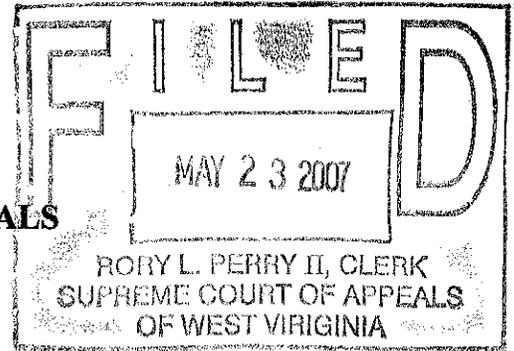


**IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS**



**MOUNTAIN COMMUNITIES
FOR RESPONSIBLE ENERGY,
Appellant,**

Vs.

APPEAL NO. 33375

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

**INITIAL BRIEF OF APPELLANT MOUNTAIN COMMUNITIES
FOR RESPONSIBLE ENERGY IN SUPPORT OF APPEAL**

Respectfully Submitted,

**Justin R. St. Clair, Esq. (WV Bar #9257)
Dalton Law Offices
410 Water Street
P.O. Box 238
Peterstown, West Virginia 24963
304.753.9464
*Counsel for Appellant***

TABLE OF CONTENTS

TABLE OF CONTENTS	ii-iii
TABLE OF AUTHORITIES	iv-v
I. INTRODUCTION	1
II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1-2
III. STATEMENT OF FACTS	2-4
A. Overview of the Law Governing Applications for Siting Certificates for Exempt Wholesale Generators	4
1. The Commission's Statutory Jurisdiction and Obligations	4-5
2. The Commission's Two-Part Analysis for Deciding Cases Under W.Va. Code § 24-2-11c	5-6
3. The EWG Siting Rules	6-7
B. The Specific EWG Siting Rules at Issue	7
1. EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1 – The 5-mile Radius Map	7-13
2. EWG Siting Rule 150 C.S.R. § 30-3-3.1.o – The Project's Cultural Impact	13-18
C. The Commission's August 28, 2006 Order Granting Beech Ridge's Application	18-21
D. MCRE's Petition for Reconsideration	21-24
E. The Commission's January 11, 2007 Order Denying MCRE's Petition	24-27
IV. ASSIGNMENTS OF ERROR	27
V. POINTS AND AUTHORITIES RELIED UPON	27-29
VI. ARGUMENT	29
A. Standard of Review	29-30

- B. The Court should reverse the Commission's January 11, 2007 Order denying MCRE's Petition for Reconsideration because the Commission has, under the guise of interpretation, arbitrarily ignored, revised, or amended its EWG Siting Rules resulting in an application of the rules that does not conform to the purpose and wording of the Rules or the intent of the W.Va. Code § 24-2-11c.** 30-43
- C. As a result of the Commission's arbitrary revision of the EWG Siting Rules, the Commission's Orders do not include adequate findings of fact or conclusions of law to reflect that the Commission properly appraised and balanced the interests of, and potential social and environmental impacts to, the citizens and communities located within the vicinity of the proposed project.** 43-45

VII. PRAYER

45

TABLE OF AUTHORITIES

CASES:

<i>Martin v. OSHA Review Comm'n</i> , 499 U.S. 144 (1991)	28,32,34,38
<i>C&P v. PSC</i> , 171 W.Va. 708, 301 S.E.2d 798 (1983)	26
<i>Monongahela Power Co. v. Public Service Commission</i> , 166 W. Va. 423, 276 S.E.2d 179 (1981)	27,29
<i>Appalachian Power Co. v. State Tax Dept. of West Virginia</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995)	27-30,32-33
<i>Tasker v. Mohn</i> , 165 W.Va. 55, 267 S.E.2d 183 (1980)	28,31
<i>Trimboli v. Board of Education</i> , 254 S.E.2d 561 (W.Va. 1979)	28,31
<i>Consumer Advocate Division v. Public Service Commission</i> , 182 W. Va. 152, 386 S.E.2d 650 (1989)	28,31
<i>The Affiliated Construction Trades Foundation v. The Public Service Commission of West Virginia</i> , 211 W.Va. 315, 565 S.E.2d 778 (2002)	29,34
<i>Ooten v. Faerber</i> , 181 W.Va. 592, 383 S.E.2d 774 (1989)	32
<i>West Virginia-Citizen Action Group v. Public Service Comm'n</i> , 175 W.Va. 39, 330 S.E.2d 849 (1985)	43
<i>Rowe v. W.Va. Dept. of Corrections</i> , 170 W.Va. 230, 292 S.E.2d 650 (1982)	29,41

STATUTES:

W.Va. Code § 24-2-1(c)	4
W.Va. Code § 24-2-11c	4-6,22,35,38-39,43

AGENCY DECISIONS:

<i>Longview Power, LLC</i> , Case No. 03-1860-E-CS, (Aug. 27, 2004)	5,18,22,35,43
<i>Western Greenbrier CO-Generation, LLC</i> , Case No. 05-0262-E-CS-CN (Nov. 21, 2005)	5,18,22

AGENCY REGULATIONS:

82 C.S.R. § 2-5-5.3.e	39
82 C.S.R. § 2-5-5.1.d	42
150 C.S.R. §§ 30-1-1.1	6
150 C.S.R. §§ 30-1-1.3	6
150 C.S.R. § 30-1-1.4	6
150 C.S.R. § 30-1-1.6	40
150 C.S.R. §§ 30-3-3.1	6
150 C.S.R. § 30-3-3.1.h	Quoted on Page 7, Discussed on nearly every page of the Brief
150 C.S.R. § 30-3-3.1.o	Quoted on Page 14, Discussed on nearly every page of the Brief
150 C.S.R. § 30-5-5.1	39

I. INTRODUCTION

The appellant, Mountain Communities for Responsible Energy ("MCRE"), by counsel, Justin R. St. Clair, and Dalton Law Offices, pursuant to Rule 10 of the *West Virginia Rules of Appellate Procedure*, hereby submits the "Appellant, Mountain Communities for Responsible Energy's Initial Brief in Support of Appeal," regarding Appeal No. 33375 currently pending before the Court. The Appellant, MCRE, appeals from two Orders of the Public Service Commission of West Virginia ("the Commission"), entered on August 28, 2006 and January 11, 2005. For the reasons set forth below, the Court should reverse the January 11, 2007 Order denying MCRE's Petition for Reconsideration of the Commission's August 28, 2006 Order granting Respondent Beech Ridge Energy, LLC's ("Beech Ridge") Application for a Siting Certificate to Authorize Construction and Operation of a Wholesale Electric Generating Facility and Related Transmission Support Line of Less than 200 kv and Associated Interconnection Facilities in Greenbrier and Nicholas Counties, West Virginia ("Application").

II. KIND OF PROCEEDINGS AND NATURE OF THE RULING BELOW

This is an appeal from the Public Service Commission's denial of MCRE's Petition for Reconsideration of the Commission's August 28, 2006 Order granting Respondent Beech Ridge Energy's application to construct and operate an exempt wholesale electric generating facility. The exempt wholesale generating facility proposed by Beech Ridge is a 186 megawatt, industrial wind turbine facility consisting of 124, 400-foot tall, wind turbines to be located along 23 miles of mountain ridges in Greenbrier County, West Virginia. Also contemplated is a 13.8 mile transmission line to be located in Greenbrier and Nicholas Counties, West Virginia.

In its Petition for Reconsideration, filed with the Commission on September 18, 2006, MCRE asserted, among other things, that the Commission should reconsider its August 28, 2006

Final Order and dismiss Beech Ridge's application for failure to comply with the mandatory provisions of the Commission's *Rules Governing Siting Certificates for Exempt Wholesale Generators*, 150 C.S.R. § 30-1-1, et seq. In its Final Order, entered on January 11, 2007, the Commission denied the Petition for Reconsideration. The Commission concluded that Beech Ridge had "substantially complied" with the pertinent regulations and that MCRE had presented nothing new in its Petition for Reconsideration. In addition, the Order essentially revised Exempt Wholesale Generator Rule 150 C.S.R. § 30-3-3.1.o.1.A-B to require an applicant to submit information regarding historic or cultural landmarks within a 5-mile radius of the proposed project after a siting certificate is granted rather than filing the information with the application, as required by the rule. It is from this Order that MCRE appeals.

III. STATEMENT OF FACTS

At issue in the present case is whether the Commission should have granted MCRE's Petition for Reconsideration and dismissed Beech Ridge's application for failure to comply with mandatory provisions of the Commission's *Rules Governing Siting Certificates for Exempt Wholesale Generators*, 150 C.S.R. § 30-1-1, et seq. (hereinafter "EWG Siting Rules"). The application was filed with the Commission on November 1, 2005. In its application, Beech Ridge proposes to construct a wind-powered generating facility consisting of 124 wind turbine generators, associated interconnection facilities, a substation and operations facilities, in Greenbrier County, West Virginia and a related transmission support line of less than 200 kv in Greenbrier and Nicholas Counties, West Virginia. *Application* p. 2 (Nov. 1, 2005).

The proposed project will be located nine miles northeast of Rupert in Greenbrier County and will consist of 124, 400-foot tall industrial wind turbines placed in a single row along approximately 23 miles of forested ridgelines in Greenbrier County. *Appendix to Application*, p.

22 (Nov. 1, 2005). Each turbine will be mounted on a 262-foot tubular steel tower and will consist of three, 127-foot blades. *Appendix to Application*, p. 35 (Nov. 1, 2005).

MCRE filed its petition to intervene in the case on December 7, 2005. In its petition, MCRE noted:

[MCRE] is an unincorporated association of individuals interested in protection, enhancement and improvement of the culture, the environment and the economy of the region that would be directly and indirectly impacted by the proposed Beech Ridge Energy wind turbine project, including individuals residing, owning property, recreating or otherwise interested in that region. In addition, MCRE has a broad interest in the overall impact of windpower projects on the culture, the environment and the economy of the State of West Virginia and other rural areas impacted by such projects.

