

In the West Virginia Supreme Court of Appeals

Alicia A. Eisenbeiss and Jeffrey C. Eisenbeiss,

Appellants,

v.

No. 33376

Public Service Commission of
West Virginia, Beech Ridge Energy, LLC
and the West Virginia State Building and
Construction Trades Council, AFL-CIO,

Appellees.

And

Mountain Communities for
Responsible Energy,

Appellant,

v.

No. 33375

Public Service Commission of
West Virginia, Beech Ridge Energy, LLC,
and the West Virginia State Building and
Construction Trades Council, AFL-CIO,

Appellees.

**Response of the West Virginia State Building and Construction Trades Council,
AFL-CIO to the Initial Briefs of Alicia A. Eisenbeiss and Jeffrey C. Eisenbeiss, and
Mountain Communities for Responsible Energy for Suspension and Final Order
and Review**

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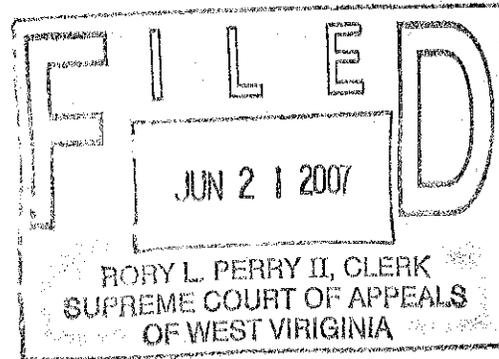


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Prior Proceedings

The instant matter concerns an application by Beech Ridge Energy, LLC (“Beech Ridge” or “Applicant”) to construct and operate a wholesale electric generating facility and related transmission line in Greenbrier and Nicholas Counties, West Virginia. The West Virginia State Building and Construction Trades Council, AFL-CIO (“Council”) intervened in the matter before the Public Service Commission of West Virginia (“Commission” or “PSC”) in order to ensure that the construction of the proposed facility will have a substantial positive impact on the local economy and local employment as required by the law (see West Virginia Code § 24-2-11c (c)) and for other reasons.

After extensive discovery and both public and evidentiary hearings on the Application, on August 28, 2006 the Public Service Commission of West Virginia approved the Application of Beech Ridge Energy, to construct and operate a wholesale electric generating facility. On or about September 18, 2006, Intervenor MCRE filed a *Petition for Reconsideration* with the Commission urging the Commission to reconsider its August 28, 2006 Order and to “dismiss the application for failure to comply with the EWG Siting Regulations” or in the alternative “to consider the points raised herein and issue a new Order containing adequate findings of fact and conclusions of law on the points discussed above.” (*MCRE Reconsideration Petition*, pages 40-41). On or about September 18, 2006, Intervenor Alicia A. and Jeffrey C. Eisenbeiss filed an unverified *Petition for Reconsideration* of the Commission’s Order of August 28, 2006 urging the Commission to “give full reconsideration” of the earlier Order in order to “view the record as a whole to fairly weigh all potential impacts of an industrial wind facility.”

(*Eisenbeiss PSC Petition*, page 11). The Council urged the Commission to Reject said Petitions.

On January 12, 2007, the Commission issued an Order declining to reconsider its August 28, 2006 Order stating that “[t]he points made in the petitions to reconsider were previously evaluated and resolved by the Commission.” (PSC January 11, 2007 Order, page 1). On February 12, 2007 Petitioner, Mountain Communities for Responsible Energy filed with this Court a *Petition for Appeal* with regard to the January 11, 2007 Order of the PSC (MCRE Supreme Court *Petition*, page 3). On that same day Petitioners Alicia A. Eisenbeiss and Jeffrey C. Eisenbeiss filed a pro se *Petition to Appeal* the January 11, 2007 PSC Order. On April 18, 2007 this Court Granted the two Petitions for Appeal. This is the Council’s *Response* to the Initial Briefs filed by the Appellants in this matter.

Introduction

Following extensive public and evidentiary hearing and extensive input from experts and lay people it is clear that Beech Ridge’s proposed electric generating facility clearly meets the requirements of the laws of this State. It is also evident that after the Commission appraised and balanced the interests of the public, the general interests of the state and local economy, and the interests of the Applicant, the benefits of the proposed facility are more than sufficient to support the decision by this Commission to issue a siting certificate in this matter. It is equally clear, given the record and the law, that the Commission was correct in declining to reconsider its August 28th Order. It is the latter issue that the Appellants have brought before this Court.

Response to Assignments of Error by the Petitioners

The MCRE Appellant summarized the issue before this Court as follows:

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.* (MCRE Initial Brief, Page 2)

The MCRE Petitioners set out two Assignments of Error of the Commission related to the above issue. The MCRE Appellant contends that the Commission erred in that it:

- Arbitrarily ignored and revised certain portions of the Commission's regulations, and
- As a result thereof, failed to include adequate findings of fact and 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 Eisenbeiss Appellants also set out two Assignments of Error of the Commission. The Eisenbeiss Appellants contend that the Commission erred in that it:

- Misused its discretion with regard to the Commission's required balancing of interests by failing to conduct "any thorough, independent evaluation of all respective positions in this case" and "intentionally disregarding the interests of the public, the general interests of the state and local economy." (Eisenbeiss Petition, page 5), and

- Failed to dismiss the underlying Application in this matter in that the Application is “erroneously flawed with deliberate inaccuracies and apparent misrepresentation.” (*Id.*).

