

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ALICIA A. EISENBEISS and JEFFREY C. EISENBEISS,

Appellants,

v.

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

Appellees,

and

MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY,

Appellant,

v.

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

Appellees,

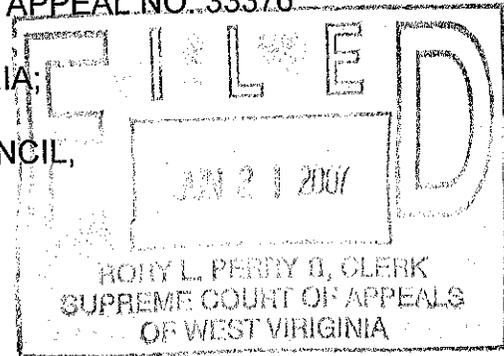
**ON APPEAL FROM THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA
CASE NO. 05-1590-E-CS**

**BRIEF OF WEST VIRGINIA-AMERICAN WATER COMPANY AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS, PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA, BEECH RIDGE ENERGY LLC AND
WEST VIRGINIA STATE BUILDING CONSTRUCTION TRADES
COUNCIL, AFL-CIO**

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APPEAL NO. 33376



APPEAL NO. 33375

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Comes West Virginia-American Water Company ("WVAW") by counsel, Linda S. Bouvette, and submits the following brief in support of Respondents, Public Service Commission of West Virginia, Beech Ridge Energy, LLC and West Virginia State Building Construction Trades Council, AFL-CIO, on the issue of whether the Public Service Commission of West Virginia may condition a siting certificate on satisfying the requirements of other regulatory agencies. The Commission's policy and practice of conditioning siting certificates and certificates of convenience and necessity on obtaining other regulatory approvals eliminates the burden and expense of obtaining such permits and approvals prior to receiving Commission approval for a project.

II. KIND OF PROCEEDING, NATURE OF THE RULING BELOW AND INTEREST OF AMICUS CURIAE

These appeals arise from two orders entered by the Public Service Commission of West Virginia (the "Commission") regarding an application for a siting certificate for the construction and operation of an exempt wholesale electric generating facility in Greenbrier County, West Virginia, including a transmission line. In its first order entered on August 28, 2006, the Commission conditionally approved a siting certificate for the construction and operation of the proposed wind energy facility.

Appellants then petitioned the Commission to reconsider its order conditionally approving the siting certificate for the Beech Ridge project. By order entered January 11, 2007, the Commission affirmed its decision to conditionally approve the facility, but placed an additional condition on the siting

certificate, requiring a hearing and determination of whether Beech Ridge has met all pre-construction conditions before it may commence construction.

It is from these two orders that Appellants appeal.

As a regulated utility subject to the jurisdiction of Commission, WVAW must apply to the Commission for a certificate of convenience and necessity before it may provide water service to a previously unserved area. On occasion, the Commission has conditioned its certificate on WVAW obtaining approvals required by other regulatory agencies. If WVAW is unable to obtain those approvals then the certificate is void. Conditioning the certificate of convenience and necessity on other agency approvals allows WVAW to pursue only those projects which have a good chance of success rather than requiring it to incur costs to obtain approvals from regulators for projects that will never receive the required certificate from the Public Service Commission.

WVAW's purpose in filing this brief is to advise the Court that the issue of conditioning a certificate on obtaining other regulatory approvals is not limited solely to exempt wholesale electric generators and siting certificates. On occasion, the Commission will also condition certificates of convenience and necessity on obtaining other regulatory approvals. If the Court determines that the Commission has abused its discretion or exceeded its authority when it conditioned Beech Ridge's siting certificate on the filing of other reports, permits or approvals from other regulated agencies, then the Commission's ability to condition certificates of convenience and necessity will also be eliminated. Regulated utilities will then incur additional expenses and costs in obtaining permits and approvals for projects that may never be granted a certificate from the Commission. Those costs will eventually be passed on to the ratepayers as part of a rate case.

Based on its experience, WVAW strongly believes the Commission should be permitted to condition siting certificates and certificates of convenience and necessity on the approvals of other regulatory agencies.

III. STATEMENT OF THE CASE

WVAW will defer to the "Statement of the Case" contained in the brief of Beech Ridge Energy, LLC, which sets forth the facts regarding this appeal and the underlying action.

IV. SUMMARY OF ISSUES PRESENTED

Of primary concern to WVAW is the issue of whether the Commission may condition its siting certificates or certificates of convenience and necessity on obtaining approvals and permits from other regulatory agencies. Mountain Communities for Responsible Energy ("MCRE") makes the argument that the Commission abuses its discretion and exceeds its authority when it conditions a certificate on such a requirement if the information is required to be presented as part of the application. However, such a position is contrary to both the laws governing the Commission and its implementing regulations. The Commission acknowledges and understands that some information, permits or approvals may not be available at the time an application for a siting certificate or certificate of convenience and necessity are filed and has provided in its regulations the flexibility to condition the permit or certificate on the filing of that information, permit or approval.