MCRE Petition to Intervene, p. 1 (Dec. 7, 2005). On February 6, 2006, MCRE was granted intervenor status along with nine other individuals and groups. *Commn. Order* p. 24 (Feb. 6, 2006). Following a period of discovery and public comment, the evidentiary hearing on Beech Ridge's application began on May 10, 2006.

On May 17, 2006, intervenor Michael A. Woelfel filed a motion to dismiss the application. On May 18, 2006, the last day of the evidentiary hearing, MCRE filed its Motion to Dismiss Application. Both motions argued that the application should be dismissed because Beech Ridge had failed to comply with the mandatory provisions of the EWG Siting Rules. The Commission took the motions under advisement. *Evd. Hrg. Tr. Day 6*, 67:20 (May 18, 2006).

On August 28, 2006 the Commission entered a Final Order granting Beech Ridge's application for a siting certificate. In its Conclusion of Law No. 4, the Commission denied the pending motions to dismiss filed by intervenors Michael A. Woelfel and MCRE. *Commn. Order*, p. 73 (Aug. 28, 2006).

MCRE filed its Petition for Reconsideration on September 18, 2006.¹ In its petition, MCRE argued that the Commission should reconsider its August 28, 2006 Order and dismiss Beech Ridge's application for failure to comply with the EWG Siting Rules. MCRE asserted that the use of the word "shall" in the EWG Siting Rules indicated that the requirements imposed therein were mandatory. Moreover, MCRE argued that due process requires an agency to abide by its rules until they are lawfully changed, especially when an individual, or in this case an unincorporated group of individuals, has reasonably relied on agency regulations promulgated for its benefit. MCRE further noted that an agency regulation may not, under the guise of interpretation, be modified, revised, amended or rewritten. *MCRE Petition for Reconsideration*, pp. 1-2 (September 18, 2006).

On January 11, 2007, the Commission entered an Order denying MCRE's Petition for Reconsideration. Pursuant to W.Va. Code § 24-5-1, MCRE filed its Petition for Appeal with this Court on February 12, 2007.

A. Overview of the Law Governing Applications for Siting Certificates for Exempt Wholesale Generators

1. The Commission's Statutory Jurisdiction and Obligations

The West Virginia State Legislature has conferred jurisdiction upon the Commission to adjudicate applications for siting certificates to construct and operate exempt wholesale generators. *W.Va. Code § 24-2-1(c)*. W.Va. Code § 24-2-11c establishes the procedure governing applications to construct and operate exempt wholesale generators. Subsection (c) establishes a balancing test that the Commission must perform in deciding whether to issue an EWG siting certificate. The statute provides, in pertinent part, "[i]n deciding whether to issue, refuse to issue, or issue in part and refuse to issue in part a siting certificate, the

¹ On September 14, 2006 the Commission entered an Order extending the deadline to file a petition for reconsideration from September 7, 2006 until September 18, 2006.

commission shall appraise and balance the interests of the public, the general interests of the state and local economy, and the interests of the applicant.” *W.Va. Code § 24-2-11c(c)*.

2. The Commission’s two-part analysis for deciding cases under W.Va. Code § 24-2-11c

The Commission has adopted a two-part analysis which it applies to decisions it is required to make under W.Va. Code § 24-2-11c(c). The Commission has held,

2. For purposes of deciding this application, and in accordance with *West Virginia Code § 24-2-11c(c)*, the Commission will use the two-part analysis for “apprais[ing] and balanc[ing] the interests of the public, the general interests of the state and local economy, and the interests of the applicant” as developed in *Longview Power, LLC*, Case No. 03-1860-E-CS (Commission Order, August 27, 2004).

3. In Part One of the analysis, the Commission will perform its duty to appraise and balance: (a) an applicant’s interest to construct an electric wholesale generation facility; (b) the State’s and region’s need for new electrical generating plants; and (c) the economic gain to the state and local economy, against: (i) community residents’ interest in living separate and apart from such a facility; (ii) a community’s interest that a facility’s negative impacts be as minimally disruptive to existing property uses as is reasonably possible; and (iii) the social and environmental impacts of the proposed facility on the local vicinity, the surrounding region, and the State.

4. The Commission performs Part Two of its analysis only if it determines in Part One that, taken as a whole, positive impacts relating to the various interests outweigh the negative impacts on the various interests. (See *West Virginia Code § 24-2-11c(c)*.) In Part Two the Commission decides whether a projects public funding, if any, and property tax abatement, if any, offends the public interest and whether the construction of the facility or material modification of the facility will result in a substantial positive impact on the local economy and local employment. (See *West Virginia Code § 24-2-11c(c)*.) Assuming the public funding and tax abatement mechanisms do not offend the public interest and construction of the facility or material modification of the facility will result in a substantial positive impact on the local economy and local employment, then the Commission may grant a siting certificate.

Western Greenbrier CO-Generation, LLC, Case No. 05-0262-E-CS-CN, p. 47 ¶¶ 2-4 (*Commn. Order* Nov. 21, 2005) *See also Longview Power, LLC*, Case No. 03-1860-E-CS, pp. 190-191 ¶¶ 5-7 (*Commn. Order* Aug. 27, 2004). Despite applying this two-part analysis to two cases decided under W.Va. Code § 24-2-11c(c) immediately prior to the present case, the Commission's August 28, 2006 Final Order and January 11, 2007 Order denying the various Petitions for Reconsideration contain no findings of fact or conclusions of law citing, or otherwise referencing, this two-part analysis and the factors to be appraised and balanced.

3. The EWG Siting Rules

W.Va. Code § 24-2-11c(j) contains enabling language authorizing the Commission to promulgate rules as may be necessary to carry out the provisions in the statute. Pursuant to this grant of authority the Commission promulgated the EWG Siting Rules. The EWG Siting Rules were filed on July 12, 2005 and became effective on September 10, 2005. *150 C.S.R. §§ 30-1-1.3 and 30-1-1.4*. The rules provide,

Scope. -- This legislative rule applies to any entity that intends to construct, or construct and operate, an electric generating facility or make a material modification to an electric generating facility as described in W.Va. Code §24-2-1(c). This rule does not apply to net-metering facilities covered by tariffs approved by this Commission in Case No. 02-1495-E-GI.

150 C.S.R. § 30-1-1.1. EWG Siting Rule *150 C.S.R. § 30-3-1* requires that certain information be included in the application for the application to be deemed complete. The rule provides, “[i]n addition to Form No. 1, a completed application shall include the following[.]” *150 C.S.R. § 30-3-3.1*.

This is not the first case to be decided by the Commission under W.Va. Code § 24-2-11c(c). It is, however, the first case to be decided in which the Commission's EWG Siting Rules were applicable. Both motions to dismiss, filed by intervenors Michael A. Woelfel and MCRE,

argued that Beech Ridge's application should be dismissed as incomplete for failure to comply with specific EWG Siting Rules.

B. The Specific EWG Siting Rules at Issue

The issues raised in the motions to dismiss filed at the close of the evidentiary hearing, and subsequently addressed in the various petitions for reconsideration, concern whether Beech Ridge's application should have been dismissed by the Commission as incomplete for failure to comply with the EWG Siting Rules. Mr. Woelfel argued that full compliance with the provisions of the EWG Siting Rules was a condition precedent to approval of the application.

In his motion, Mr. Woelfel contended that Beech Ridge had failed to file a meaningful 5-mile radius map fully addressing the cultural impact of the project and had failed, during the evidentiary hearing, to provide competent evidence addressing the cultural impact of the project as required by EWG Siting Rule 150 C.S.R. § 30-3-3.1.h and EWG Siting Rule 150 C.S.R. § 30-3-3.1.o. *Woelfel Mot. Dismiss* pp. 1-3 (May 17, 2006). Like Mr. Woelfel, counsel for MCRE argued that the application should be dismissed because Beech Ridge had failed to file a 5-mile radius map meeting the mandatory requirements of EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1. *MCRE Mot. Dismiss* pp. 1-3 (May 18, 2006).

1. EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1 – The 5-mile Radius Map

EWG Siting Rule 150 C.S.R. § 30-3-3.1.h requires, in pertinent part,

Maps. The applicant **shall** file the following maps with its application.

1. 5-miles radius Map. The applicant **shall** supply an ANSI size D map(s) of 1 inch:4800 feet scale or larger containing at least a 5-mile radius from, and depicting, the proposed 24-2-1(c) generating facility and transmission lines, and showing the following features:

- A. Major population centers and geographic boundaries;

- B. Major transportation routes and utility corridors;
- C. Bodies of water which may be directly affected by the proposed 24-2-1(c) generating facility;
- D. Topographic contours;
- E. Major institutions;
- F. Incorporated communities; public or private recreational areas; parks; forests; hunting or fishing areas, or similar facilities; historic scenic areas or places; religious places; archaeological places; or places otherwise of cultural significance, including districts, sites, buildings, structures and objects which are recognized by, registered with, or identified as eligible for registration by the National Registry of Historic Places, or any state agency;
- G. Land use classifications; including residential, urban, manufacturing, commercial, mining, transportation, utilities, wetland, forest and woodland, pasture and cropland;

EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1.A-G (emphasis added). Both intervenors Michael A. Woelfel and MCRE contended that Beech Ridge did not comply with the mandatory requirements of this Rule.

On May 17, 2006, day five of the evidentiary hearings, Beech Ridge moved its entire application, including the 5-mile radius map filed with the application, into evidence as Beech Ridge Exhibit No. 1. *Evd. Hrg. Tr. Day 5, 20:18-22* (May 17, 2006). Several moments later Beech Ridge attempted to move two other "revised" 5-mile radius maps into evidence as Beech Ridge Exhibit Nos. 2 and 2a. *Evd. Hrg. Tr. Day 5, 23:14-15 and 24:12-13* (May 17, 2006). After counsel for Beech Ridge tendered the exhibits the witness on the stand, David Groberg, testified,

I want to start out by saying, I am not regarding these maps in any way saying, acknowledging or conceding that the map the was included in our application fails to meet the guidelines for PSC certificates. But had to put in another map with the revised transmission line. And there's been an awful lot of talk including ads run two pages wide, in local newspapers, and recommendations made to seemingly half the speakers in Fairlea that our other map was insufficient. So we felt like, we recognize that while we have met the guidelines, we could have done a better job of coming up with a map that wouldn't have affected the people. So we tried to do a better job.