These then are the matters before this Court – did the Commission ignore or amend its regulations; did the Commission include sufficient findings of fact and conclusions of law with regard to the appraisal and balancing of the local communities interests; should the Commission have undertaken an independent investigation; did the Commission intentionally disregard the interests of the public; and did the Applicant engage in deliberate inaccuracies and apparent misrepresentations. A fair review of the record makes it clear that none of the above listed errors are present.

Discussion of the Law and Argument

The Council will briefly set out the law regarding petitions to reconsider before the PSC, the law regarding the review of final orders of the PSC, the law with regard to the certificates at issue and will address the Petitioners’ cited errors as they arise in the discussion of the law and argument.

Law and Argument Regarding Review of Order of the Public Service Commission

In reviewing final orders of the PSC, this Court has stated:

[A]n order of the public service commission based upon its findings of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from misapplication of the legal principles. Syl. Pt. 1 K. Sexton v. Public Service Commission, 188 W.Va. 305, 423 S.E.2d 914 (1992) citing Syl. Pt. 5 United Fuel Gas Company v. The Public Service Commission, 143 W. Va. 33, 99 S.E.2d 331 (1970).

This Court has also held that the Sexton ruling is one of the three “central principles” in reviewing Orders of the PSC. The other two are: “first, the primary

purpose of the PSC is to 'serve the interests of the public,'" Lumberport-Shinnston Gas Co. v. Public Service Commission of W.Va., 165 W. Va. 762, 764, 271 S.E. 2d 438, 440 (1980) quoting Boggs v. Public Service Commission, 154 W.Va. 146, 154, 174 S.E.2d 331, 336 (1970); and the PSC is empowered to regulate "in a manner that is just and reasonable and not contrary to the law." Lumberport-Shinnston supra, 764 quoting Delardas v. Morgantown Water Company, 148 W.Va. 776, 137 S.E.2d 426 (1964).¹

In Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981), this Court articulated a detailed standard for review of PSC orders as follows:

2. 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.

More recently this Court summarized that standard in the following manner:

"The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper." Syl. Pt. 1, Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993).

¹ This Court has also held that in appeals of PSC opinions which present "an issue of jurisdictional denial" or one that involved the interpretation of a statute, rule or regulation and presents a purely legal question are subject to a *de novo* review. West Virginia Highlands Conservancy, Inc. v. Public Service Commission of West Virginia, 206 W.Va. 633, 635, 527 S.E.2d 495, 497 (1998).

In describing the third prong of the test as articulated in the Central West Virginia Refuse, this Court has stated that it must determine, “whether the result of the PSC’s final Order is proper in light of the reasonable needs of the regulated entity and the relevant public needs.” (Affiliated Construction Trades Foundation v. the Public Service Commission of West Virginia and Big Sandy Peaker Plant, PPLC 565 S.E. 2d 778, 784 (2002)).

The issue then for this Court, as it always is when it is asked to review actions of the PSC, is to determine:

- if the Commission has exceeded its statutory powers and jurisdiction;
- whether the record includes adequate evidence to support the Commission’s findings; and
- whether the substantive result of the Commission’s action is proper in light of the public interest and the applicant’s interest.

When one reviews the *MCRE* and *Eisenbeiss Briefs* and the Commission’s Orders, there is no basis for an argument that the Commission has exceeded its statutory duties, based its decision on an inadequate record or failed to consider the Applicant’s interest and the public’s interest.

The Law and Argument Regarding Petitions to Reconsider

The Procedural Rules of the Public Service Commission, at § 150-1-19.3 provide for the filing of petitions for reconsideration as follows:

Petitions for reconsideration after entry of a Commission order must be made by petition, duly verified, filed with the Commission within ten (10) days from the date of mailing by certified mail of the Commission order. Such petition shall state specifically the grounds relied upon, and

shall be filed with the Commission and a copy served by the petitioner upon the attorney for each adverse party.

