

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ALICIA A. EISENBEISS and JEFFREY C. EISENBEISS,

Appellants,

v.

APPEAL NO. 33376

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;
BEECH RIDGE ENERGY LLC; and WEST VIRGINIA
STATE BUILDING CONSTRUCTION TRADES COUNCIL,
AFL-CIO,**

Appellees.

and

MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY,

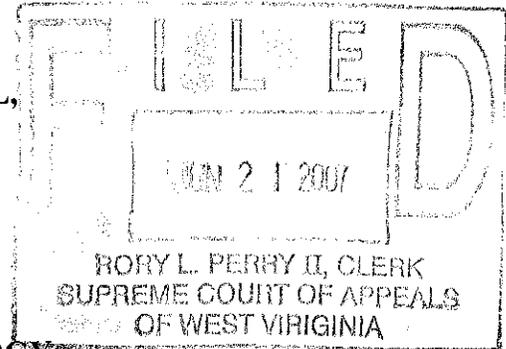
Appellant,

v.

APPEAL NO. 33375

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;
BEECH RIDGE ENERGY LLC; and WEST VIRGINIA
STATE BUILDING CONSTRUCTION TRADES COUNCIL,
AFL-CIO,**

Appellees.



**On Appeal From the Public Service Commission of West Virginia
Case No. 05-1590-E-CN**

AMICUS CURIAE BRIEF
ON BEHALF OF MEADWESTVACO CORPORATION

Counsel for MeadWestvaco Corporation

Thomas N. McJunkin (WVSB No. 2474)
Christopher L. Callas (WVSB No. 5991)
JACKSON KELLY PLLC
1600 Laidley Tower
P. O. Box 553
Charleston, West Virginia 25322
304-340-1000

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I. INTEREST OF AMICUS CURIAE

MeadWestvaco Corporation (“MeadWestvaco”) is the property owner whose lands will most directly and significantly be impacted by the proposed wind energy project that is the subject matter of this appeal (the “Project”).

A majority of the Project’s wind turbines and transmission lines are to be located on MeadWestvaco’s Beech Ridge property in Greenbrier County, West Virginia. As a public-minded company committed to responsible and sustainable use of its lands -- and after years of careful study -- MeadWestvaco determined that the Project constitutes a highly desirable commercial use of its property, fully compatible with the tract’s existing uses. MeadWestvaco participated in the public process before the Public Service Commission of West Virginia (“Commission”) that resulted in the Orders now on appeal. As the property owner most affected by the Project, MeadWestvaco is keenly interested in the outcome of this case.

MeadWestvaco wishes to convey its perspective and insights on this matter and to respectfully request that its views and its interests, no less than those of opponents of the Project, be considered by this Honorable Court.

II. PROCEDURAL BACKGROUND

On August 28, 2006, after extensive hearings, the Commission entered an Order granting the application (“Application”) of Beech Ridge Energy, LLC (“Beech Ridge”) to construct and operate the Project. On January 11, 2007, the Commission entered an Order denying the petitions of several intervenors in those proceedings, including Mountain Communities for Responsible Energy (“MCRE”) and Alicia and Jeffrey Eisenbeiss (the “Eisenbeisses”), for reconsideration of the Commission’s August 28, 2006 Order. As the Appellants here, the Eisenbeisses and MCRE (collectively, the “Appellants”) now asks this Court to throw out the Commission’s January 11, 2007 decision and to dictate the Commission’s

dismissal of the Application or, alternatively, to remand of the matter for further evidentiary development.

III. STATEMENT OF FACTS

During the Commission hearings on the Application, MeadWestvaco's Forestry Division Minerals Manager, Paul Miller, testified in support of the Project. *Evd. Hrg. Tr. Day 6*, pp. 92 – 106 (May 18, 2006). Mr. Miller testified about MeadWestvaco's corporate commitment to sustainable development, its years of study of its Beech Ridge property as a potential wind energy source, its consideration of the specific impacts of the Project and, ultimately, its decision to support the Project. MeadWestvaco relates in this *amicus* brief only facts that Mr. Miller presented to the Commission, but believes that these facts were relevant to the Commission's determination and are likewise germane to this Court's determination on this appeal.