Evd. Hrg. Tr. Day 5, 2:24-25:8 (May 17, 2006).

After taking several moments to review the new maps while the witness was testifying, counsel for MCRE objected to the introduction of the new maps. *Evd. Hrg. Tr. Day 5, 29:9-17 (May 17, 2006)*. Following counsel's objection a discussion concerning the maps ensued over the course of several minutes wherein MCRE's counsel contended that "Beech Ridge [had] in effect admitted that their application was insufficient," [*Evd. Hrg. Tr. Day 5, 30:15-16 (May 17, 2006)*] and was attempting to rehabilitate the 5-mile radius map filed with the application. *Evd. Hrg. Tr. Day 5, 36:17-18 (May 17, 2006)*. Ultimately, the Commission sustained the objection, ruling, "[a]s far as the maps, the maps can be used for demonstration purposes, for transmission line changes, revisions, and modifications. But when it comes to --- but the Commission will rely on the map filed with the application." *Evd. Hrg. Tr. Day 5, 40:10-15 (May 17, 2006)*.

Later during MCRE's cross-examination of Beech Ridge witness David Groberg, counsel for MCRE requested that Beech Ridge's Exhibit No. 2a, to which the earlier objection had been sustained, be moved into evidence as MCRE Exhibit No. 13. Counsel was very clear as to the purposes for requesting the map be introduced as MCRE's exhibit,

MCRE rather than conduct any kind of Cross Examination, I think we just want to perfect the record. We wish now to move for admission of Beech Ridge 2A, as --- as a document that confronts and rebuts the land use map filed initially in this application. WE

think that those two maps on the record, on briefs, the Commission can compare the two maps and see the differences we can develop on briefs. So we think rather than ask the witness questions, we'll just -- as odd as it sounds, we'll move their map into the record as our evidence against their initial land use map.

Evd. Hrg. Tr. Day 5, 93:10-20 (May 17, 2006). In response to the Commission's request for clarification, counsel stated that MCRE was adopting the map as its exhibit to rebut the completeness or adequacy of this initial 5-mile map filed with the application. Counsel noted that, rather than ask the witness a bunch of questions about the maps, MCRE would point out the distinctions between the maps in its brief. *Evd. Hrg. Tr. Day 5, 98:10-18 (May 17, 2006).*

After adopting Beech Ridge's map as an MCRE exhibit, counsel presented Beech Ridge's witness David Groberg with MCRE's 5-mile radius map, MCRE Exhibit No. 1, prepared by the citizen members of MCRE who live in the vicinity of the proposed project. When questioned about the differences between Beech Ridge's initial 5-mile map and MCRE's 5-mile map, Mr. Groberg conceded that the public recreation facilities around the Williamsburg school and community center were "public recreation facilities," and that there were public hunting and fishing areas within the 5-mile project area. *Evd. Hrg. Tr. Day 5, 103:3-13 (May 17, 2006).* Those public recreation areas are not depicted on Beech Ridge Energy's original 5-mile map. When questioned about the historic areas depicted on MCRE's 5-mile map, Mr. Groberg agreed that the areas on MCRE's map were areas of historic interest to the community. Mr. Groberg further agreed that churches were places of religious significance. *Evd. Hrg. Tr. Day 5, 104:19-24 (May 17, 2006).* Mr. Groberg also conceded that cemeteries are places of cultural significance. *Evd. Hrg. Tr. Day 5, 105:14-15 (May 17, 2006).* Finally, Mr. Groberg did not take issue with any of the locations depicted on MCRE's 5-mile map which was offered to rebut

Beech Ridge Energy's assertion that it had complied with EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1. *Evd. Hrg. Tr. Day 5*, 100:12-17 (May 17, 2006).

MCRE renewed its arguments for dismissal in its Initial and Reply briefs, filed with the Commission following the evidentiary hearing. MCRE noted that it had submitted its own 5-mile map, MCRE Exhibit No. 1, for the purpose indicating the inadequacies and fatal deficiencies of Beech Ridge's 5-mile map filed with the application. Moreover, MCRE pointed out that Beech Ridge did not dispute the factual basis for MCRE's map through any rebuttal testimony or witnesses. *MCRE Initial Brief*, p. 11 (June 26, 2006).

MCRE asserted that Beech Ridge's 5-mile map failed to substantially comply with EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1. MCRE noted that the map was not of the scale required by the Rule. The rule requires the map's scale to be 1 inch = 4,800 feet. Beech Ridge's map is at a scale of 1 inch = 5,416.89 feet. Furthermore, Beech Ridge's map does not identify the major transportation routes within the 5-mile radius area. The map does not display existing utility corridors within the 5-mile radius of the project and does not disclose the existence of bodies of water that may be directly affected by the project. Moreover, MCRE argued that Beech Ridge's map does not display topographic contours and the comparison of Beech Ridge's map to MCRE's 5-mile map reflects that Beech Ridge's map fails to adequately display the community and cultural information required by the rule. Finally, MCRE noted that the map does not adequately portray, and often inaccurately portrays, the land use classification within the 5-mile radius of the project. *MCRE Initial Brief*, pp. 14-17 (June 26, 2006).

In support of its arguments for dismissal, MCRE cited a prior ruling by the Commission concerning a similar rule requiring an applicant to file a 5-mile radius map. In *In Re Appalachian Power Company*, Case No. 93-0123-E-CN (May 10, 1993), the Commission

granted a motion to dismiss for an applicants failure to comply with Electric Rule 9.2(1)(a) requiring the applicant to file a 5-mile radius map. In that case the Commission held,

The entire purpose of the rule is to enable the Commission, parties and the public to easily determine the exact location of the line and see how that relates to certain physical, environmental, cultural and economic features.

In Re Appalachian Power Company, Case No. 93-0123-E-CN, Page 4, (May 10, 1993). Relying on this standard, MCRE argued,

The Beech Ridge map is basically a purported land-use map that features turbine locations, county boundaries, a few community names, a couple of what appear to be public road identifications, purported land use information, a maze of unidentified roads, and nothing more. It does not identify geographic features such as mountains or ridges and does not indicate the location or identity of streams. The map does not distinguish private roads from public roads and does not, with an exception or two, identify public roads by type, number or name. In fact within the entire 5-mile Radius shown on the Beech Ridge map, there are only a total of 12 words or phrases on the map[.]

MCRE Initial Brief, pp. 12-13 (June 26, 2006).

MCRE reminded the Commission that Beech Ridge must rely solely on the 5-mile map file with the application on the issue of dismissal. Finally, MCRE noted that,

If the Beech Ridge 5-Mile Map had been the only community/cultural map available at the hearing of this matter, neither the Commission nor the parties nor the interested public could have made use of that map in any meaningful way. In fact, all through the hearing, very little use was made of the Beech Ridge 5-Mile Radius Map because it was virtually useless as a map, or as a vehicle to provide to a viewer the information required to be provided by the Siting Regulations.

MCRE Initial Brief, pp. 19-20 (June 26, 2006).

Beech Ridge responded to MCRE's assertions by noting that it was the statute, W.Va. Code § 24-2-11c, that governs the proceedings and that a hyper-technical interpretation of the rules should not overrule the statute's mandate. Beech Ridge also argued that the differences

between MCRE's map and its own resulted from different interpretations of the siting rule.

Beech Ridge Resp. Mot. Dismiss, ¶¶ 1-5 (June 26, 2006).

The initial brief of the West Virginia State Building Trades Council, AFL-CIO (hereinafter "the Council") stressed that the Commission had certain duties and responsibilities as well as discretion with regard to the matters before it. Without specifically addressing the flaws in Beech Ridge's application, the Council argued that it is the statutory analysis that is required of the Commission that is paramount in the matters before it and which should guide the Commission's consideration of the pending motions. Finally, the Council argued that the Commission had discretion to interpret its regulations to determine a reasonable and appropriate construction of its rule. *Council Initial Brief*, p. 8 (June 26, 2006).

Commission Staff also weighed in on the dismissal argument regarding the 5-mile map inadequacies. Staff stated that Beech Ridge had at least minimally complied with the requirements of the rule. Staff noted that Beech Ridge's map was not perfect, but stated that a map that is not perfect is not grounds for dismissal. Moreover, Staff argued that the Commission is not bound by the technical rules of evidence, but may exercise discretion to facilitate its efforts to learn all of the facts bearing on the matters before it. *Staff's Reply Brief*, p. 1 (July 10, 2006).

2. EWG Siting Rule 150 C.S.R. § 30-3-3.1.o – The Project's Cultural Impact

EWG Siting Rule 150 C.S.R. § 30-3-3.1.o is closely related to EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1 because, when read together, the Rules require an applicant to identify, map, estimate the impact of the proposed facility, and describe any plans to mitigate any adverse impacts on "historic, scenic, religious or archaeological areas or places; or places otherwise of cultural significance" depicted on the 5-mile map. EWG Siting Rule 150 C.S.R. § 30-3-3.1.o provides,

Cultural Impact.

1. Landmarks.
 - A. The applicant **shall** estimate the impact of the proposed 24-2-1(c) generating facility on the preservation and continued meaningfulness of any historic, scenic, religious or archaeological areas or places; or places otherwise of cultural significance depicted on the map required by Rule 3.1.h.1.
 - B. Describe any plans to mitigate adverse impacts on these landmarks.
2. Recreation Areas. The applicant shall estimate the impact of the proposed 24-2-1(c) generating facility on recreational areas identified on the map required by Rule 3.1.h.1. and describe any plans to mitigate.

EWG Siting Rule 150 C.S.R. § 30-3-3.1.o.1.A-B (emphasis added).

Beech Ridge Energy's application contains the following statements regarding EWG Siting Rule 150 C.S.R. § 30-3-3.1.o.1.A-B,

The Applicant is completing a Phase Ia cultural resource study comprised of an archaeology predictive model, and a historical architecture viewshed analysis for the geographic area where the 24-2-1(c) generating facility will be located. This study involves extensive coordination with the West Virginia State Historic Preservation Office (WVSHPO). The results of this study will include identification of proximate cultural resources and recommendations for further studies as based upon results of the Phase Ia study and coordination with the WVSHPO. This coordination is ongoing as of the time of the submission of this application.