The Commission in this matter informed the Parties prior to its consideration of the *Petitions to Reconsider* its August 2006 Order, “[p]arties are advised that reconsideration offers an opportunity to point out matters which the Commission overlooked, but is not for the purpose of considering new arguments or evidence not in the record.” (Commission Order September 5, 2006). It is clear that the Commission has long held that a petition for reconsideration will be rejected unless the petition establishes new and convincing arguments or issues and/or points to evidence from the record that had not been considered by the Commission previously.² Taking the Commission’s rules and its statements into consideration it is clear that the Commission was correct in declining to reconsider its August 2006 Order based upon the *MCRE* and *Eisenbeiss Reconsideration Petitions*.³ The *Reconsideration Petitions* were rejected because they simply failed to bring anything new to the matter. As this Court has stated, in a context not related to the Commission, when the motions for reconsideration “add nothing of substance to their original arguments” there was no “err in failing to grant” such a motion

² The Commission’s standard for review of motions for reconsideration has been consistent over time. In 1996 the Commission rejected a Motion to Reconsider because the petition “simply restates the arguments he previously made before us. We have already considered and rejected those arguments. Having presented no new grounds to justify a different outcome, we shall reject his petition for reconsideration.” (PSC Case No. 95-1031-PSWD-C, 10/31/96). In 1998 the Commission rejected a Motion for Reconsideration because the petition “does not raise any issues that the Commission did not consider in the decision reflected in the April 8, 1998 Order.” (PSC Case No. 97-1329-E-CN, 4/29/98). In 1987 the Commission, in response to a Motion for Reconsideration regarding an Order that was alleged to be contrary to the evidence, unsupported by the evidence and containing factual errors held that the Petition should be denied because in reviewing the record established by the ALJ, the Petition “did not present any new arguments or evidence which has not already been considered and rejected” in the matter. (PSC Case No. 85-577-T-C, 1/9/87). In 1998 the Commission rejected a Petition for Reconsideration because the Petition “raises no issues or concerns that were not already addressed in the majority’s decision.” (PSC Case No. 97-0496-W-PWD-PC, 2/11/98).

³ With regard to the *Eisenbeiss’ Reconsideration Petition* the letter *Petition* was not verified and therefore was not properly filed in accordance with the Commission’s rules.

(Browning v. Halle, 632 S.E.2d 29, (2005)).⁴ In the instant matter, nothing of substance is added to the original arguments and thus the Commission was correct in rejecting the *Petitions to Reconsider*.

The Commission was right to reject the two *Reconsideration Petitions* because they simply fail to provide the Commission with “matters which the Commission overlooked” that are sufficient to require the Commission to reconsider its earlier determinations regarding this project. In fact, the two *Reconsideration Petitions* in the instant matter essentially plowed old ground while adding nothing of substance to the previous arguments in this matter. In addition, the *Reconsideration Petitions* urged the Commission to rebalance the interests and to provide additional weight to the protests filed by the public without offering any basis for a newly calculated balance.

The MCRE Reconsideration Petition and MCRE's First Assigned Error - The bulk of the *MCRE Reconsideration Petition* as well as MCRE's example underlying its first assignment of error before this Court concerns a matter much considered in the underlying proceeding - concerns about the adequacy of the original “5-mile map” submitted by the Applicants in this matter. As they have in their earlier pleadings, MCRE, before the Commission and again before this Court, essentially argue that the new regulations of the Commission (150 C.S.R. § 30-3-3.1.h and related sections) by the use of the word “shall” require strict compliance with all aspects of the new regulations as interpreted by MCRE rather than by the Commission. However, what MCRE failed to note is that the mandatory nature of the word “shall” can only be applied to unambiguous and objective requirements rather than requirements that entail judgment or are subjective

⁴ This Court noted that while attorneys file motions entitled “Motion to Reconsider” the West Virginia Rules of Civil Procedure do not provide for such a motion. Such motions are considered pursuant to Rule 59(e) or 60(b) of the West Virginia Rules of Civil Procedure.

in nature. For example, the *MCRE Reconsideration Petition* before the PSC called to task the Applicant's 5-mile map for its failure to "show all major transportation routes within the five mile radius" (*MCRE Reconsideration Petition*, page 5). The new regulations state that the Applicant must supply a "5-mile-map" depicting the proposed facility and "showing the following features" including "B. Major transportation routes." MCRE apparently considers the route to the communities of Williamsburg and Friars Hill "major routes" and seems to contend that the Commission has no ability to interpret its new regulations as they apply to the map at issue. In fact, the law of this State is that agency interpretations of statutes and regulations are: appropriate where "ambiguity" exists; will be disregarded when they conflict with the clear language of the rules; and, if long-standing, are to be afforded much weight. (Consumer Advocate Division v. PSC, 182 W.Va. 152, 156, 386 S.E.2d 650, 654 (1989)). In the instant matter, given the recent nature of the statute and the regulations, there is no long-standing interpretation of the regulations at issue. Thus it is clear that the Commission has the clear authority to interpret its own regulations.⁵ In addition, the Commission has not disregarded the clear language of the rules, rather it has used its clear authority to interpret its own regulations and to apply them to the facts in the record.

In its August 2006 Order the Commission found that the map at issue was "sufficient to allow the application to be fully debated" and that "Beech Ridge has substantially complied with the rules" at issue. (August 2006 Order, Conclusion of Law

⁵ MCRE in its Reconsideration Petition looked to C&P Telephone v. PSC (171 W.Va. 708, 714, 301 S.E.2d 798, 804 (1983)) for the proposition that the PSC is required to abide by its rules until the rules are lawfully changed. The reliance by MCRE on the C&P Telephone decision is misplaced in that it concerns a situation where three weeks prior to a rate hearing the PSC changed what was required of a utility and informed the utility that the utility was required to change its cash-working capital formula, thus reversing its course of action from earlier precedents. Such is not the case in the instant matter.

number 4). The Commission addressed MCRE's concerns regarding the map again in its February 2007 Order (Conclusions of Law 2 – 19). In that MCRE failed to come forth with anything of substance to add to their original argument, the Commission was correct to reject *MCRE's Reconsideration Petition*.

