators, lawmakers, and stakeholders that renewable energy was able to be reliably developed and safely operated to supply the electricity grid statewide. Through

[6] S.L. 2002-87 (Senate Bill 1416), § 4, 2002 N.C. Sess. Laws.
[7] S.L. 2007-397 (Senate Bill 3), § 13, 2007 N.C. Sess. Laws.

dozens of meetings, numerous stakeholders, lawmakers, and legislative staff deliberated each word in, and the intent of, S.B. 3. Ultimately, more than 90 participants reached agreement, and it became "the policy of the State of North Carolina . . . To promote the development of renewable energy and energy efficiency [by] . . . Diversify[ing] the resources used to reliably meet the energy needs of consumers in the State[;] Provid[ing] greater energy security through the use of indigenous energy resources available within the State[; and] Encourag[ing] private investment in renewable energy and energy efficiency."[8]

At the same time, while stakeholders were debating the language that would become the policy of the State, stakeholders were also discussing legislative mechanisms that could help implement this policy. One such option was to adopt a REPS, which would require the State's electric utilities to supply a percentage of retail electric sales using a combination of renewable energy resources, that could be owned by the utility or procured through contracts from independent power producers, and energy efficiency measures. Compliance with this policy would require a significant expansion of the amount of renewable energy

[8] N.C.G.S. § 62-2(a) (2007). *See also* S.L. 2007-397 (Senate Bill 3), § 1, 2007 N.C. Sess. Laws.

generation in the State. Concern was openly expressed by utilities, regulators, the Governor's staff, and some stakeholders that utilities and North Carolina's young renewable energy industry would be unable to supply so much renewable energy so fast. In response to these concerns, the North Carolina Utilities Commission ("NCUC") commissioned a collaborative research study into the technical potential and cost implications of a Renewable Energy and Energy Efficiency Portfolio Standard ("REPS") policy. The study found that requiring the combined use of a specific amount of renewable energy and energy efficiency could result in approximate savings of $577 million in net present value over 20 years relative to the electric utilities' "status quo" portfolio and plans for new generation.[9]

S.B. 3 concerned itself not just with supply of renewable energy resources, but also with the aggregate cost to the State and the cost to each electricity customer class. To ensure least cost compliance in the State's energy policy, S.B. 3 ensured flexibility in compliance by allowing the REPS to be satisfied through any aggregate combination of utility

[9] LA CAPRA ASSOCIATES, INC. ET AL., ANALYSIS OF A RENEWABLE PORTFOLIO STANDARD FOR THE STATE OF NORTH CAROLINA: A TECHNICAL REPORT (Dec. 2006) *available at*: https://www.epa.gov/sites/production/files/2016-03/documents/analysis_of_a_renewable_portfolio_standard_for_the_state_of_north_carolina.pdf.

owned and operated projects and power purchase agreements with independent power producers. However, the size and scale of the renewable energy projects necessary for compliance with the REPS required independent power producers to bring together millions of dollars in cash, debt, and equity financing. By 2009, it was clear that the State needed to adopt additional policy changes that could allow additional equity financing opportunities to adequately drive renewable energy development.

B. Legislative Intent

The economic and policy intent that motivated expanding REITC eligibility to include gross premiums tax was well known and regularly discussed throughout the legislative process. Government decision-makers discussed and understood that investment partnerships were necessary to achieve the State's energy policy. From 2005 to 2007, it was clear to decisionmakers at the General Assembly, the Utilities Commission, the Energy Policy Council, the Governor's Office, and other executive branch offices that the REPS would never be complied with solely through renewable energy installations funded, developed, owned, and operated by single investors. However, the need for unprecedented

renewable energy investment and partnerships ran headlong into the economic recession. NCSEA knew that cost-effective compliance required that the number of renewable energy firms competing on price and quality must be able to develop in excess of the demand for the portion of the law utilities chose not to comply with through their own development. From 2008 to 2009, NCSEA measured a 28% increase in the number of renewable energy and energy efficiency firms operating in North Carolina. In addition to the growth in number of firms doing business in North Carolina, the industry expanded its presence from 64 counties in 2008 to all 100 counties in 2009, indicating that industry and renewable resource supply needs could be met.[10] However, given the utilities at that time had significantly less technical and financial experience with renewable energy development than the industry had, the recession's impact on tax investor availability threatened to slow renewable energy development when it needed to be increasing.