...

An assessment of potential impacts to archaeological and/or historic architectural resources **has not yet been concluded**. A description of such impacts and any mitigation will be developed in coordination with the WVSHPO following that agency's review of the Phase Ia study results. This Response will be supplemented at that time.

Appendix to Application, p. 64 (Nov. 1, 2005) (emphasis added). On January 4, 2006, Staff filed its First Set of Data Requests of Beech Ridge Energy, LLC. Question No. 10 of Staff's first data request inquired as to when the Phase Ia cultural resource study would be available to the Commission. On January 26, 2006, Beech Ridge Energy responded to Staff's first data request. That response provided, "Beech Ridge has consulted with the State Historic Preservation Office ("SHPO") and had several meetings with a SHPO representative. Beech Ridge continues to prepare and consult about a Phase I A cultural resource study and will make it available to the Commission as soon as possible." *Beech Ridge Resp. to Staff Data Req. No. 1*, Page 14 of 22 (January 26, 2006).

On April 28, 2006, Beech Ridge Energy filed a supplemental response to Question No. 10 of Staff's first data request, noting,

On behalf of Beech Ridge, BHE Environmental, Inc. ("BHE") has consulted with the West Virginia State Historic Preservation Office ("SHPO"), and upon obtaining SHPO's approval of BHE's proposed methodology, began work to complete a Phase I study to meet the requirements of SHPO. BHE will conduct two comprehensive reports that together represent a comprehensive study of the area's cultural resources. The first will be a report on investigations of architectural historic resources within the viewshed of the project, including districts, buildings, structures, and objects that may be eligible to the NHRP. The second will be a report on investigations of archeological resources within the construction area of the Project.

On April 25, 2006, Beech Ridge filed the Rebuttal Testimony of Dr. Robert B. Patton which more completely addresses issues relating to SHPO.

Beech Ridge Suppl. Resp. to Staff Data Req. No. 1, Page 1, (April 26, 2006). Thus, as of April 26, 2006, mere weeks prior to the evidentiary hearing, Beech Ridge Energy had not completed a Phase I A cultural resource study that it had represented would be completed five months earlier in the original application.

Interestingly, it was discovered at the hearing that Beech Ridge Energy had completed a cultural resource study that was not submitted with the application. That study, entitled "Beech Ridge Windfarm Project Cultural Resources Literature Review and Viewshed Analysis for Beech Ridge Energy LLC," was submitted to the WVSHPO on November 7, 2005. That report concluded, on page 20, that "[b]ased upon these results, adverse affects on historic architectural properties from the proposed project are not anticipated. BHE recommends that no further investigations for historic architectural properties would be required." On December 20, 2005, the West Virginia Division of Culture & History rejected BHE's November 7, 2005 report as insufficient. In a letter, dated December 20, 2005, Susan M. Pierce, the Deputy State Historic Preservation Officer, recited numerous flaws or inadequacies with Beech Ridge Energy's initial report. Letter from Susan M. Pierce, Deputy Historic preservation Officer, to BHE Environmental, *Beech Ridge Windfarm Literature Analysis* p. 2-3 (Dec. 20, 2005) (attached as Exhibit A to *Woelfel Mot. Dismiss* (May 17, 2006)).

Ironically, one of the problems discussed in Ms. Pierce's letter was the adequacy of Beech Ridge's map. Ms. Pierce noted, "[t]he maps themselves are problematic. While the maps show the location of previously inventoried resources; they are not identified on the map nor in the text. Not even rivers or towns are identified on the maps. This makes it very difficult to compare the report map to survey maps, which was attempted in our office." Letter from Susan M. Pierce, Deputy Historic preservation Officer, to BHE Environmental, *Beech Ridge Windfarm Literature Analysis* p. 2 (Dec. 20, 2005) (attached as Exhibit A to *Woelfel Mot. Dismiss* (May 17, 2006)).

During the evidentiary hearing, Dr. Patton, Beech Ridge Energy's cultural expert acknowledged that Beech Ridge Energy had "only entered into the process of scoping the

project,” [Evd. Hrg. Tr. Day 3, 131:24-25 (May 12, 2006)] and that there was a lot more work to be done. Evd. Hrg. Tr. Day 3, 132:4 (May 12, 2006). Moreover, Dr. Patton conceded that there were several properties within the five mile radius that had not yet been evaluated. Evd. Hrg. Tr. Day 3, 134:1-4 (May 12, 2006). Thus, at the conclusion of the evidentiary hearing, the evidence before the Commission reflected that Beech Ridge had failed to map all potential sites and consequently failed to discuss mitigation plans. The Commission recognized this failure on three separate occasions. Evd. Hrg. Tr. Day 3, 138:10-15, 146:5-8 and 147:8-11 (May 12, 2006).

In addition, Susan M. Pierce, the Deputy Director of the West Virginia State Historic Preservation Office, wrote a letter to the Commission, dated May 12, 2006, that reaffirmed the intervenors’ assertions that Beech Ridge had failed to comply with EWG Siting Rule 150 C.S.R. § 30-3-3.1.o.1.A-B. Ms. Pierce stated,

Based upon this report, my office was unable to confirm the existence of historic resources in the project area nor evaluate potential effects to them by the proposed wind farm. There simply was insufficient information for my staff to evaluate the presence of historic resources within the area of potential effect. BHE’s report actually recommended no further work although very little documentation was provided regarding the existence of historic resources.

Letter from Susan M. Pierce, Deputy Historic preservation Officer, to Sandra Squire, Commission Executive Secretary, *Siting Certificate – Beech Ridge Energy, LLC*, p. 1 (May 12, 2006) (filed as public comment, May 15, 2006). Additionally, Ms. Pierce noted,

Because of these circumstances, we are unable to provide any substantial comments to the PSC regarding the potential effect to historic resources; therefore, we request that the PSC within its authority assure that this project can reasonably avoid substantial direct or indirect adverse effects to historic resources.

Id. at p. 3.

At the close of the evidentiary hearing, the only witnesses who testified in depth concerning the cultural/historic resources within the 5-mile radius of the project were intervenors and citizen witnesses. Additionally, because Beech Ridge was not adequately informed about the cultural and historic resources within the 5-mile radius of the project, the evidentiary hearing concluded with no discussion whatsoever concerning plans to mitigate the project's impact on cultural, historic, religious and recreational resources.

C. The Commission's August 28, 2006 Order Granting Beech Ridge's Application

On August 28, 2006 the Commission entered a Final Order granting Beech Ridge's application. Despite applying a two-part analysis to the previous two cases decided under W.Va. Code § 24-2-11c, *Western Greenbrier CO-Generation, LLC*, Case No. 05-0262-E-CS-CN (*Commn. Order* Nov. 21, 2005) and *Longview Power, LLC*, Case No. 03-1860-E-CS (*Commn. Order* Aug. 27, 2004), the Commission's Order contains no findings of fact or conclusions of law referencing or otherwise applying this two-part analysis to the instant case.

In the Order, the Commission denied the pending motions to dismiss filed by intervenors Michael A. Woelfel and MCRE, concluding, "[t]he Commission agrees with Staff that Beech Ridge's map was sufficient to allow the application to be fully debated. Therefore, we conclude that Beech Ridge has substantially complied with the rule and the Commission should not dismiss Beech Ridge's application." *Commn. Order*, p. 73 (Aug. 28, 2006). The Order contains no citation to, or analysis of, EWG Siting Rules 150 C.S.R. § 30-3-3.1.o and 150 C.S.R. § 30-3-3.1.h.1. The Order contains no findings of fact or conclusion of law illustrating the analysis under which the Commission concluded that Beech Ridge "substantially complied" with the rule.

Of the 26 findings of fact listed in the Order, only four arguably address locations required to be depicted on the 5-mile radius map pursuant to EWG Siting Rules 150 C.S.R. § 30-

3-3.1.o and 150 C.S.R. § 30-3-3.1.h.1. Finding of fact No. 3 discusses the past and present land use of MeadWestvaco's property, on which the project will be located. The Commission notes that part of the property has previously been mined and several mines are still active. Beech Ridge's 5-mile radius map does not disclose this land use. Finding of fact No. 5, notes, "MeadWestvaco allows public access on the tract for activities such as hunting, berry picking, and picnicking. If the wind project is built, this public access will continue." *Commn. Order*, p. 70 (Aug. 28, 2006) (citation to record omitted). Although the listed activities certainly indicate that MeadWestvaco's property is a "public or private recreational area" or "hunting or fishing areas," as contemplated by EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1.F, the property is not so depicted on Beech Ridge's 5-mile radius map.

Finding of fact No. 12 provides, "Utility lines and communication towers exist where the project is planned." *Commn. Order*, p. 71 (Aug. 28, 2006) (citation to record omitted). EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1.B requires an applicant to depict existing utility corridors within the 5-mile radius of the project. Beech Ridge's 5-mile radius map does not depict any utility lines other than its own proposed transmission line. Finding of fact No. 23 indicates that, "the remnants of at least two strip mines, a tipple and a slag dump are closer to Duo than the H1 and H2 turbines." *Commn. Order*, p. 72 (Aug. 28, 2006). Remarkably, the Commission cites Beech Ridge's 5-mile map as the source of this finding of fact. The 5-mile map filed with the application contains no such land use data and provides no similar information regarding the area around Duo that could support the Commission's finding of fact.

Of the 67 Conclusions of Law contained in the Order, only three arguably address locations required to be depicted on the 5-mile radius map pursuant to EWG Siting Rules 150 C.S.R. § 30-3-3.1.o and 150 C.S.R. § 30-3-3.1.h.1. Conclusion of Law No. 31 addresses the

public's continued access to MeadWestvaco's tract for recreational purposes and further concludes that the project will not affect local waters. *Commn. Order*, p. 79 (Aug. 28, 2006). Conclusion of Law No. 36 likewise concerns the projects impact on local waters. *Id.* at p. 80. Finally, Conclusion of Law No. 53 addresses pre-construction conditions concerning the historical/archaeological significance study and mitigation plans attached to the certificate. *Id.* at p. 83.