MCRE's Second Assigned Error - MCRE does not begin to discuss their second Assignment of Error until page forty-three (43) of their forty-five (45) page Initial Brief. MCRE's short discussion circles back to the issue of the 5-mile map in arguing that the Commission, by permitting the Applicant to "file an inadequate and confusing map", combined with a purported lack of evidence regarding "historical or culturally significant locations within the 5-mile radius of the project" resulted in Orders that are lacking in "findings of fact and conclusions of law regarding the impact of the proposed project on communities within the five-mile radius of the project." (*MCRE Initial Brief*, page 44).

As this Court is aware, the section of the law (W. Va. Code § 24-2-11c) pursuant to which the Siting Certificate case has been issued provides general and specific guidance and standards for the Commission in making its determination whether or not to issue a siting certificate in this or any other siting certificate application proceeding. The law further provides the Commission with the clear ability to establish terms, conditions and limitations on the construction and operation of the proposed facility as needed to meet the requirements of the law. It further details the items on which the Legislature required the Commission to issue related findings of fact and conclusions of law.

The law states:

In determining 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.* The commission shall issue an order that includes *appropriate findings of fact and conclusions of law that address each factor specified in this subsection.* All material terms, conditions and limitations applicable to the construction and operation of the proposed facility or material modification of the facility shall be specifically set forth in the commission order. (West Virginia Code § 24-2-11c(c)) (Emphasis added).

It is then that the Commission must *appraise and balance three things*: the interests of the public, general interests of the state and local economy and the interests of the applicant.

Secondly, the Commission must *specifically determine two matters* and may only issue a certificate: if the terms and conditions of any public financing or tax abatements do not offend the public interest and if the construction of the facility will result in a substantial positive impact on the local economy and local employment.⁶

⁶ The MCRE presents a two-sided equation to be used by the Commission. The MCRE looks to the Applicant's interest and the economic gain to the state simply being weighed against the interests of the local community. In essence they place the, what are in their view, limited potential positives of the proposed project against their perceived negatives of the proposed project on a two sided scale. Given the statute, the Council believes that the balancing more accurately is a weighing of the *public's interest* (including both the positive and negative impacts), the *applicant's interest* (to construct and operate such facility) and the *general interests of the state and local economy* "against" each other to achieve a balance required by the law.

This is important in that it is clear that the Legislature of the State of West Virginia created the scale on which the Commission must weigh and balance and in doing so the Legislature provided direction to the Commission regarding how to consider the three interests the Legislature referenced. While it has long been the case that "the primary purpose of the PSC is to 'serve the interests of the public'", the method to be used in questions regarding exempt wholesale generators, is the balancing of the interests as set by the Legislature. The Council is not advocating, in looking to the three interests at issue, that having two positive interests will always outweigh one negative interest. The balance must be undertaken on a case-by-case basis depending on the evidence in the record. What is clear, however, is that the Legislature did not intend to simply place all the "negatives" against all the "positives" (the Legislation is not an attempt to balance between a job and a bat). It is rather a weighing of the components of each of the three interests within the context of each of the three interests and then weighing the three interests in an overall manner.

Third, the Commission shall issue an order that includes appropriate findings of fact and conclusions of law regarding the five factors specified in the subsection of the law.

In this context, in 2006 the Commission Granted the Siting Certificate, balanced the interests as required by the statute and issued the Siting Certificate contingent on both preconstruction, construction and operational matters based on concerns raised by the Intervenor before the Commission. In addition, the Commission set out findings of fact and conclusions of law regarding the specific matters required by the Legislature and more.⁷

The *Appellants* before this Court, however, are arguing that the Commission failed to include adequate findings of fact and conclusions of law regarding the required balancing or that the Commission intentionally disregarded the interests of the public and the general interests of the state and local economies. The Orders and the record make it clear that these purported errors are simply incorrect.

As set out above, one of the key aspects of the Commission's general appraisal as well as its specific determinations concerns the impact of the proposed facility on the state and local economy. It is important to note in this regard, however, that while the statute requires that the Commission "appraise and balance" the impact of the facility on the state and local economy, it mandates that the Commission may not issue the certificate unless it affirmatively finds that the *construction* of the facility will result in a "substantially positive impact on the local economy and local employment."

⁷ The Council is not arguing that the Commission only set out findings and conclusions on these matters. However, it is important that the Legislature required specific findings and conclusions and the Commission complied.

Let us be clear, the only credible evidence before the Commission in this matter is that the construction of this facility will have such a substantial positive impact on the local economy and local employment and that the facility will have a positive impact generally on the state and local economy.