Throughout the General Assembly's 2009 session, legislators worked to address a growing concern that the size of private investments

[10] N.C. SUSTAINABLE ENERGY ASSOCIATION, N.C. RENEWABLE ENERGY AND ENERGY EFFICIENCY INDUSTRIES CENSUS 2009 (Oct. 2009), *available at:* https://energync.org/wp-content/uploads/2017/03/NC_Clean_Energy_Industry_Census_2009.pdf.

in renewable energy and the volume of projects necessary to meet the REPS would not be achievable during the recession and recovery period without some changes to State tax policy. During the course of the 2009 legislative session, the General Assembly explored three options to amend the State's tax policy to spur renewable energy development: (i) increasing the maximum amount of a taxpayer's liability that could be offset by the REITC from 50% to 100%; (ii) turning the tax credit into a grant; and (iii) expanding the universe of North Carolina taxpayers that were eligible to claim the REITC. This legislative deliberation is evidenced by the fact that there were three proposed committee substitutes for H.B 512 over the course of two months and multiple public committee meetings.[11]

NCSEA asked legislators to consider changes to the REITC to make it more likely to be used, such as increasing the limit of a taxpayer's liability that could be offset by the REITC from 50% to 100%. NCSEA opposed changing the REITC to a grant because other states, when they fell on hard times, had repurposed such grants for other needs. Ultimately, NCSEA pursued expanding REITC eligibility to include

[11] NC General Assembly history of House Bill 512, 2009, *available at:* https://www.ncleg.gov/BillLookUp/2009/h512.

gross premiums taxes, which did not fluctuate with the economy in the same manner as individual and corporate income taxes. Tax attorneys with experience in partnership deal structures engaged with lawmakers during the drafting of H.B. 512. NCSEA itself sought education and counsel by tax attorneys throughout the process because NCSEA's internal team did not have that specific tax law expertise. However, both lawmakers and advocates were concerned that the economic recession had reduced tax liability in the State. The Fiscal Note for H.B. 512 states that, due to the economic downturn, it is unclear how much the changes to the tax credit policy would result in use of the tax credit, and that expanding eligibility to the gross premiums tax ". . . will allow insurance companies and other business entities taxed exclusively under the gross premiums to take the credit."[12]

Ultimately, the expansion of the REITC to include gross premiums taxes was the policy contained in both the first and the final versions of H.B. 512, because it was central to the intent of the legislature to maintain or preferably increase private investment in renewable energy during the ongoing recession and for aiding recovery. H.B 512 passed the

[12] Legislative Fiscal Note v4, House Bill 512, 2009; *available at:* https://www.ncleg.gov/Sessions/2009/FiscalNotes/House/PDF/HFN0512v4.pdf.

Senate 45-0 and House 83-29. Governor Perdue signed the bill into law, when she could have just let it become law or vetoed the bill if she disagreed with the intent or substance of the policy.[13]

C. Intended and Actual Impacts

The intended policy outcomes of H.B. 512, and the associated economic, energy security, and fiscal benefits, have been realized by North Carolina. Employment in North Carolina's renewable energy and related renewable energy industry sectors increased an astounding 693% from 2007 to 2019, with 112,720 jobs in 2019.[14] Renewable energy projects have added $14.3 billion of value to gross state product and $23.2 billion in total economic output as revenue received by North Carolina individuals and businesses from 2007 to 2018 (in year 2013 dollars).[15] Importantly, the business activity enabled and driven by H.B. 512 helped drive down renewable energy costs in North Carolina.

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[13] NC General Assembly history of House Bill 512, 2009, *available at:* https://www.ncleg.gov/BillLookUp/2009/h512.

[14] E2 & N.C. SUSTAINABLE ENERGY ASSOCIATION, CLEAN JOBS NORTH CAROLINA 2020 (Aug. 2020) *available at:* https://e2.org/wp-content/uploads/2020/08/E2-NCSEA-Clean-Jobs-North-Carolina-2020.pdf.

[15] JEFFREY PETRUSA ET AL., RTI INTERNATIONAL, ECONOMIC IMPACT ANALYSIS OF CLEAN ENERGY DEPLOYMENT IN NORTH CAROLINA – 2019 UPDATE (May 2019) *available at:* https://energync.org/wp-content/uploads/2019/05/v3NCSEA_Economic_Impact_Analysis_of_Clean_Energy_Development_in_North_Carolina_2019.pdf [hereinafter RTI INTERNATIONAL, 2019 UPDATE].

By tax year 2011, the average value of the 100 renewable energy projects claiming the REITC was $1.2 million, which was a 43-fold increase from 2007 in the value of renewable energy systems claiming the credit.[16] In contrast, the average value of a renewable energy system claiming the personal REITC did not even achieve a 2-fold increase in value between 2007 to 2011.[17] Cumulative investment in North Carolina renewable energy projects valued at $1 million or greater grew from $20 million in 2007 to a total investment of $13.04 billion by 2018.[18] Looking specifically at 2010, as it was the first full tax year following the adoption of H.B. 512, annual investment in renewable energy projects valued at $1 million or greater increased 129%, for a total investment of $376 million in renewable energy projects and a near-doubling of cumulative renewable energy project investment in North Carolina.[19] This helps demonstrate how the REITC drove business investment in utility-scale renewable energy projects for compliance with the REPS, consistent with State policy. In contrast, the average value of a renewable energy system

[16] NCSEA analysis of NC Department of Revenue Economic Incentives Reports about renewable energy tax credits claimed by tax year. Reports can be found at: https://www.ncdor.gov/news/reports-and-statistics/economic-incentives-reports.
[17] *Id.*
[18] RTI INTERNATIONAL, 2019 UPDATE.
[19] *Id.*

claiming the personal REITC did not even achieve a 2-fold increase in value between 2007 to 2011. The General Assembly intended for H.B. 512 to attract tax investors from outside of renewable energy economy. OAH's flawed interpretation of the intent of the REITC policy, that only those constructing renewable energy facilities for their own use could take the REITC, could only be true for personal tax credits, not business tax credit.