The Order contains no findings of fact or conclusions of law concerning potential impacts to the major population centers and geographic boundaries required on the 5-mile radius map. Likewise, the Order contains no findings of fact regarding potential impacts to: (1) major transportation routes; (2) bodies of water that may be directly affected by the project; (3) topographic contours; (4) major institutions; (5) incorporated communities within the 5-mile radius; (6) public or private recreation areas, parks, forests, hunting or fishing areas, or similar facilities within the 5-mile radius of the project, other than MeadWestvaco's property; (7) historic scenic areas or places; (8) religious places; (9) archaeological places or places otherwise of cultural significance, including districts, sites, buildings, structures and objects which are recognized by, registered with, or identified as eligible for registration by the National Registry of historic Places, or any state agency; or (10) land use classifications, other than the findings regarding MeadWestvaco's property and the area around Duo; all of which are required to be depicted on the 5-mile radius map pursuant to EWG Siting Rule 150 C.S.R. § 30-3-3.1.h.1.

The Order is completely devoid of any findings of fact or conclusions of law regarding the impact of the proposed project on the preservation and continued meaningfulness of any historic, scenic, religious or archaeological areas or places; or places otherwise of cultural significance depicted on the 5-mile radius map, required by EWG Siting Rules 150 C.S.R. § 30-

3-3.1.o.1.A. The Order does not contain any findings of fact or conclusions of law regarding plans to mitigate adverse impacts on these landmarks, required by EWG Siting Rules 150 C.S.R. § 30-3-3.1.o.1.B.

Instead, despite the mandatory language of the Rule requiring the information to be submitted with the application, the Commission granted the siting certificate on the condition that, prior to commencing construction, Beech Ridge file any necessary environmental permits and/or certifications, including any letters from the West Virginia Division of History and Culture or the West Virginia State Historic Preservation Office indicating either that Beech Ridge does not need to take further action or outlining what action Beech Ridge needs to take to be in compliance with that agency's rules or laws. *Commn. Order*, p. 88 (Aug. 28, 2006). The Commission also required Beech Ridge to file evidence of acceptance and/or rejection of the historical/archaeological study with any required mitigation plans prior to commencing construction. *Id.*

D. MCRE's Petition for Reconsideration

On September 18, 2006, MCRE filed its Petition for Reconsideration requesting the Commission to reconsider its August 28, 2006 Order and dismiss Beech Ridge's application for failure to comply with the EWG Siting Rules. MCRE's petition reiterated the points made in its motion to dismiss and subsequent briefs. MCRE again noted the deficiencies with Beech Ridge's 5-mile radius map and the lack of evidence regarding the proposed project's impact to cultural resources within the 5-mile radius of the project site.

In its petition, MCRE asserted that due process requires an agency to abide by its rules until they are lawfully changed, especially when an individual, or in this case an unincorporated group of individuals, has reasonably relied on agency regulations promulgated for its benefit.

MCRE further argued that an agency regulation may not, under the guise of interpretation, be modified, revised, amended or rewritten. *MCRE Petition for Reconsideration*, pp. 1-2 (September 18, 2006).

MCRE argued that the use of the word "shall" in the EWG Siting Rules indicated that the requirements imposed therein were mandatory. *MCRE Petition for Reconsideration*, p. 2 (September 18, 2006). MCRE noted that the plain, unambiguous and mandatory language of EWG Siting Rules 150 C.S.R. § 30-3-3.1.o requires an applicant to identify, map, estimate the impact of the proposed facility, and describe any plans to mitigate any adverse impacts on "historic, scenic, religious or archaeological areas or places; or places otherwise of cultural significance" depicted on the 5-mile map. Thus the rule clearly requires this information to be provided as a condition precedent to approval of an application for a siting certificate. MCRE asserted that the Commission's August 28, 2006 Order had effectively rewritten this rule as a condition subsequent to approval. *MCRE Petition for Reconsideration*, p. 13 (September 18, 2006).

The petition also addressed the two-part analysis adopted by the Commission and the Commission's duty under W.Va. Code § 24-2-11c. MCRE argued that the language of the Commission's prior decisions reflects the importance of weighing the impacts the proposed facility may have on communities in the local vicinity of the project as part of the balancing test conducted pursuant to W.Va. Code § 24-2-11c(c). Moreover, MCRE asserted that the rules applicable to EWG siting certificate cases were promulgated to insure that the Commission had before it all relevant information necessary to conduct the two-part analysis established in the *Longview* and *Western Greenbrier* cases as part of the balancing test required by W.Va. Code § 24-2-11c(c). *MCRE Petition for Reconsideration*, p. 14 (September 18, 2006).

MCRE argued the language of the EWG Siting Rules clearly places the burden of mapping the 5-mile radius on the applicant, yet the result of the Commission's interpretation effectively places the burden upon intervenors to adequately map the local vicinity. MCRE contended that this results in a "catch 22" situation for local intervenors. If an applicant files an incomplete 5-mile map and local intervenors do not file a complete map of their own, they risk the Commission concluding the area around the project and their communities is a cultural wasteland. On the other hand, if an intervenor does file its own 5-mile map, the map will effectively supplement the map filed by the applicant. Under either scenario the applicant benefits at the intervenor's expense. *MCRE Petition for Reconsideration*, p. 16-17 (September 18, 2006).

Finally, MCRE noted that given the Commission's refusal to dismiss Beech Ridge Energy's application for failure to comply with EWG Siting Rules 150 C.S.R. §30-3-3.1.h.1 and 150 C.S.R. § 30-3-3.1.o.1.A-B, and given the fact that very few of the Commission's findings of fact or conclusions of law address the impact of the project on locations required to be mapped by those Rules, MCRE can only conclude that the Commission failed to properly consider the impact of the project on communities within the local vicinity. *MCRE Petition for Reconsideration*, p. 22-23 (September 18, 2006).

In response to the issues raised by MCRE concerning Beech Ridge's compliance with the EWG Siting Rules, Beech Ridge argued that MCRE simply interpreted the rules differently than Beech Ridge and the Commission, and that MCRE believes its interpretation is the only possible interpretation. *Beech Ridge Resp. to Petitions for Reconsideration*, p. 3 (September 28, 2006).

The Council filed its Reply to MCRE's Petition for Reconsideration on September 26, 2006.

The Council argued that MCRE's petition should be denied because it added nothing of

substance to the original arguments. *Council's Resp. to Petitions for Reconsideration*, p. 3 (September 26, 2006). Additionally, the Council argued that the EWG Siting Rules were ambiguous and that the Commission therefore had the authority to interpret them. *Id.* at p. 4.

E. The Commission's January 11, 2007 Order Denying MCRE's Petition

On January 11, 2007, the Commission entered an Order denying MCRE's Petition for Reconsideration. Finding of Fact No. 11 addresses the scale of Beech Ridge's 5-mile radius map noting that a one-inch line on the scale set forth in the EWG Siting Rules would be about nine-tenths of an inch on the scale provided by Beech Ridge's 5-mile map. Finding of Fact No. 12 notes that Beech Ridge's map shows recreational areas, 11 churches, three cemeteries and three historical sites. The map is based upon data from WVU's GIS Technical Center; SHPO for historical and cultural areas; and local brochures for recreation, tourism and cultural areas. Finding of Fact No. 46 states that Mr. Groberg testified that he had no reason to doubt the features appearing on MCRE's map existed, but he did not agree the information on MCRE's map was required. *Commn. Order*, p. 46 (January 11, 2007).

The Order contains no findings of fact regarding exactly how many churches, cemeteries, recreational areas and historical sites are actually in the 5-miles radius of the project. Likewise, the Order is completely devoid of any findings of fact regarding the impact of the proposed project on the preservation and continued meaningfulness of any historic, scenic, religious or archaeological areas or places; or places otherwise of cultural significance depicted on the 5-mile radius map, required by EWG Siting Rules 150 C.S.R. § 30-3-3.1.o.1.A. Nor does the Order contain any findings of fact regarding plans to mitigate adverse impacts on these landmarks, required by EWG Siting Rules 150 C.S.R. § 30-3-3.1.o.1.B.

The Order contains 15 conclusions of law regarding the sufficiency of Beech Ridge's 5-mile radius map. The Commission concluded that,

3. Whether utility corridors, major transportation routes, cultural and historical landmarks, and so forth, are required on the five-mile map depends upon their significance, and reasonable minds can differ on such matters as whether small private cemeteries are required, or whether a local road is a major transportation corridor.
4. While Beech Ridge's five-mile map was not perfect, it showed the majority of the area's cultural and historic interests, as well as other items required by the Commission's Siting Rules. Accordingly, Beech Ridge's five-mile map was sufficient under the Commission's Siting Rules.
5. The Commission extensively addressed the sufficiency of Beech Ridge's five-mile map in its August 28, 2006, order ... MCRE has presented nothing new in this regard, and the Commission should stand by its earlier decision.
6. The Commission has taken great care throughout these proceedings to require that Beech Ridge's maps provide adequate information.

Commn. Order, p. 52 (January 11, 2007). In regard to MCRE's argument that the Commission had effectively rewritten EWG Siting Rule 150 C.S.R. § 30-3-3.1.o.1.A-B, the Commission concluded,

7. Utility and EWG applicants must satisfy the requirements of several state agencies. It is common practice, and in the best interest of the state, for the various governmental agencies to work cooperatively. It would be grossly inefficient to require applicants to proceed through the various regulatory processes in serial fashion.
8. It is in the public interest for the Commission to process issues relating to the PSC's jurisdiction promptly and for the Commission to require applicants to comply with the judgments rendered by sister governmental agencies.
9. The Commission should stand by its decision to conditionally grant Beech Ridge a siting certificate, provided that SHPO

indicates either that Beech Ridge does not need to take further action or outline what action Beech Ridge must take to be in compliance with that agency's rules/laws, and that Beech Ridge files the historical/archaeological significance study with any required mitigation plans prior to commencing construction.