The evidence before the Commission comes in the form of direct testimony as well as expert analysis and testimony. A brief summary of the testimony follows.

Local construction employment – As detailed in the Direct Testimony of Building and Construction Trades Council’s Expert, Chris Thompson, Ph.D., as well as in his report entitled, *The Estimated Economic Impacts on West Virginia from Beech Ridge Energy’s Proposed Wholesale Electric Generating Facility and Related Transmission Line in Greenbrier and Nicholas Counties*, the impact of local construction jobs required by the proposed facility can only be described as substantial. In fact, in his Direct Testimony Dr. Thompson testified:

- Q. Overall how would you characterize the economic impact of construction of the facility?
- A. The construction of the project will result in a *substantial positive impact* on the local economy and local employment. The construction will also *positively impact on the state economy*. These positive impacts will be the result of substantial increases in sales, taxes, business activities and jobs. The positive impacts are set out in detail in my report which is attached to this testimony as Exhibit 2. (Emphasis added)

The Exhibit 2 referred to by Dr. Thompson sets out “low” and “high” impact scenarios for economic impact for direct, indirect and induced effects. The study (at page 4) summarizes the economic impact as follows:

The record in this matter establishes that the construction phase of the proposed facility will require approximately 215 construction workers during the approximate 215

day construction period.⁸ These jobs themselves will generate “some \$16 million of additional output and almost \$6.2 million of addition value-added with the construction industry.” (Report, page 4). Dr. Thompson also testified that there are “policy tools and measures” that can be used to ensure that the construction jobs benefit the local economy. These measures include “local hiring agreements by the operator of the plant.” (Thompson testimony, 5/11/06 transcript, pages 124-125). In the instant matter, that is exactly what is in place.

The record demonstrates that the construction jobs will be filled by local individuals. The local construction trades unions entered into a Memorandum Agreement with the Applicant in May of 2006 (Direct Testimony of Mike Matthews, Exhibit 1). According to the testimony of Mr. Mike Matthews, Business Manager, Executive Secretary/Treasurer of the Charleston, West Virginia Building and Construction Trades Council, AFL-CIO, “[t]he Agreement ensures that the workers used in the construction of the project at issue in this case will be local workers.” (Direct Testimony of Mike Matthews, page 2).⁹

There simply is no other evidence in the record other than the fact that the construction of the facility will result in a substantial positive impact on the local economy and local employment.

The positive impact of the project on the state and local economy – It is also clear that the evidence before the Commission was that the project overall will have a positive

⁸ The record establishes that the cost of construction of the facility, not including the cost of the turbines and the towers themselves, will be approximately \$65 million and that it will require approximately 215 days to construct. (see Groberg testimony, 5/17/06 transcript pages 73-75). In addition, it should be noted that Dr. Thompson utilized the “conservative” figure of 161.3 construction jobs in his analysis in order to reflect that the 215 construction jobs will be approximately three quarters of a year in length. (Thomson testimony, 5/11/06 transcript pages 126-127).

⁹ It is also important to note that the Memorandum Agreement by its terms will apply to any entity that may purchase the facility at issue. (Memorandum, page 3).

impact on the local and state economies and is thus in the best interests of the state and local economy. As referenced above, the Building Trades Council provided evidence in this matter in the form of expert testimony by Dr. Chris Thompson of Johns Hopkins University that included a research study of the economic impact of the proposed facility using the IMPLAN software.¹⁰

Dr. Thompson sets out “low” and “high” impact scenarios for economic impact for direct, indirect and induced effects of the Beech Ridge Project. The study, at page 4, summarizes the economic impact as follows:

In sum, based on low and high scenarios, the Beech Ridge Project is likely to generate the following impacts on the economy of the state of West Virginia (with the Project construction activity included in the figures):

- 265 to 1,089 jobs in total (direct, indirect, and induced) with each 100 Beech Ridge construction jobs associated with another 64 jobs in other sectors of the West Virginia economy.
- \$25.3 million to \$104 million of additional private sector output
- \$11.3 to \$46.4 million of value added, including \$7.3 million to \$30 million of additional employee compensation
- \$528,000 to \$2.2 million of additional indirect business taxes.

Dr. Thompson’s study, at pages 8 – 9, also provides a high and low estimate for increased state tax revenues (\$817,000 to \$3.4 million) and federal tax revenues (\$1.9 million to \$7.9 million). It is worth noting that Dr. Thompson states, at page ii, that in that the effects of the permanent employment were not modeled in the study and that to the extent therefore that indirect and induced impacts in reality are maintained in years beyond the construction period, “the eventual total impacts of the Project on the state’s economy will even be *higher* than estimated here.” (Emphasis original)

The economic impact of the construction, according to Dr. Thompson, constitutes

¹⁰ IMPLAN is a software product that is used to estimate the economic impact of projects such as the Beech Ridge facility.

a substantial positive impact on the local economy and local employment and a positive impact on the state's economy (Thompson Direct Testimony at page 10) as required by law. There is nothing in the record to contradict this conclusion.¹¹

In appraising and balancing the impact of the construction and operation of the proposed facility, the Commission came to the only possible conclusion – that this project is in the best interests of the state and local economy. Likewise, in determining whether construction of the facility will result in a substantial positive impact on the local economy and local employment, the Commission came to the only possible determination -- that the construction will have a substantial positive impact on the local economy and local employment.