A substantial majority of the Project's wind turbines -- 106 of 124 -- are to be located on MeadWestvaco's Beech Ridge property, a tract of working forest and mineral production land encompassing of over 100,000 contiguous acres in Greenbrier County, West Virginia that MeadWestvaco has actively managed as a commercial asset for more than 36 years. The Project area is located more than 15 miles from the Town of Lewisburg, West Virginia. Most of the structures are located at least a mile within the nearest property line.

As Mr. Miller testified, MeadWestvaco first became aware that its Beech Ridge property might constitute a viable wind resource in the early to mid-1990s. In the ensuing years, MeadWestvaco worked with a number of interested developers to study both the commercial potential of its property for wind energy and also the potential environmental, aesthetic and other impacts of such a project. Based on its years of analysis and its careful scrutiny of the potential impacts of the Project as proposed by Beech Ridge, MeadWestvaco determined that the Project would constitute a highly desirable and responsible commercial use of its property.

Although most of the Beech Ridge property has been subject to mining or timber harvesting at some point in time, under MeadWestvaco's stewardship the tract has also been available for outdoor recreation. MeadWestvaco has timbered and reforested much of its Beech Ridge property and intends to continue growing and harvesting timber there for the foreseeable future. Essentially all of the property is open to the public for fishing, hiking, wildlife viewing, berry picking and other non-motorized recreation, and most of the property is available for hunting. As Mr. Miller testified, MeadWestvaco concluded that the Project is fully compatible with the ongoing and beneficial uses of its property.

MeadWestvaco has contractual commitments from Beech Ridge that at all phases of the Project operations will be conducted responsibly, with no negative environmental impacts and in compliance with all applicable laws and regulations. At the end of the life of the Project, Beech Ridge is contractually required to remove the turbines and towers. Beech Ridge has already responded to requests to support local charitable projects, and MeadWestvaco is satisfied that Beech Ridge will be a stable and responsible corporate citizen and community member.

In its evaluation of the Project, MeadWestvaco was sensitive to its potential visual impacts and to its potential impacts on local property values. Although generally rural and wooded in character -- as would be expected of land predominantly held for timbering, mining and other compatible commercial and recreational purposes -- the project area is neither (as the Appellants seem to suggest) native forest land nor an area free from visible evidence of infrastructure development. On the contrary, as Mr. Miller told the Commission, the tract is located in an area of the State where it is virtually impossible to find a publicly accessible vista that does not already encompass structures such as electric transmission lines, cell phone and radio towers, microwave relay towers and utility poles. Most of the turbines and towers will be

located well within the tract. In both of its Orders, the Commission specifically and thoroughly addressed the Appellants' concerns about the visual impact of the Project, and found those concerns to be overstated and unpersuasive relative to the other factors and interests bearing on the public interest.

Likewise, Mr. Miller noted that a report on the effects of wind development on local property values prepared by George Sterzinger, Frederic Beck and Damian Kostiuk for the Renewal of Energy Policy Project (Analytical Report, May 2003), further satisfied MeadWestvaco that the concerns about negative impacts on property values were unjustified. Moreover, according to a March 27, 2006 National Public Radio story by Adam Hocberg, the wind project currently operating in Tucker County has become one of the county's largest taxpayers, and there is little evidence that the Project has hurt property values. According to the former Economic Development Director for the county, tourism has in fact grown since the towers were erected.

Mr. Miller noted the tax benefit of the Project, estimated to be at least \$600,000 per year, and about the hundreds of construction jobs and 20 permanent jobs it is anticipated to provide. Finally, Mr. Miller testified that the Project is consistent with the national need for renewable energy sources that do not contribute to climate change and help reduce dependence on foreign oil.

The facts as set out in Mr. Miller's testimony filed in the hearings before the Commission expressed the basis of MeadWestvaco's decision to support the Project as responsible commercial development of its Beech Ridge property. That testimony constituted only a very small part of the voluminous record considered by the Commission in concluding to issue the siting certificate for the Project.