V. POINTS AND AUTHORITIES RELIED UPON

1. "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." *Chesapeake and Potomac Telephone Company of West Virginia*, 300 S.E.2d 607 (1982), Syllabus Point 1.

2. "While a petitioner is not entitled to a "judicial trial" de novo under this provision [West Virginia Code §24-5-1], the court is empowered to reverse and set aside an order of the Public Service Commission where the order is contrary to the evidence, is not supported by the evidence or is arbitrary or based upon a mistake of law." *Preston County Light and Power Co. v. Public Service Commission of West Virginia*, 297 F.Supp. 759, 765 (1969), citations omitted.

3. Although judicial review is limited to the record taken before the Commission, the court is able to review "the evidentiary support for the findings of the Commission as well as the correctness of the legal principles applied and conclusions reached by that body." *Id.* at 766.

4. "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. The commission may issue a siting certificate only if it determines that the terms and conditions of any public funding or any agreement relating to the abatement of property taxes do not offend the public interest, and 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." W.Va. Code §24-2-11c(c).

5. By statute, the Commission has the right to include in its order granting a siting certificate "[a]ll material terms, conditions and limitations applicable to the construction and operation of the proposed facility..." *Id.*

6. In the event the applicant fails to obtain required permits from, or meet applicable requirements of applicable government agencies within 100 days of the date the application is filed, the Commission may issue a Siting certificate contingent upon receipt of such permits/approvals. 150 CSR §5.1

7. "The purposes and duties of the historic preservation section are ...to review all undertakings permitted, funded, licensed or otherwise assisted, in whole or in part, by the state for the purposes of furthering the duties of the section;... " *W.Va. Code §29-1-8(a)*.

VI. ARGUMENT

A. JUDICIAL REVIEW OF AN ORDER OF THE PUBLIC SERVICE COMMISSION IS BASED ON AN ABUSE OF DISCRETION STANDARD AND IS LIMITED TO THE RECORD TAKEN BEFORE THE COMMISSION.

The Court has previously established the standard of review of an order of the Public Service Commission of West Virginia ("Commission"):

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.

Chesapeake and Potomac Telephone Company of West Virginia, 300 S.E.2d 607 (1982), Syllabus Point 1. See also *Monongahela Power Co. v. Public Service Commission*, 276 S.E.2d 179 (1981).

"While a petitioner is not entitled to a "judicial trial" de novo under this provision [West Virginia Code §24-5-1], the court is empowered to reverse and set aside an order of the Public Service Commission where the order is contrary to the evidence, is not supported by the evidence or is arbitrary or based upon a mistake of law." *Preston County Light and Power Co. v. Public Service Commission of West Virginia*, 297 F.Supp. 759, 765 (1969), citations omitted. Although judicial review is limited to the record taken before the Commission, the court is able to review "the evidentiary support for the findings of the Commission as well as the correctness of the legal principles applied and conclusions reached by that body." *Id.* at 766. The evidence in the record before the Commission supports its findings and the legal principles applied by the Commission and the conclusions it reached in granting the siting certificate are correct. The inclusion of a condition in the siting certificate requiring Beech Ridge to obtain other regulatory approvals prior to construction does not support Appellee's contention that the Commission failed to comply with its statutory duties under W.Va. Code §24-2-11c(c):

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. The commission may issue a siting certificate only if it determines that the terms and conditions of any public funding or any agreement relating to the abatement of property taxes do not offend the public interest, and 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.

Id. By statute, the Commission has the right to include in its order granting a siting certificate "[a]ll material terms, conditions and limitations applicable to the

construction and operation of the proposed facility..." *Id.* Consistent with the statute, the Commission included in its EWG regulations, a provision allowing it to condition a siting certificate on obtaining other agency approvals:

150 CSR §5.1. In the event the applicant fails to obtain required permits from, or meet applicable requirements of applicable government agencies within 100 days of the date the application is filed, the Commission may issue a Siting certificate contingent upon receipt of such permits/approvals.

The Commission has merely followed its statutory and regulatory directives by conditioning the Beech Ridge siting certificate on obtaining all other required regulatory approvals and permits. Conditioning the siting certificate on obtaining these approvals and permits benefits MCRE and its members by ensuring the Beech Ridge wind energy project will undergo further intense scrutiny and review by other governmental agencies before it is constructed. The Commission has properly exercised its discretion and authority in placing such a condition in the siting certificate.