These matters are covered in the Commission's August 2006 Order at Findings of Fact 9,11, 22 and Conclusions of Law 17, 18, 19, 20, 21, 22, 24 and 25. It simply cannot be said that there was insufficient evidence to support the Commission's conclusions or that the substantive result of the Commission's actions were in some manner improper in light of the public interest and the applicant's interest. The Commission engaged in balancing of interests as required by the statute. As this Court has stated, this 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." (Monongahela Power Co. v. Public Service Commission, Syl. Pt 2, supra). There is simply nothing brought to this Court by the Petitioners to demonstrate that the Commission has failed to meet that

¹¹ The Court should note that while Intervenor, such as Friends of Greenbrier County, implied throughout the hearing on this matter at the PSC that the potential existence of purported negative economic consequences might come to pass following the construction of the facility at issue, there simply is nothing in the record whatsoever regarding any such consequences.

standard.

Public financing -- The PSC notes at Conclusion of Law 47 (August 2006 Order) neither public financing nor property tax abatements are at issue in this matter in that the Applicant will finance the project with private funds. (See also Findings of Fact 14 from August 2006 Order).

The Applicant's interest -- The Commission concluded that it was required to consider the Applicant's interest in this matter (2006 Order, Conclusion number 11), and found that the Applicant was unchallenged with regard to its ability to operate and construct the proposed project. It was this expertise, its world-wide investment and the private nature of the project's funding that demonstrated the applicant's interest in the project at issue.

The public's interest -- The Commission's 2006 and 2007 Orders discuss at length and include numerous findings of fact and conclusions of law regarding the interests of the public as raised by the Intervenors in this matter. The Orders detail the public letters of opposition and support and include findings and conclusions regarding the sufficiency of the five-mile map, road funding, evidence of public comment, long-term benefits versus adverse impacts, impacts on bats, tourism and property values, public support and protest, the route of the transmission line, noise, U.S. Fish and Wildlife, etc., etc., etc. It is difficult to understand the basis of MCRE's second assignment of error that the Orders fail to include adequate findings of fact or conclusions of law regarding the potential impact of the proposed facility on the local area.

It is important to note that this Court of Appeals has held that the public interest must be broadly defined. In looking at the public interest in the case that generated the

statute at issue in the instant matter the Court stated, “[w]e do not suggest that the arrangements here are either good or not good for the state, the county, economic development, local employment or whatever other factors involve the public interest. Rather we simply conclude that ‘the public interest’ to which the PSC is required to give attention, demands a fully developed concern for all citizens and business entities, be they ratepayers, taxpayers, or neither.” (The Affiliated Construction Trades Foundation v. The Public Service Commission of West Virginia, 211 W.Va. 315, 326 (2002)). The Council contends that, given as the Commission has noted that the Federal Energy Policy Act of 2005 encourages the use of renewable resources in an effort to reduce the nation’s dependency on fuels that contribute to global warming, it is in the public’s interest to do so and this factor must be considered as a positive impact on the public’s interest. As well should the interests of the portion of the public that has called for the wind project to be constructed and operated, including the Town Council of Rainelle, the Town Council of Rupert and others be considered within the concept of the interests of the public.

Conditions – Surprisingly, the Appellants essentially failed to address the issue of the Commission’s practice of placing conditions on the granting of siting certificates. It is important to note at the outset that all conditions are not the same. That is, the Commission has placed General Preconstruction and Construction Conditions on Certificates as well as separate Operational Phase Conditions (such as in the Certificate in the instant matter). It is clear that many of these conditions as a practical matter can only come into force at a later point. For example, in the instant matter the Commission’s Orders require the Applicant to use licensed certified herbicide applicators and to have Material Safety Data Sheets on the plant site for all herbicides used on the

transmission line right-of-way. (Beech Ridge, General Operating Conditions 2 and 3). Simply put, there can be no quarrel with conditioning a certificate on compliance with such conditions.

It is important to note that not only does the statute specifically state that the Commission must decide whether it will “issue, refuse to issue, or issue in part and refuse to issue in part a siting certificate” (West Virginia Code § 24-2-11c (c)),¹² but once the Commission has issued a siting certificate, that statute provides that it shall retain jurisdiction over the holder of the siting certificate for purposes of “enforcing the material terms and conditions of a commission order” (West Virginia Code § 24-2-11c (e)(3)) through proceedings “initiated by its own motion or on the motions of any person.” (§ 24-2-11c (f)). When one combines these statutory provisions with the holding by this Court that the Commission’s jurisdiction includes the “authority conferred on it by statute and the necessary implications there from” (ACT, *supra*, Syl Pt. 6), it is clear that the Commission has the authority and jurisdiction to “issue in part” a siting certificate with conditions and limitations and that the rights of others are protected by permitting the Commission or others to bring the Applicant back before the Commission if the Applicant fails to comply with the conditions. That is, if Beech Ridge uses unlicensed herbicide applicators, the Commission or others can bring Beech Ridge back before the Commission.