IV. ARGUMENT

- A. **The Orders of the Public Service Commission of West Virginia approving construction and operation of the Project were thorough and thoughtful, fully satisfied the evidentiary and legal standards for review, and should be sustained.**

The Commission's August 28, 2006 Order approving the Application for construction and operation of the Project followed extensive hearings and briefing. That the decision, 92 pages in length, was thorough and thoughtful is beyond question. That the Commission conscientiously fulfilled its responsibilities in reviewing the Application is not seriously challenged before this Court. MCRE makes no effort to attack the Commission's actions on any substantive ground; its appeal rests on a highly technical (and technically meritless) basis. The Eisenbeisses' appeal is essentially a request that they be given an evidentiary "redo" by this Court (even though they acknowledge, on page 8 of their appeal brief, that "[u]ndoubtedly, the preponderance of the evidence will weigh in favor of the Applicant [Beech Ridge]"). The Commission's Order of January 11, 2007 denying the Appellants' petitions for rehearing further demonstrates the thoroughness of the Commission's performance of its statutory responsibilities. In each of its Orders, the Commission went to great lengths to address each concern raised by the parties to those proceedings.

A long line of decisions of this Court establishes that "a final order of the Public Service Commission based upon findings of fact will not be disturbed unless such finding is contrary to the evidence, without evidence to support it, arbitrary, unjust or results from a misapplication of legal principles." See, e.g., United Fuel Gas Co. v. Public Service Commission, 80 S.E. 931 (W.Va. 1914); and VEPCO v. Public Service Commission, 242 S.E.2d 698 (W.Va. 1978). The Commission's Orders challenged by the Appellants were plainly not arbitrary, unjust or the result of any misapplication of law. Likewise, under the three-pronged

test expressed in C&P Telephone Company v. Public Service Commission, 300 S.E.2d 607 (W.Va. 1982), in reaching the determinations reflected in the Orders now attacked by the Appellants, the Commission acted entirely within its authority, upon more than adequate evidence, to reach a proper substantive result. This Court's responsibility on appeal of a Commission order is not to supplant the Commission's balance of the affected interests, but to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Cox v. Public Service Commission, 426 S.E.2d 528 (W.Va. 1992).

Review of the Commission's Orders approving the Project demonstrates conclusively that the Commission's consideration of the Project more than satisfied these legal and evidentiary standards. By their appeals, the Appellants very plainly ask this Court to supplant the Commission's reasoned balancing of the interests — something this Court has repeatedly emphasized is not its role. Accordingly, MeadWestvaco respectfully submits that the August 28, 2006 and January 11, 2007 Orders of the Commission should be sustained and the appeal before this Honorable Court summarily dismissed.

B. In considering the claims of parties opposed to commercial development on land they do not own, consideration and weight should also be given to the rights and interests of property owners who wish such development to occur on their land.

The proposed Project will be located primarily on MeadWestvaco's land, and will constitute desirable commercial development of MeadWestvaco's property. The Project is not only a plainly lawful commercial enterprise, but an undertaking that is encouraged by federal energy and environmental policy to reduce this country's dependence on foreign oil in a manner that does not contribute to atmospheric gases. MeadWestvaco respectfully submits that remand of this matter in the face of the Commission's conscientious and thorough performance of its statutory responsibilities would not only be inappropriate under this Court's prior decisions, but

would necessarily elevate MCRE's tenuous technical argument and the Eisenbeisses' broad request for a "redo" over and above the Commission's reasoned analysis and substantive determinations, and would prioritize the Appellants' vague and narrow interests in thwarting development over and above the specific and greater interests of the public in permitting the Project to proceed. Remand to accommodate the Appellants would also clearly and directly interfere with MeadWestvaco's intentions and plans for its Beech Ridge property and would be damaging to MeadWestvaco's financial interests, as well as those of Greenbrier County in general.

The Appellants participated in the proceedings before the Commission, one of many mechanisms in place to protect the public and to insure that commercial development such as the Project occurs only in a lawful and responsible manner. The Commission weighed the evidence and determined that the Project is in the public interest. Notwithstanding the Appellants' disappointment in the result, the process worked.

MeadWestvaco fully recognizes the public review process as an appropriate and necessary precondition to development, and fully respects the right of members of the public to participate in that process. But to give credence to the Appellants' appeal to this Court, MeadWestvaco submits, would be damaging and unfair to MeadWestvaco. In considering the Appellants' complaints with the public process and with the result of that process, MeadWestvaco respectfully requests that this Court also consider MeadWestvaco's views and the potential impact of the Court's decision on MeadWestvaco's private property rights.