10. Compliance with the requirements of sister agencies is indeed part of the siting certificate process. However, the Commission should not require all other regulatory proceedings to be complete, before an applicant may begin the PSC process. Instead, applicants must demonstrate to the Commission that they are working in good faith to complete the requirements of sister state agencies, as well as any relevant federal agencies.
11. In this particular case, Beech Ridge's testimony, as well as SHPO letters, establish that Beech Ridge is working in good faith on the SHPO process relating to cultural and historical sites.
12. MCRE was not deprived of the right to litigate the importance of the cultural landmarks because the Commission accepted Beech Ridge's five-mile map. The Commission required a substantial showing of important community areas, and MCRE prefers a more extensive showing of community highlights. MCRE's [sic] is not deprived of due process by virtue of the fact that the Commission does not agree with MCRE.
13. MCRE's argument to dismiss Beech Ridge's application due to map insufficiencies, consistent with a 1993 order in AEP, has been made in prior pleadings, and MCRE has provided nothing new for the Commission to consider.
14. Moreover, the AEP case can be distinguished because the AEP map was so insufficient that it was not possible to adequately review the project. In comparison, Beech Ridge's five-mile map contained sufficient information for the case to proceed.

Commn. Order, pp. 52-53 (January 11, 2007) (citations to record omitted). Finally, the Commission concluded,

7. C&P v. PSC, 171 W.Va. 708, 301 S.E.2d 798 (1983), does not require the Commission to grant MCRE's five-mile map arguments. While we agree with the precept that an agency

must abide by its rules, we also agree with Building Trades and Beech Ridge that this is a case of first impression and the Commission was faced with ambiguous matters, such as whether a certain utility line was a major corridor. Therefore, there was no long-standing rule to be applied, as there was in C&P.

Commn. Order, p. 53 (January 11, 2007). It is from this Order that MCRE appealed.

IV. ASSIGNMENTS OF ERROR

- A. **The Court should reverse the Commission's January 11, 2007 Order denying MCRE's Petition for Reconsideration because the Commission has, under the guise of interpretation, arbitrarily ignored, revised, or amended its EWG Siting Rules resulting in an application of the rules that does not conform to the purpose and wording of the Rules or the intent of the W.Va. Code § 24-2-11c.**
- B. **As a result of the Commission's arbitrary revision of the EWG Siting Rules, the Commission's Orders do not include adequate findings of fact or conclusions of law to reflect that the Commission properly appraised and balanced the interests of, and potential social and environmental impacts to, the citizens and communities located within the vicinity of the proposed project.**

V. POINTS AND AUTHORITIES RELIED UPON

- A. **"In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence...The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." Syl. Pt. 2, *Monongahela Power Co. v. Public Service Commission*, 166 W. Va. 423, 276 S.E.2d 179 (1981).**
- B. **"Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).**

- C. "The notice element of due process requires that administrative boards follow their own rules and statutes." Syl. Pt. 2, *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980).
- D. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. pt. 1, *Trimboli v. Board of Education*, 254 S.E.2d 561 (W.Va. 1979).
- E. "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Division v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989).
- F. "It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' that is, so long as the interpretation 'sensibly conforms to the purpose and wording of the regulations[.]'" *Martin v. OSHA Review Comm'n*, 499 U.S. 144 (1991)
- G. "Rules and Regulations of ...[an agency] must faithfully reflect the intention of the legislature; where there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the ...[agency's] Rules and Regulations that it has in the statute." Syl. Pt. 5, *Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995)
- H. "Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage." Syl. Pt. 3, *Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995)
- I. If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute. A valid legislative rule is entitled to substantial

deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary and capricious. (citation omitted). Syl. Pt. 4, *Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995)

- J. "It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority." Syl. Pt. 3, *Rowe v. W.Va. Dept. of Corrections*, 170 W.Va. 230, 292 S.E.2d 650 (1982)
- K. "The Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public." Syl. Pt. 9, *The Affiliated Construction Trades Foundation v. The Public Service Commission of West Virginia*, 211 W.Va. 315, 565 S.E.2d 778 (2002).

VI. ARGUMENT

A. Standard of Review

Generally speaking, the standard of review to be applied to final orders of the Commission is an abuse of discretion standard. This Court has held,

In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. *We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected*, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

Syl. Pt. 2, *Monongahela Power Co. v. Public Service Commission*, 166 W. Va. 423, 276 S.E.2d 179 (1981) (emphasis added). It is therefore clear that, as part of its review, this Court will examine the manner in which the Commission has employed the methods of regulations which it has selected.

With regard to interpretation of an agency's rules or regulations, this Court has held, "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995). At issue in the present case is the Commission's interpretation and application of its EWG Siting Rules. Accordingly, the Court should apply a *de novo* standard when reviewing the Commission's Orders. Under this standard of review, it is abundantly clear that the Commission's January 11, 2007 Order should be reversed because the Commission's interpretation and application of EWG Siting Rules 150 C.S.R. § 30-3-3.1.o and 150 C.S.R. § 30-3-3.1.h.1 does not conform to the purpose and wording of those rules or that statute under which they were enacted.

B. The Court should reverse the Commission's January 11, 2007 Order denying MCRE's Petition for Reconsideration because the Commission has, under the guise of interpretation, arbitrarily ignored, revised, or amended its EWG Siting Rules resulting in an application of the rules that does not conform to the purpose and wording of the Rules or the intent of the W.Va. Code § 24-2-11c.

MCRE asserts that the Commission's January 11, 2006 Order denying its Petition for Reconsideration should be reversed because the record clearly reflects that the Commission has arbitrarily rewritten or ignored its EWG Siting Rules to the detriment of intervenors and the general public living within the vicinity of the project. The siting rules at issue in this case were promulgated by the Commission to ensure that applications for siting certificates to construct and operate an EWG facility contain adequate data for the Commission to consider the potential

impacts the proposed project will have on areas within a five-mile radius of the project site. The Commission's interpretation and application of these rules, as evidenced by its August 28, 2006 and January 11, 2007 Orders, effectively relieved this applicant of the duty to provide complete data concerning the area in the immediate vicinity of the project and the potential impacts that the project may have on cultural and historical resources located within that area.

In its petition for reconsideration, MCRE urged the Commission to reconsider its prior Order because the plain language of the EWG Siting Rules requires compliance with the disclosure requirements imposed therein in order for an application to be deemed "complete." As such, MCRE argued that compliance with the EWG Siting Rules was a condition precedent to approval of an application for a siting certificate. MCRE contended that the Commission's August 28, 2006 Order had effectively rewritten the rules to require compliance with EWG Siting Rule 150 C.S.R. § 30-3-3.1.o as a condition subsequent to approval. *MCRE Petition for Reconsideration*, p. 13 (September 18, 2006).

This Court has long held that, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. pt. 1, *Trimboli v. Board of Education*, 254 S.E.2d 561 (W.Va. 1979). In addition, the Court has concluded that the notice element of due process requires an administrative body to comply with its own rules and processes. Syl. Pt. 2, *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980). Moreover, the Court has long held that, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Division v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

In its January 11, 2007 Order denying MCRE's petition for reconsideration, the Commission agreed with MCRE's contention that an agency must abide by its rules. However,

as a rationale for its interpretation of the EWG Siting Rules, the Commission concluded that this was a case of first impression, that the Commission was faced with ambiguous matters, and that there was no long-standing rule to be applied. *Commn. Order*, pp. 52-53 (January 11, 2007).

This Court has stated that interpretation of an agency regulation is proper when an ambiguity exists. However, such interpretation is impermissible when the language of the rule is clear and unambiguous. See *Consumer Advocate Division v. Public Service Commission*, 182 W.Va. 152, 156, 386 S.E.2d 650, 654 (1989). Likewise, this Court has held that an agency's interpretation of its rules is entitled some deference, unless the language of the rule is clear and unambiguous. See *Syl. Pt. 1, Ooten v. Faerber*, 181 W.Va. 592, 383 S.E.2d 774 (1989).

In West Virginia, there does not appear to be a clear test for determining whether an agency's interpretation of an ambiguous administrative rule is proper. However, the United States Supreme Court has held that,

It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' that is, so long as the interpretation 'sensibly conforms to the purpose and wording of the regulations[.]

Martin v. OSHA Review Comm'n, 499 U.S. 144 (1991) (internal citations omitted). Also, prior opinions of this Court provide persuasive authority for the position that an agency's interpretation of an ambiguous administrative rule must be based upon a permissible construction of the rule and the statute it was intended to administer.

In *Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995), this Court held,

Rules and Regulations of ...[an agency] must faithfully reflect the intention of the legislature; where there is clear and unambiguous

language in a statute, that language must be given the same clear and unambiguous force and effect in the ...[agency's] Rules and Regulations that it has in the statute.

Syl. Pt. 5, *Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995) (citations omitted). The Court enunciated the test to be applied when reviewing an agency's rule:

Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.

If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary and capricious. (citation omitted).

Syl. Pts. 3 & 4, *Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

In the *Appalachian Power* case, the Court was reviewing the sufficiency of, rather than the agency's interpretation of, an administrative rule of the West Virginia State Tax Department. Although not directly on point, the rationale behind the Court's ruling is equally applicable in a situation such as the present, where the Court is reviewing an agency's interpretation of its rule

rather than the sufficiency of the rule itself. In other words, where an administrative rule contains ambiguous provisions, the Court should determine whether the agency's interpretation of the rule is based upon a permissible construction of the rule in light of the purpose behind the rule and the statute it was intended to interpret or administer.

Based upon the authorities discussed above, MCRE urges this Court to reject the Commission's interpretation of the EWG Siting Rules and conclude that, rather than interpret the rules, the Commission has attempted to rewrite them to avoid dismissing Beech Ridge's application. Beech Ridge, the Council and the Commission all conclude that the language of the EWG Siting Rules is ambiguous, thus requiring the Commission to interpret them. MCRE contends that, even if the language of the rules is ambiguous, the Commission is still required to interpret them in a manner that "sensibly conforms to the purpose and wording of the regulations" *Martin*, 499 U.S. 144 (1991).

The Commission's interpretation of EWG Siting Rules 150 C.S.R. § 30-3-3.1.o and 150 C.S.R. § 30-3-3.1.h does not conform to the purpose and wording of the rules or the intent of the controlling statute, W.Va Code § 24-2-11c. In fact, the Commission's interpretation of the EWG Siting rules is not even consistent with the recognized purpose of the Commission, which is to serve and safeguard the interests of the public. *See* Syl. Pt. 9, *The Affiliated Construction Trades Foundation v. The Public Service Commission of West Virginia*, 211 W.Va. 315, 565 S.E.2d 778 (2002).