A second type of condition requires an Applicant to either demonstrate compliance with other statutes, (for example the Endangered Species Act or the

¹² West Virginia Code § 24-2-11c(c) further provides that the Commission shall set out “all material terms, conditions and limitations applicable to the construction or operation of the proposed facility.”

Migratory Bird Treaty Act) either prior to commencing construction and/or during the construction or operation stage of the project.

For example, this Commission, in the Beech Ridge matter, conditioned the issuance of the certificate on the Applicant's compliance with the Endangered Species Act, the Migratory Bird Treaty Act and the National Environmental Policy Act of 1969. (General Preconstruction and Construction Certificate condition 14). The Commission further required the Applicant to notify the Commission within 10 days during construction or operation if any authorized governmental agency or court with competent jurisdiction found that the Applicant was not in compliance with any one of the three acts. This Commission then stated, "[f]urthermore, the Commission may seek any legal remedies it has the authority to seek, including injunctive relief, to address any such findings."¹³

In addition, during the hearing on the Beech Ridge certificate the Commission heard expert and lay testimony on issues covered by the federal acts. For example, as noted in the Commission's August, 28, 2006 Order, testimony was entered into the record regarding whether the project would "take" endangered bats. The Commission then rightly considered and weighed that testimony and evidence in its required balancing test. (See 2006 Order pages 80 – 82).

The result of these actions by the Commission is clear. The Commission both recognized the statutory jurisdiction and expertise of federal and state regulatory authorities by requiring not only compliance with environmental laws, but notification of failure to comply. It also undertook to weigh and balance evidence on these matters

¹³ Here again, the Commission or others have the ability to bring the Applicant back before the Commission in the event that the Applicant fails to comply with this type of condition. (West Virginia Code § 24-2-11c (f)).

itself. Thus, the consideration of issues such as these is two-fold: consideration by the Commission in the first instance and issuing a certificate that is contingent on compliance with laws of other agencies for the life of the project with promised penalties for failure to comply. It simply cannot be said that the Commission either delegated consideration of issues to other agencies or failed to take issues such as these into consideration during its deliberations. The Council contends that this is an appropriate manner for the Commission to consider these issues within the context of the general public interest.

This process also effectively addresses the argument that the parties to this matter, or anyone else, have been denied the ability to cross-examine evidence on particular issues if those matters are considered by a state or federal agency that does not provide for an evidentiary hearing process. MCRE argues that it is "unfair to intervenors" (MCRE Brief, page 42) that West Virginia State Historic Preservation Office's regulatory process does not include a formal procedure for citizen involvement and "does not conduct hearings . . . wherein a party may cross-examine or otherwise challenge the conclusions and findings an applicant submits" to that Office. This situation, it is argued, is "unfair" in the circumstance where the Commission conditions certificates on the Applicant obtaining approval from that Office. However, in similar cases before the Commission parties have obtained testimony before the Commission from the Office regarding these issues. Thus, the Parties had a forum to raise these matters, the Commission can consider the evidence before it (whether the Office testifies or not) in its balancing test and the certificate, if granted, can be conditioned on future compliance with the penalty of sanctions by this Commission for failure to comply. Again, the Council contends that this process protects all of the interests involved and is consistent

with due process and administrative law and protective of the interests before the Commission.¹⁴

With regard to the Assignments of Error put forward by the Eisenbeiss Appellants, there is simply nothing in the record of this matter that supports the statements that the Commission “intentionally” disregarded the interests of the public or that the Applicant’s application was “flawed with deliberate inaccuracies and misrepresentations” (Eisenbeiss Brief, page 6). The record is clear, however, that the Commission, through its public and evidentiary hearing process, undertook a full review of the matters required by the law in reaching its determination in this matter. It cannot be said that the evaluation was in any way deficient or in excess of its statutory powers, that the evidence does not support the Commission’s findings or that the substantive result is somehow improper in light of the interests involved. The Eisenbeiss allegations simply must fail.

Conclusion

The Council, in its efforts to protect the interests of its members and the public, operates every day before agencies of this state where reasoned decisions and interpretations of law are the rules of the road. It is within the authority of the Commission, as it is with other administrative agencies, to consider the issues before it,

¹⁴ With regard to the matter of the issuance of a conditional certificate and the propriety of conditioning a certificate on approval by other federal and state regulatory agencies, the Commission’s historical actions in this area find support in Town of Andover v. Energy Facilities Siting Board, 435 Mass. 377, 380, 758 N.E.2d 117, 121-122 (Supreme Judicial Court of Massachusetts, Suffolk, 2001) wherein the Court stated that the Siting Board’s statement that final emissions limits would be set by the Department of Environmental Protection and not the Siting Board was “far from constituting a delegation, the statement is an accurate observation of the different roles of the board and the department in the over-all permit process.” (See also Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 448 Mass. 45, 858 N.E.2d 294 (2006)). While the statutes of Massachusetts and West Virginia are undoubtedly different, the Massachusetts Court recognized the varying roles of the agencies and found that it is not an improper delegation for the board to look to future actions of the EPA.

interpret its statutes and regulations and to determine a reasonable and appropriate construction of its rules in the matter before it. The Commission considered the interests before it and undertook to make the required balancing of those interests based on the evidence and the law. The Commission's actions are exactly the type of actions that an administrative agency is empowered to take.

