In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00098-CV

CIRRUS WIND I, LLC, APPELLANT

V.

STEPHENS RANCH WIND ENERGY, LLC AND STEPHENS RANCH WIND ENERGY II, LLC, APPELLEES

On Appeal from the 106th District Court
Lynn County, Texas
Trial Court No. 15-12-07252, Honorable Carter T. Schildknecht, Presiding

April 7, 2017

CONCURRING OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

The crux of this case, it seems to me, is found in the difference between two paragraphs of the parties' Allocation Agreement. The agreement's paragraphs 3 and 4 read as follows:

> 3. The total limitation on Appraised Value for all Qualified Property under the Limitation Agreement of Ten Million Dollars ($10,000,000) shall be prorated each tax year for each of CWI, SRWE and SRWE II, with each such entity to be allocated an amount of such total limitation that is the product of (i) $10,000,000 multiplied (ii) by a fraction in which the (a) numerator is the total nameplate capacity of all wind turbines for the [sic]

> placed in service as of the end of such period for such entity and (b) denominator is the total nameplate capacity of all wind turbines placed in service as of the end of such period for all such entities.
>
> 4. Each of CWI, SRWE and SRWE II shall be responsible for its portion of the payments required under each of Articles III and IV of the Limitation Agreement with such portion for each such entity being the product of (i) the total payment required multiplied (ii) by a fraction in which the (a) numerator is the total nameplate capacity of all wind turbines placed in service for such entity and (b) denominator is the total nameplate capacity of all wind turbines placed in service for all such entities (such entity's fractional share being such entity's respective "Allocation Percentage").

Paragraph 3 allocates the limitation on appraised value among the three companies by a formula in which the $10 million limitation is multiplied by a fraction. The numerator is the total nameplate capacity of wind turbines placed in service for the particular company; the denominator is the total nameplate capacity of all the wind turbines placed in service by all three companies. And the fraction states the "as of" date for the calculation. The nameplate capacity of turbines placed in service, for both the numerator and the denominator, is determined "as of the end" of the tax year for which the calculation is being performed.

Paragraph 4, the paragraph directly in dispute in this case, allocates responsibility for payments required under Articles III and IV of the Limitation Agreement. Payment responsibility is allocated among the companies by a formula, under which the total payment is multiplied by the very same fraction described in paragraph 3: nameplate capacity of turbines placed in service for the company over total nameplate capacity of all turbines placed in service by all three companies. But paragraph 4 omits the expressly-stated "as of" date.

Because the parties did not expressly state an "as of" date in paragraph 4, a date must be inferred to resolve their dispute. If the inference, considering the agreement as a whole, is that the parties intended, but simply neglected, to state the same date as in paragraph 3, end-of-tax-year figures will constitute the fraction. But the inference could be that the parties intended some other "as of" date.

The trial court agreed with the position of appellees, and the independent third party, that the parties intended January 1, the first day of the tax year, as the "as of" date. Appellees argue that property is valued for ad valorem tax purposes as of January 1, and many other taxation matters also are keyed to the first of the year, so the parties should be deemed to have intended to use that date in paragraph 4.

My colleagues disagree with the trial court, and essentially adopt the position of appellant. Their analysis of the agreements leads them to conclude that the parties intended the "as of" date for paragraph 4's fraction to be the date the calculation is being performed.

Neither of the parties' positions regarding the "as of" date to be applied in paragraph 4 is unreasonable to me. It also seems to me there could be other reasonable readings not adopted by either side. The majority finds it significant that, under section 3.6 of the Limitation Agreement, the independent third party is to provide the companies and the school district with its calculations by November 1 of each year. But under section 3.7 of the same agreement, payments of amounts owed to the school district are to be made no later than January 31. Since paragraph 4 addresses the allocation of responsibility for payments due from the companies, a reasonable reading

of paragraph 4 might conclude the calculation should be made when the payments are due.

In short, this record does not convince me that the reading given the Allocation Agreement by the trial court, or that given it by the majority of this Court, is the agreement's only reasonable reading. I would conclude the Allocation Agreement is ambiguous regarding the "as of" date to be applied in paragraph 4. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 231-32 (Tex. 2003).

For reasons stated in the majority's opinion, the Court will not render a declaratory judgment but will remand the cause. I agree with that resolution of the appeal, but for the different reasons I have outlined. I therefore do not join the majority's opinion but concur in the Court's judgment.

James T. Campbell
Justice