As part of the balancing test called for in W.Va. Code § 24-2-11c, the Commission is required to "appraise and balance the interests of the public[.]" In performing this analysis, the Commission must consider the interests of, and impacts to, the citizens and communities located within the immediate vicinity of the project. The Commission's prior cases illustrate this point.

The Commission's two-part analysis adopted in *Longview Power, LLC*, reflects that, as part of the balancing test conducted pursuant to W.Va. Code § 24-2-11c(c), the Commission will consider: (i) community residents' interest in living separate and apart from such a facility; (ii) a community's interest that a facility's negative impacts be as minimally disruptive to existing property uses as is reasonably possible; and (iii) the social and environmental impacts of the proposed facility on the local vicinity, the surrounding region, and the State.

In its Petition for Reconsideration, MCRE asserted that the EWG Siting Rules were promulgated to insure that the Commission had before it all relevant information necessary to conduct the two-part analysis established in the *Longview* case. Specifically, MCRE argued that EWG Siting Rules 150 C.S.R. §30-3-3.1.h and 150 C.S.R. § 30-3-3.1.o were promulgated to ensure that the Commission had before it all relevant data to assess a proposed facility's impacts within the 5-mile radius of the project. *MCRE Pet. for Reconsideration*, p. 14-15 (September 18, 2006).²

The Plain language of W.Va. Code § 24-2-11c(c) charges the Commission with the task of "appraising and balancing the interests of the public." The Commission's prior decisions reflect that, as part of its analysis, the Commission will consider the interest of, and impact to, citizens and communities located within the local vicinity of the proposed facility. Finally, the plain language of EWG Siting Rules 150 C.S.R. §30-3-3.1.h and 150 C.S.R. § 30-3-3.1.o clearly reflect that the purpose of these rules is to provide the Commission with information about the area most likely to be impacted by the proposed facility. Given that most, if not all, of the

² It should be noted that in its motion to dismiss and subsequent petition for reconsideration, MCRE provided the Commission with persuasive precedent regarding the rationale behind a similar 5-mile radius map rule, wherein the Commission noted, "[t]he purpose of the rule is to give the Commission, parties, and the public an overview of the potential impacts of siting the line." *In Re Appalachian Power Company*, Case No. 93-0123-E-CN, Page 4, (May 10, 1993).

potential negative impacts of the proposed facility will occur within the area immediately surrounding the project site, MCRE contends that any "interpretation" of ambiguous provisions should favor disclosure of more information about the resources within this area, not less. Such interpretation would be consistent with the purpose of the rule and statute, which is to determine what is located in the area and how it will be affected.

The Commission's interpretation of EWG Siting Rule 150 C.S.R. §30-3-3.1.h in no way conforms to the purpose and wording of the regulation. The Commission concluded that Beech Ridge's 5-mile radius map "substantially complied" with the EWG Siting Rules and was sufficient to allow the application to be fully debated. The Commission's conclusion is not supported by any findings of fact or conclusion of law regarding what it deems to be "substantial compliance."

Neither of the Commission's Orders in this case contain findings of fact or conclusions of law indicating how many churches, cemeteries, parks, recreational areas, hunting or fishing areas, historic sites, or other sites required to be on the 5-mile map are actually in the area, or how they may be affected. Thus for all intents and purposes it is impossible to determine whether Beech Ridge "substantially complied" with the rules. The map's deficiencies render it inadequate and completely useless for fulfilling the purpose of the rule; to provide the Commission with data necessary to assess the project's potential impacts on the communities within the 5-mile radius. Moreover, the paucity of findings of fact or conclusions of law in both Orders addressing the impact of the project in the local vicinity, and the few citations to Beech Ridge's map in the record, suggests that either the Commission paid little mind to these concerns, or was unable to because of the insufficiencies of Beech Ridge's 5-mile radius map.

MCRE also argues that, as a matter of policy, the Commission's "interpretation" of EWG Siting Rule 150 C.S.R. §30-3-3.1.h, regarding the 5-mile radius map, should be rejected because "substantial compliance" may very well lead to "minimal compliance." The language of the Rule clearly places the burden of mapping the 5-mile radius on the applicant. The "substantial compliance" interpretation adopted by the Commission leads to an absurd, convoluted interpretation of the 5-map map rule that places the burden of mapping the 5-mile radius on intervenors.

If an applicant files a 5-mile map which is not of a proper scale, does not clearly indicate or identify topographic contours, bodies of water, community recreation areas, or places of religious, historical, archaeological, architectural or other cultural significance, the Commission is presented inaccurate information that portrays the area within the local vicinity of the project as a cultural wasteland. If the 5-mile map submitted by an applicant portrays the local vicinity as a cultural wasteland, then clearly any adverse impacts of the proposed project will be considered minimal. As such, it is in an applicant's best interest to "minimally comply" with the 5-mile mapping requirement.

On the other hand, local citizens have a tremendous interest that the Commission receive all pertinent information regarding the potential adverse impact a proposed project may have on their communities and, if an applicant is permitted to file an inadequate map, the burden must then shift to the intervenors to demonstrate the resources in their community. This is an absurd result and is clearly not contemplated by the rules. Moreover, in future cases there may not always be intervenors appearing before the Commission to provide information about their communities. As such, the Commission interpretation should require strict compliance with the

EWG Siting Rules to ensure it receives all pertinent information necessary to carry out its function and adequately serve the public interest.

The Commission's conclusions of law regarding EWG Siting Rule 150 C.S.R. § 30-3-3.1.o provides conclusive proof that the Commission has attempted to "amend" the rule rather than "interpret" it. The Commission's interpretation of the rule is completely unreasonable because the interpretation absolutely cannot be construed to "sensibly conform to the purpose and wording of the regulations" *Martin*, 499 U.S. 144 (1991). MCRE asserts that the Commission has attempted to "interpret" the rule out of existence.

As discussed above, W.Va. Code § 24-2-11c charges the Commission with appraising and balancing the interest of the public. As part of this analysis the Commission must consider the potential impacts to the communities within the immediate vicinity of the project. EWG Siting Rule 150 C.S.R. § 30-3-3.1.o requires an applicant to identify, map, estimate the impact of the proposed facility, and describe any plans to mitigate any adverse impacts on "historic, scenic, religious or archaeological areas or places; or places otherwise of cultural significance" depicted on the 5-mile map. The plain language of the EWG Siting Rules mandates that an applicant submit all required information with its application. The Commission's "interpretation" of EWG Siting Rule 150 C.S.R. § 30-3-3.1.o does not require an applicant to submit the information required by the rule until after its application has been granted!

The rationale behind the Commission's conclusions makes absolutely no sense whatsoever in light of the language and purpose of EWG Siting Rule 150 C.S.R. § 30-3-3.1.o. The Commission concluded that EWG applicants must satisfy the requirements of several state agencies and that it would be grossly inefficient to require an applicant to proceed through the various regulatory processes in serial fashion. Thus the Commission should get its part over with

promptly and then condition a certificate on an applicant's compliance with the regulations of other agencies. *Commn. Order*, pp. 52-53 (January 11, 2007).

It is apparent from the Commission's conclusions of law that the Commission deems location of historic or cultural sites; assessment of potential impacts to those sites; and mitigation plans to be a SHPO concern, not a Commission concern.³ However, W.Va. Code § 24-2-11c and the Commission's prior decisions under the statute require the Commission to appraise and balance the interest of the public. MCRE asserts that this process requires the Commission to assess potential impacts to the communities located in the immediate vicinity of the project, including potential impacts to cultural or historic resources located in the area. The Commission's conclusion that Beech Ridge should consult with SHPO and provide the information required by EWG Siting Rule 150 C.S.R. § 30-3-3.1.o after the certificate has been granted effectively precludes the Commission from considering the potential impacts to cultural and historic resources as part of its analysis. The result in this case is that the Commission has concluded that the project's potential positive impacts outweigh the potential negative impacts, without considering all of the potential negative impacts. This is clearly not what is contemplated by the language of the rule, the Commission's prior decisions and W.Va. § 24-2-11c.

Beech Ridge has cited EWG Siting Rule 150 C.S.R. § 30-5-5.1 as support for the Commission's Order granting the siting certificate conditioned on consultation with SHPO and compliance with SHPO regulations. EWG Siting Rule 150 CSR § 30-5-5.1 authorizes the

³ Ironically, State Historic Preservation Office regulations indicate that, in addition to conducting its own evaluation, SHPO will request the Commission to conduct an assessment of a project's impact on any landmarks identified by SHPO! See *Standards and Procedures for Administering State Historic Preservation Programs*, 82 C.S.R. § 2-5-5.3.e. (If historic areas are identified within the project area, the Division shall request the agency to conduct an assessment of the effect of the project on the resource(s), in accordance with subpart 5.4. of this rule, as part of the process to obtain a permit as stipulated under W.Va. Code 29-1-8(b)).

Commission to issue a siting certificate contingent upon the receipt of approvals or permits from other governmental agencies in the event the applicant has not obtained the required permits, or met the requirements of other governmental agencies within 100 days of the filing of the application. The language of EWG Siting Rule 150 C.S.R. § 30-3-3.1.o.1 makes no mention of the SHPO or any required permits. Moreover, MCRE contends that this rule applies to permits or requirements of other agencies which are not required to be presented to the Commission under the EWG Siting Rules. An example would be a building permit to be issued by a county or municipal agency, or a storm water drainage permit to be issued by the West Virginia Division of Water Quality.

MCRE does not dispute that, if a project is constructed, an applicant will have to comply with regulations, or obtain permits from various other agencies. Many such permits are bureaucratic in nature and it would be unreasonable to require an applicant to obtain all necessary permits before an application could be granted. It would not make sense to require an applicant to undertake the burden and expense of obtaining a building permit, or a designation as an EWG from the Federal Energy Regulatory Commission, before the applicant knows for sure whether its application will be granted. Most of these types of permits are not required to be presented to the Commission in an application under the EWG Siting Rules. However, MCRE asserts that it is entirely improper to seek a condition which, in effect, relieves an applicant of complying with the disclosure requirements of certain EWG Siting Rules. If an applicant wishes to be relieved of the disclosure requirements of certain EWG Siting Rules it must request a waiver pursuant to EWG Siting Rule 150 CSR § 30-1-1.6. In the instant case, Beech Ridge did not request a waiver of EWG Siting Rule 150 C.S.R. § 30-3-3.1.o.