Prior to S.B. 3 and H.B. 512, North Carolina ranked near the bottom in the nation for renewable energy deployment. H.B. 512, combined with S.B. 3, gave North Carolina the competitive advantage to become home to numerous renewable energy companies, serving other southern states that followed North Carolina's lead. Since then, several of the top U.S. solar developers are homegrown NC firms for whom this tax credit extension was instrumental, and they now operate in states across the country.

Business investment in renewable energy has also driven increases in tax revenues. As of 2019, "clean energy investments in North Carolina were slightly more than 12 times larger than state incentives for them."[20]

[20] *Id.*

For local governments, many rural, property tax revenue increases an average of 2,000% when a parcel is used for renewable energy generation.[21] In addition, the $1.2 billion in tax credit claimed in North Carolina over the life of the REITC has driven $1.4 billion in tax revenue, and the tax revenues will continue growing for years to come as these investments keep employing people, generating renewable electricity, and paying local and State taxes.[22]

Finally, it is worth noting that the REITC has driven the State policy, adopted in S.B. 3, of diversifying the State's energy resources. In 2011, NCSEA analyzed DOR's data and determined that the REITC was initially significant for bioenergy. By 2011, as solar costs declined and business models improved, tax credit investment in solar projects in North Carolina grew, with 47% of projects claiming the REITC being solar projects to biomass' 28%.[23]

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[21] DANIEL BROOKSHIRE ET AL., N.C. SUSTAINABLE ENERGY ASSOCIATION, INCREASED NORTH CAROLINA COUNTY TAX REVENUE FROM SOLAR DEVELOPMENT – 2020 UPDATE (Sept. 2020) *available at*: https://energync.org/wp-content/uploads/2020/09/Sept2020-Increased-North-Carolina-County-Tax-Revenue-from-Solar-Development.pdf.

[22] RTI INTERNATIONAL, 2019 UPDATE.

[23] NCSEA analysis of NC Department of Revenue Economic Incentives Reports about renewable energy tax credits claimed by tax year. Reports can be found at: https://www.ncdor.gov/news/reports-and-statistics/economic-incentives-reports.

III. Conclusion

North Carolina's renewable energy investment tax credits played an instrumental role in driving economies of scale and cost declines for renewable energy, making our State a leader in solar power and renewable energy industry. This policy has brought North Carolina utilities and industry very close to being able to offer renewable energy and energy efficiency with energy storage as the most affordable option for reliably and safely powering North Carolina's economy. The technology and cost improvements and consumer learning have also opened the door to market innovations for inclusive financing and business models that can make renewable energy affordable and accessible for all North Carolinians.

The need for investment and capital for a safe, reliable, equitable, resilient, and renewable energy system and economy will only intensify in 2021 and the decade to come. Such a system is increasingly imperative to an inclusive, globally competitive, and thriving North Carolina economy.

The OAH Decision states "the undisputed evidence shows that Farm Bureau invested in a partnership to obtain the renewable energy

credits generated by these properties to offset its gross premiums tax liability. Based on the partnership structure, Farm Bureau's investment was not in the renewable energy property itself but rather in the credits that the property generated."[24] This is exactly what the General Assembly and advocates such as NCSEA intended – for partnership structures to be used for tax equity financing to drive private investment in renewable energy statewide to achieve just the statewide scale of economic activity, job creation, and related fiscal and economic benefits that have resulted.

As North Carolina's electric utilities, consumers, world class academic institutions working on energy, and our leading edge energy industry now contemplate affordable options for North Carolina to power itself with near 100% clean energy, we are concerned that the Department of Revenue's actions are leading to a destruction of investor and industry confidence in North Carolina's state government that will delay and diminish the economic opportunity, bill savings, and societal benefits such market activity would provide.

[24] OAH Decision.

Accordingly, NCSEA respectfully requests that this Court take the foregoing considerations into account while adjudicating the case currently before it.

Respectfully submitted, this the 25th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 7.8 and 7.14 of the North Carolina Business Court Rules in that it (excluding the caption, any index, table of contents, or table of authorities, signature blocks, and required certificates) contains no more than 3,750 words, as determined by the word count feature of Microsoft Word. I further certify pursuant to Rule 7.14(e) that no party's counsel authored this brief, that no party's counsel paid for the preparation of this brief, and that no one other than the amicus curiae paid for this brief.

This the 25th day of January, 2021

/s/ Peter H. Ledford
Peter H. Ledford

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing document has been filed with the North Carolina Business Court's electronic filing system, which will effect service to all parties and counsel of record in accordance with BCR 3.9(a).

This the 25th day of January, 2021.

/s/ Peter H. Ledford
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