The law of eminent domain, although not applicable here, offers a useful perspective. It is fundamental, for example, that private property may not be taken without the owner's consent for the private use of another; and that "property" within the meaning of West

Virginia's constitution "comprehends not only the thing possessed but the right to use and enjoy it and every part of it." Stover v. Milam, 557 S.E.2d 390 (W.Va. 2001); State ex rel. McMillon v. Stahl, 89 S.E.2d 693 (W.Va. 1955). Moreover, limitation upon an owner's use of its property cannot be imposed by law for the benefit of other property owners. State ex rel. Nunley v. Mayor and City Council of Montgomery, 117 S.E. 888 (W.Va. 1923).

Where a property owner wishes to develop its property in a lawful manner but is prevented from doing so – not because the proposed development does not serve the public interest in general but to accommodate the concerns of private parties opposed to the occurrence of commercial development on the lands of another – the property owner's property has been diminished in value and has effectively been subjected to a constructive easement for the benefit of those private parties. In such an instance, the imposition of the *de facto* easement constitutes the extraction of property rights from the property owner desiring development for the benefit of the private parties opposing that development. In the instant appeal, the Appellants seek to turn principles of private property rights upside down; essentially, they ask this Court to take from MeadWestvaco and to give to them property rights in MeadWestvaco's Beech Ridge property.

V. CONCLUSION

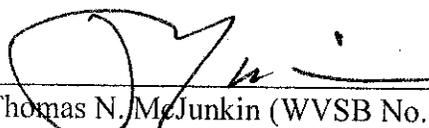
In light of the fact that the proposed project is a lawful activity that has been subject to close and reasoned scrutiny by the Public Service Commission of West Virginia, MeadWestvaco respectfully requests that this Court consider not only the rights and interests of those who wish to prevent commercial development, but also the rights and interests of MeadWestvaco as a property owner desiring the development to take place on its property.

For the reasons stated above, the appeals should be summarily dismissed.

Respectfully Submitted,

MEADWESTVACO CORPORATION

By Counsel,



Thomas N. McJunkin (WVSB No. 2474)
Christopher L. Callas (WVSB No. 5991)
JACKSON KELLY PLLC
1600 Laidley Tower
P. O. Box 553
Charleston, West Virginia 25322

CERTIFICATE OF SERVICE

I, Thomas N. McJunkin, do hereby certify that service of the attached ***AMICUS CURIAE BRIEF ON BEHALF OF MEADWESTVACO CORPORATION*** was made upon all parties of interest by forwarding a true and exact copy thereof in a properly stamped and addressed envelope in the regular course of the United States mail this 21st day of June, 2007, to the individuals listed below:

Vincent Trivelli, Esquire
The Caldwell Practice PLLC
Law and Arts Center West
500 Randolph Street
Charleston, WV 25302

Stephanie Mendelson
336 North Court Street
Lewisburg, WV 24901

John Auville, Esquire, Staff Attorney
Legal Division
WV Public Service Commission
201 Brooks Street
Charleston, WV 25301

Jeffrey C. & Alicia A. Eisenbeiss
PO Box 21
Renick WV 24966

Michael Woelfel, Esquire
St. James Building
401 10th Street, Suite 502
Huntington, WV 25701

John Walkup, III
HC 68, Box 91B
Williamsburg, WV 24991

Marvin W. Masters, Esquire
The Masters Law Firm LC
181 Summers Street
Charleston, WV 25301

Peter Schoenfeld
West Virginia Highlands Conservancy
HC 70, Box 553
Davis, WV 26260

Diana Everett
Rt. 2, Box 204
Lewisburg, WV 24901

Frank Young
Rt. 1, Box 108
Ripley, WV 25271

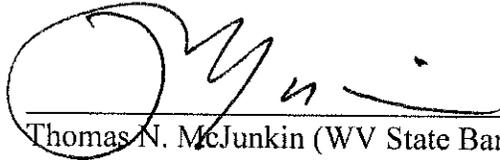
Justin R. St. Clair, Esquire
Dalton Law Offices
410 Water Street
PO Box 230
Peterstown, WV 24963

Linda Cooper, President
Citizens for Responsible Wind Power, Inc.
PO Box 4405
Star City, WV 26504

Cleve Benedict
HC 37, Box 155
Lewisburg, WV 24901

Jim Lakiotes
HC 67, Box 553
Renick, WV 24966

Lee F. Feinberg, Esq.
Susan J. Riggs, Esq.
Grant P. H. Shuman, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301



Thomas N. McJunkin (WV State Bar #2474)