EWG Siting Rule 150 C.S.R. § 30-3-3.1.o clearly requires the potential impacts and mitigation plans regarding recreational areas and cultural/historic resources to be presented in the application to be considered in the Commission's analysis. It may be true that Beech Ridge will have to present the same evidence, or go through the same process, with the West Virginia State Historic Preservation Office in order to comply with that agency's regulations. However, it is the Commission who must decide whether the cumulative positive impacts caused by the project will outweigh the cumulative negative impacts, not the WVSHPO.⁴ Without all of the information regarding the social and environmental impacts required by the EWG Siting Rules, including the information concerning potential impacts to cultural, historic and recreational areas, the Commission simply cannot properly conduct its two-part analysis.

MCRE contends that when an applicant is required to present evidence involving data required by one of the EWG Siting Rules to another agency in order to obtain a permit or approval from that agency, that process should occur prior to, or in conjunction with, the process before the Commission. If this were to occur then an applicant could subpoena someone from the sister agency to testify, or otherwise provide the Commission with evidence of the sister agency's conclusions regarding potential impacts to resources within that agency's purview as well as mitigation plans the agency approves of which will alleviate any potential impacts. The Commission will then have the information it needs to consider the potential cumulative impacts as part of its balancing test.

⁴ MCRE believes that the Commission's conditioning of Beech Ridge's siting certificate on consultation with, and compliance with SHPO and compliance with SHPO regulations constitutes an impermissible delegation of authority. In effect, the Commission has delegated the final decision of whether this project will be built to the WVSHPO. According to the condition, the WVSHPO will have the final say on whether this project will be built. This Court has held that an agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority. *Syl. Pt. 3, Rowe v. W.Va. Dept. of Corrections*, 170 W.Va. 230, 292 S.E.2d 650 (1982). MCRE contends that the same rationale should apply to an agency's interpretation of existing rules. The Legislature has conferred exclusive jurisdiction to decide whether to grant an EWG siting certificate on the Commission. The Commission now seeks to "pass the buck" to another agency.

MCRE further asserts that practice of conditioning certificates upon consultation and compliance with WVSHPO is completely unfair to intervenors, such as MCRE, who have become involved in a case out of concerns regarding a proposed project's potential negative impacts on their communities. A review of the WVSHPO regulations reveals that SHPO does not conduct hearings, such as the evidentiary hearing before the Commission, wherein a party may cross-examine or otherwise challenge the conclusions and findings an applicant submits to that office. *See Generally* 82 CSR § 2-1-1.1, *et seq.* SHPO's regulations do reflect that members of the public may participate in the review process, but do not require notice of the review to be published. Nor do those regulations describe any formal procedure for citizen involvement in the review process. *82 C.S.R. § 2-5-5.1.d.*

Based upon the conclusions reached in its Orders, it is apparent that the Commission believes that the requirements of EWG Siting Rule 150 C.S.R. § 30-3-3.1.o are satisfied by conditioning a certificate on SHPO approval. This interpretation essentially contemplates a process wherein an applicant submits studies and other data *ex parte* to WVSHPO, without formal notice to interested parties that they may participate in the review process, and without a formal procedure whereby a party can directly challenge the accuracy or completeness of the data submitted by the applicant. The Commission has essentially concluded that the interests of the public are served by the above-described process rather than requiring an applicant to include information about cultural and historical resources in its application. As a result, intervenors are denied the opportunity to review and challenge Beech Ridge's evidence regarding potential impacts to cultural and historic resources located within their communities and sufficiency of any proposed mitigation plans.

In sum, although the Court pays deference to an agency's interpretation of its rules where an ambiguity exists, the agency's interpretation must be reasonable, that is it must sensibly conform to the purpose and language of the rule. Agencies may not arbitrarily ignore or revise their rules unless they are repealed or revised pursuant to lawful procedures. In the present case, the Commission's "interpretation" of EWG Siting Rule 150 C.S.R. § 30-3-3.1.h does not conform to the purpose of the rule which is to gather data in order to properly appraise and balance the various interests noted in W.Va. Code § 24-2-11c and the Commission's two part analysis adopted in *Longview*. The Commission's "interpretation" EWG Siting Rule 150 C.S.R. § 30-3-3.1.o.1 is not reasonable because it does not conform to the purpose or the language of the rule and essentially attempts to write the rule out of existence. For these reasons the Court should reverse the Commission's January 11, 2007 Order.

C. As a result of the Commission's arbitrary revision of the EWG Siting Rules, the Commission's Orders do not include adequate findings of fact or conclusions of law to reflect that the Commission properly appraised and balanced the interests of, and potential social and environmental impacts to, the citizens and communities located within the vicinity of the proposed project.

The primary purpose of the Commission is to serve the interests of the public. *See* Syl. Pt. 1, *West Virginia-Citizen Action Group v. Public Service Comm'n*, 175 W.Va. 39, 330 S.E.2d 849 (1985). The interest of the public are a primary concern in EWG Siting Certificate cases because the Legislature has provided, "In deciding whether to issue, refuse to issue, or issue in part and refuse to issue in part a siting certificate, the commission shall appraise and balance the interests of the public, the general interests of the state and local economy, and the interests of the applicant." *W.Va. Code § 24-2-11c(c)*.

In 2004, the Commission adopted a two-part analysis for the purpose of conducting the balancing test required by W.Va. Code § 24-2-11c(c). The Commission two-part analysis clearly

reflects the importance of weighing the impacts the proposed facility may have on communities in the local vicinity of the project as part of the balancing test conducted pursuant to W.Va. Code § 24-2-11c(c).

The EWG Siting Rules were enacted to ensure the Commission received the data necessary to carry out its duties under its two-part analysis and W.Va. Code § 24-2-11c. MCRE asserts that EWG Siting Rules 150 C.S.R. §30-3-3.1.h.1 and 150 C.S.R. § 30-3-3.1.o.1-2 were promulgated to ensure that the Commission had before it all relevant data to assess a proposed facility's impacts within the 5-mile radius of the project.

In the present case, the Commission has interpreted its EWG Siting Rules to permit an applicant to file an inadequate and confusing map of the area within the 5-mile radius of the project. The Commission further interpreted the EWG Siting Rules to permit an applicant to completely disregard its obligation to present any evidence regarding historical or culturally significant locations within the 5-mile radius of the project until after the Commission has conducted the balancing test and issued a siting certificate. MCRE asserts that as a result of the Commission's "interpretations," both Orders issued by the Commission were nearly devoid of findings of fact or conclusion of law regarding the impact of the proposed project on communities within the five-mile radius of the project.

In sum, given the Commission's refusal to dismiss Beech Ridge Energy's application for failure to comply with EWG Siting Rules 150 C.S.R. §30-3-3.1.h.1 and 150 C.S.R. § 30-3-3.1.o.1.A-B, and given the fact that very few of the Commission's findings of fact or conclusions of law addresses the impact of the project on locations required to be mapped by EWG Siting Rules 150 C.S.R. §30-3-3.1.h.1 and 150 C.S.R. § 30-3-3.1.o.1.A-B, MCRE can only conclude that the Commission failed to properly consider the impact of the project on communities within

the local vicinity. As such, MCRE believes that residents of communities within the local vicinity, including intervenors, have suffered substantially as a result of the Commission's failure to require adherence to its rules and precedent. For these reasons, MCRE contends that the erred in refusing to grant MCRE Petition for Reconsideration.

VII. PRAYER

WHEREFORE, for all of the forgoing reasons, the Appellant, Mountain Communities for Responsible Energy, prays that this Honorable Court reverse the Commission's January 11, 2007 Order denying its petition for reconsideration, remand this case to the Commission, and Order the application to be dismissed for failure to comply with the mandatory requirements of the *Rules Governing Siting Certificates for Exempt Wholesale Generators*, 150 C.S.R. § 30-1-1, et seq.; or, in the alternative, remand the case to the Public Service Commission of West Virginia for further evidentiary development.

Respectfully submitted this 23rd day of May, 2007.



Justin R. St Clair, Esq. (WV Bar #9257)
Dalton Law Offices
410 Water Street
P.O. Box 238
Peterstown, WV 24963
Phone: 304.753.9464
Fax: 304.753.9446

MOUNTAIN COMMUNITIES FOR
RESPONSIBLE ENERGY,
By Counsel

CERTIFICATE OF SERVICE

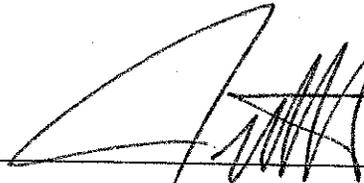
I, Justin R. St. Clair, Counsel for Mountain Communities for Responsible Energy do hereby certify that service of the attached **INITIAL BRIEF OF MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY IN SUPPORT OF APPEAL** was made upon the following designated parties by depositing true copies thereof in the United States Mail, postage pre-paid, on this the 23rd day of May, 2007:

Lee F. Feiberg, Esquire
Spilman Thomas & Battle, PLLC
P.O. Box 273
Charleston, West Virginia 25321-0273
Counsel for Beech Ridge Energy, LLC

Vincent Trivelli, Esquire
178 Chancery Row
Morgantown, West Virginia 26501
*Counsel for West Virginia State Building
and Construction Trades Council,
AFL-CIO*

John Auville, Esquire
Staff Attorney
West Virginia Public Service Commission
201 Brooks Street
P.O. Box 812
Charleston, West Virginia 25323

Jeffery C. and Alicia A. Eisenbeiss
P.O. Box 21
Renick, West Virginia 24966



Justin R. St Clair, Esq. (WV Bar #9257)
Dalton Law Offices
410 Water Street
P.O. Box 238
Peterstown, WV 24963
Phone: 304.753.9464
Fax: 304.753.9446