

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

ALICIA A. EISENBEISS and JEFFREY C. EISENBEISS,

Appellants,

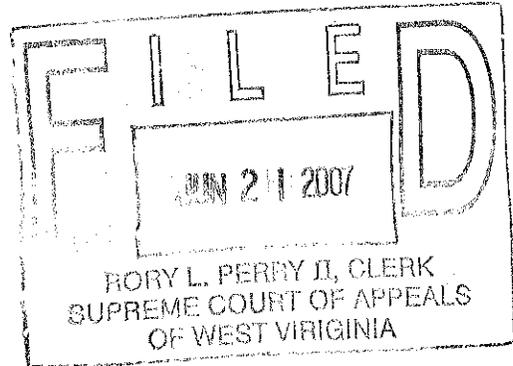
v.

APPEAL NO. 33376

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;  
BEECH RIDGE ENERGY, LLC; WEST VIRGINIA  
STATE BUILDING AND 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-CS**

**BRIEF *AMICUS CURIAE* OF  
APPALACHIAN POWER COMPANY**

Gina E. Mazzei-Smith (WV State Bar #6135)  
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Appalachian Power Company (“APCo”) submits this brief in support of the brief of Beech Ridge Energy, LLC.

APCo is a member of the Utilities, Telecommunications and Energy Coalition of West Virginia, Inc. (“UTEK”) and fully endorses the brief *amicus curiae* submitted by UTEK. In addition, however, it believes that its experience operating in a highly regulated industry will be illuminating on issues of evident interest to this Court, as reflected in the oral argument of Appellants’ petitions for appeal.

First, APCo respectfully suggest that the Public Service Commission (the Commission”) when it placed a plethora of conditions upon the siting certificate which is granted to Beech Ridge Energy LLC, was not neglecting its responsibility or attempting to delegate its own functions to others. It was simply recognizing that binding regulatory requirements exist beside the Commission’s own requirements.

It may be instructive to consider a practical example: On June 18, 2007, APCo filed with the Commission its direct testimony in Case No. 06-0033-E-CN, a proceeding in which APCo is seeking a certificate of public convenience and necessity to construct a 629MW Integrated Gasification Combined Cycle (“IGCC”) generating facility. Part of that filing, the direct testimony of Timothy Mallan, reviewed the principal environmental permits and authorizations which APCo must obtain from various entities in order to realize its proposed project. These include air permits for construction, water quality certification, stormwater construction permits, an industrial discharge permit, and a modification of any existing industrial solid waste permit. The required permits and authorizations are mandated by various governmental authorities unrelated to, and independent of, the Commission. They include the West Virginia Department of Environmental Protection (“the DEP”), the West Virginia Division of Natural Resources, the

U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers. APCo must satisfy their respective requirements in addition to making the showing which the Commission requires of it to obtain the grant of a certificate.

The Commission cannot be expected either to usurp or to duplicate the functions of these other agencies and the various statutes and rules governing their jurisdiction and requirements. Each agency has its own job to perform and its own determinations to make -- functions delegated to them not by the Commission, but by Congress, the West Virginia Legislature, or other sources of authority. The specific approval of each is needed with respect to some particular(s) aspect before the IGCC facility can be constructed and operated. If the Commission should make reference to such other agencies and the determinations which they must independently make or even condition its own approval on the applicant obtaining all of these other approvals (as it did in the case at bar), it is not shirking its own defined responsibilities or attempting to delegate its work to others. In such instances, the Commission's conditions depict respect for the independent functions of fellow regulators and demonstrate an abundance of caution that no regulated entity mistakenly suppose that it can implement a project until it has obtained all needed approvals from all regulators having some aspect of jurisdiction. APCo respectfully suggests, therefore, that the Court can conclude that the conditions attached to the Commission's Beech Ridge approval give rise to no cause for concern.

The brief *amicus curiae* submitted by UTEC contains a helpful discussion of the dangers inherent in allowing the aesthetic preferences of one landowner to restrict the property rights of his neighbor. For dealing with genuine impositions by one landowner upon another, all of the resources of the accumulated body of nuisance law is available. APCo will not repeat that

argument. But, again, APCo believes that the Court may find APCo's practical experience as a regulated public utility to be instructive.

It is a reasonable and desirable objective for a public utility and its regulator to seek reasonable ways in the design, construction, and operation of a project to reduce its impacts, including its visual impact. Take the case of the APCo's 765-kV Wyoming-Jacksons Ferry transmission line certificated by the Commission in Case No. 97-1329-E-CN. APCo's team used computer simulations to visualize the appearance of its line against the landscape. It adopted techniques, such as using a dulled, non-reflective finish on the metal members of the supporting towers and positioning the line below the crests of hills, to render the line less visually obtrusive. When all is said and done, however, such measures can only go so far. They cannot make any (non-underground) project disappear and, unless West Virginia is prepared to forgo the benefits of an efficient and developed system of public utilities and of an economy which is dependent upon such a system, there will be continued need to build facilities to create and deliver public services to the people and the businesses which employ them. The desire of some not to look at the lawful use which others make of their property cannot thwart such needed development.

Finally, APCo wishes to caution against indulging a prejudice, in a State richly endowed with and highly dependent upon coal, against wind power. Coal has few greater advocates than APCo. It is the largest consumer of coal in West Virginia and the American Electric Power system of which it is a part is the largest consumer of coal in the country. The IGCC plant discussed above is a technologically advanced project to gasify coal and thus construe to use that resource to generate power in a cleaner manner far into the future. APCo realizes, however, that in today's governmental climate, there is a growing interest in and the potential for mandated use of renewable energy resources such as wind power. It is engaged in the process of adding wind

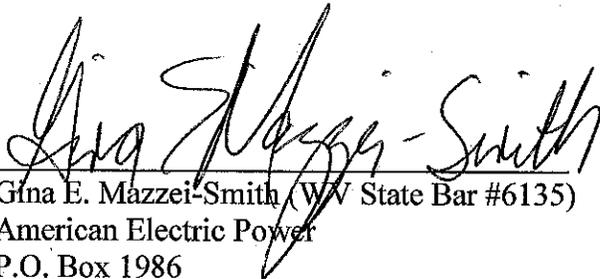
capacity to its generation portfolio and the day may not be far off when a “green power” portfolio component is not an option but a requirement. It would be prudent for all those concerned for the future of West Virginia to take wind power seriously and to appreciate the contributions which it can offer.

WHEREFORE, your *amicus curiae* respectfully urges the Court to affirm the Public Service Commission’s grant of a siting certificate to Beech Ridge Energy LLC.

Respectfully Submitted

**APPALACHIAN POWER COMPANY**

By Counsel



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Dated this 21<sup>st</sup> day of June, 2007

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