The Eisenbeiss Appellants are in essence asking this Court to engage in an effort that this Court has held it is not appropriate to do – rebalance the interests and reinterpret the Commissions' rules and methods. They have selected this road because the record does not support a successful ride down the road of appropriate review by this Court of a PSC Order. That is, with regard to the August 2006 or the January 2007 Orders, the Petitioners have failed to demonstrate: that the Commission exceeded its statutory powers or jurisdiction; or that the record fails to include adequate evidence to support the Commission's findings; or that the substantive result of the Commission's actions was improper in light of the public's and the applicant's interests.

With regard to the January 2007 Order the Appellants simply fail to argue that the Commission in some manner erred with regard to the Commission's regulations and interpretation of Petitions to Reconsider. The Appellants failed to bring anything of substance to their *Petitions to Reconsider* before the PSC and they failed to bring forth anything before this Court that would demonstrate an error by the Commission with regard to the January 2007 Order.

With regard to the August 2006 Order and the underlying certificate case, the Commission looked to the record before it and balanced the interests of the parties and the public as required by law. Concerning the issue for which the Commission was

required to make a positive determination – the construction employment impact on the local economy and local employment – the record is clear that the Commission’s only choice was to find that construction will result in a substantial positive impact on the local economy and local employment. To find otherwise would have been contrary to the evidence in the record.¹⁵

With regard to the appraisal and balancing of the interests of the public, the general interests of the state and local economy and the interests of the Applicant, once again the record directed the Commission to only one conclusion – that the Commission should grant the siting certificate at issue. The Commission’s August 2006 granting of the siting certificate was contingent on factors and issues raised by the Petitioners in this matter including: protecting and further studying the impact of the facility on the bird and bat populations, obtaining and maintaining all applicable permits from state and federal regulatory agencies, including cultural issues, and maintaining all commitments, representations and agreements made with all parties and other entities.

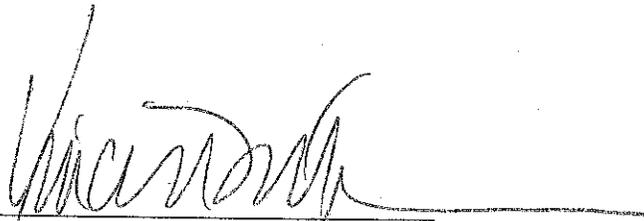
The MCRE Appellant alleges that the Commission ignored portions of its regulations with regard to the five-mile map and failed to provide adequate findings of fact and conclusions of law regarding its balancing of the interests before it. As discussed above, neither purported error is supported by the record in this matter. Also as discussed above, the Commission’s process was well within its statutory powers and jurisdiction and should be approved by this Court.

¹⁵ “An order of the public service commission based upon its findings of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from misapplication of the legal principles.” (Syl. Pt. 1 K. Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) citing Syl. Pt. 5 United Fuel Gas Company v. The Public Service Commission, 143 W. Va. 33, 99 S.E.2d 331 (1970)).

The Commission had before it a clear record. While much time and many procedural objections and deadend roads had been traveled, the Commission undertook an important step for the future of this State and the Greenbrier County area. In doing so the Commission ensured that the project at issue would be built and operated in compliance with all applicable laws and in a way that substantially benefits the state and local economy. The Council urged the Commission to issue the siting certificate with the contingencies stated above and urges this Court to reject the Appeals before it, let the Commission's work on this project stand and let the real work on the project itself begin.

Respectfully submitted this day of 19th June, 2007.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Alicia A. Eisenbeiss and Jeffrey C. Eisenbeiss,

Petitioners,

v.

Case No. 33376

**Public Service Commission of West Virginia,
and Beech Ridge Energy, LLC,**

Respondents

and

Mountain Communities for Responsible Energy,

Petitioners,

v.

Case No. 33375

**Public Service Commission of West Virginia,
and Beech Ridge Energy, LLC,**

Respondents

CERTIFICATE OF SERVICE

The undersigned counsel for the West Virginia State Building and Construction Trades Council, AFL-CIO hereby certifies that service of the **RESPONSE OF THE WEST VIRGINIA STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO TO THE INITIAL BRIEFS OF ALICIA A. EISENBEISS AND JEFFREY C. EISENBEISS, AND MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY FOR SUSPENSION OF FINAL ORDER AND REVIEW** has been made by depositing a true and exact copy thereof in the U.S. Mail, postage prepaid, on the 19th day of June, 2007 to the following:

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