B. CONDITIONING A SITING CERTIFICATE ON OTHER REGULATORY APPROVALS IS NOT AN ABUSE OF THE COMMISSION'S DISCRETION NOR IS IT IN EXCESS OF ITS AUTHORITY.

MCRE claims that the Commission abused its discretion and exceeded its statutory authority by conditioning the siting certificate on the filing of "evidence of any necessary environmental permits and/or certifications prior to commencing construction (including any letters from US Fish & Wildlife, WVDNR, W.Va. Division of Cultural [sic] and History and 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

agencies [sic] rules/laws.)" *Commission Order entered 8/28/06, Condition No. 11, p. 88.* MCRE also refers to a second condition of the Siting Certificate wherein the Commission requires Beech Ridge to "file evidence of the approval and/or acceptance of the...historical/archeological significance study with any required mitigation plans prior to commencing construction." *Commission Order entered 8/28/06, Condition No. 12, p. 88.*

MCRE challenges only these two conditions, contending that this information should have been submitted with the application and placed in evidence during the hearing. MCRE states in its initial brief to the Court that

MCRE does not dispute that, if the 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 is granted. Most of these types of permits are not required to be presented to the Commission in an application under the EWG Siting Rules.

MCRE Initial Brief, p. 40. The same is true for the historical/archeological significance study. It does not make sense for an applicant to bear the burden and expense of preparing this study until it is sure its application is granted. Likewise, the State of West Virginia has made clear that SHPO is not to incur the burden and expense of reviewing and advising on such a study until a permit or certificate is granted for the project.

The purposes and duties of the historic preservation section are ...to review all undertakings permitted, funded, licensed or

otherwise assisted, in whole or in part, by the state for the purposes of furthering the duties of the section;...

W.Va. Code §29-1-8(a). By law, until the Commission issued the siting certificate to Beech Ridge, SHPO had no authority to act. Therefore, conditioning the siting certificate on any necessary approvals or review by SHPO is within the Commission's authority and discretion and is consistent with state law.

C. **THE COMMISSION HAD AMPLE EVIDENCE IN THE RECORD TO DETERMINE THE IMPACT OF THE WIND ENERGY PROJECT ON RESIDENCES AND HISTORICAL, CULTURAL AND ARCHEOLOGICAL SITES WITHIN IN THE FIVE MILE RADIUS.**

Appellants claim the Commission could not adequately consider the impact of the wind energy project on residences and historical, cultural and archeological sites within a five mile radius of the turbine sites.

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 CSR §30-3-3.1.h* and *150 CSR §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.

MCRE Initial Brief, p. 35. The record before the Commission and this Court is replete with evidence of the impact the Beech Ridge wind energy project will have on residences and historical, cultural and archeological sites located within a five mile radius of the turbine locations. Beech Ridge introduced evidence of the impact the facility would have on viewshed, noise, traffic, land use, water and wildlife resources. It then introduced evidence of its mitigation plans to reduce

the impact of the facility on residences and sites within the five mile radius. All such evidence was subject to cross-examination and challenge by the Appellants and other parties. Beech Ridge proposed the use of a set back provision of one mile from residences to reduce noise impacts, continued access to the site for hunting, fishing, picnicking and hiking, minimum FAA lighting and other lighting, adaptive management to protect birds and bats, a decommissioning fund to remove the turbines after their useful life, the removal or relocation of certain turbines to accommodate a particular residence, to name a few. The record demonstrates that the Commission had ample evidence to consider the impact of the project on this area as part of its duty to balance the interests of the public against the interests of the state and local economy and the applicant. The Commission acted within its discretion and authority in conditioning the siting certificate and it properly balanced the interests of the parties based on the evidence before it.

VII. CONCLUSION

The Commission acted within its authority and discretion in conditioning the siting certificate on Beech Ridge submitting copies of permits, reports, and letters from other agencies, including SHPO. Conditioning the certificate on obtaining these other approvals eliminates the burden and expense of obtaining permits and approvals that may be rendered void or useless if a siting certificate application or an application for a certificate of convenience and necessity are not granted or are modified significantly from the original application.

WVAWC supports the Commission's use of conditions as a cost-effective method of ensuring a project is properly permitted and regulated. The Commission has answered the age-old riddle of which comes first: the certificate comes first and then the other regulatory approvals. Until the certificate is issued, an applicant does not have defined project that can be permitted or approved by other agencies.

VIII. PRAYER FOR RELIEF

For the reasons set forth herein, WVAWC respectfully requests that the Court affirm the decision of the Commission below.

WEST VIRGINIA-AMERICAN WATER COMPANY

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing
"BRIEF OF WEST VIRGINIA-AMERICAN WATER COMPANY AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS, PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA, BEECH RIDGE ENERGY, LLC
AND WEST VIRGINIA STATE BUILDING CONSTRUCTION TRADES
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