

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ALICIA A. EISENBEISS and JEFFREY C. EISENBEISS,

Appellants,

v.

APPEAL NO. 33376

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

Appellees.

and

MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY,

Appellant,

v.

APPEAL NO. 33375

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

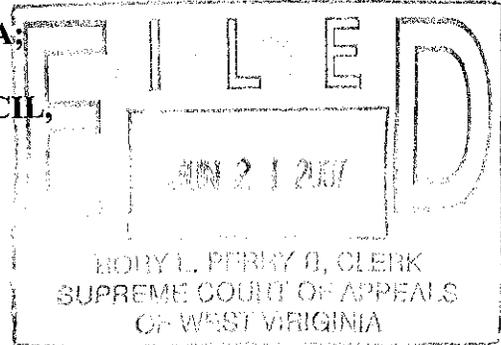
Appellees.

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

**BRIEF AMICUS CURIAE OF THE WEST VIRGINIA OIL AND
NATURAL GAS ASSOCIATION IN SUPPORT OF APPELLEES'
JOINT RESPONSE TO APPELLANTS' BRIEFS**

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I. INTRODUCTION

COMES NOW the West Virginia Oil and Natural Gas Association (“WVONGA”), by counsel Sharon O. Flanery and Steptoe & Johnson PLLC, and respectfully submit a brief as amicus curiae in the above captioned matter.

The amicus curiae, WVONGA, is an organization representing those participating in the exploration, production, transmission, storage, sale, and distribution of oil and natural gas in the state of West Virginia. WVONGA is a representative voice for these members in a broad range of economic, environmental, legal and regulatory matters.

This matter arose from an order entered August 28, 2006 whereby the Public Service Commission of West Virginia (the “PSC”) granted Beech Ridge Energy LLC’s application for a siting certificate for the construction and operation of a wholesale renewable wind energy generating facility in Greenbrier County, West Virginia. Objectors Alicia A. Eisenbeiss, Jeffrey C. Eisenbeiss, and Mountain Communities for Responsible Energy challenged the granting of the siting certificate with assertions that the PSC could not grant conditional siting certificates and that proper consideration was not given to certain public interests. At the heart of this matter is the role of the Public Service Commission in determining what information is necessary and what guidelines must be met in order to issue a siting certificate. This issue is of critical importance to the members of WVONGA, as many WVONGA members are commonly under the jurisdiction of the Public Service Commission to obtain siting certificates; and therefore it submits this brief as an amicus curiae in support of the positions held by the PSC.

Orders of the PSC are reviewable by this Honorable Court. “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 a

misapplication of legal principles.” *United Fuel Gas Company v. The Public Service Commission*, 143 W. Va. 33, 99 S.E.2d 1 (1957). See also *Boggs v. Public Service Comm’n*, 154 W. Va. 146, 174 S.E.2d 331 (1970). *Broadmoor/Timberline Apartments v. Public Service Commission*, 180 W. Va. 387, 376 S.E.2d 593 (1988). *Sexton v. Public Service Comm’n*, 188 W. Va. 305, 423 S.E. 2d 914 (1992). This Court has ruled that it “will not substitute [its] judgment for that of the Public Service Commission on controverted evidence” and “findings of fact made by the Public Service Commission will be overturned as clearly wrong when there is no substantial evidence to support them.” *Chesapeake and Potomac Telephone Company v. Public Service Commission of W. Va.*, 171 W. Va. 494, 300 S.E.2d 607 (1982). The Court will only review whether the PSC abused or exceeded its authority, which it recognizes to be broad, and determine whether the PSC gave “reasoned consideration to each of the pertinent factors” required for the issuance of a siting certificate. *Monongahela Power Co. v. Public Service Comm’n*, 166 W. Va. 423, 276 S.E.2d 179 (1981). These decisions by this Court indicate the deference given to the well-reasoned and informed issuance of siting certificates by the PSC.

In light of the standard for reviewing an order and the clear adherence to the statutory and regulatory guidelines for granting a siting certificate, this amicus respectfully requests that this Honorable Court uphold the Public Service Commission of West Virginia order granting a siting certificate.

II. ARGUMENT

A. The Public Service Commission Properly Conducted the Statutory Balancing Test

The statutory mandate promulgated in W. Va. Code § 24-2-11c(c), regarding the issuance of siting certificates is quite clear as to what standards must be considered in determining whether issuance is appropriate.

“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 of 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.”

The plain language of this statute clearly sets forth the three prong balancing test to be used by the PSC in the issuance of siting certificates. The three factors include: (1) the interests of the public, (2) the general interests of the state and local economy, and (3) the interests of the applicant. Reasoned consideration must be given to pertinent factors that affect these interests.

While the balancing test factors appear broad, applicants receive additional guidance as to what some of the pertinent factors are from the Rules Governing Siting Certificates for Exempt Wholesale Generators (“Siting Rules”). W. Va. Code St. R. § 150-30-1, et seq. The Siting Rules require information such as an overview of the project, justification for the need of the project, land to be used for the facility, site preparation and reclamation plans, proposed structures, impact on public utilities, affect on water flows and wind patterns, public financing sources, local and state economic impact, regional development impact, environmental impact on

species, view pollution, noise pollution, change in traffic patterns, cultural impact on landmarks and recreational areas, among a host of other required information.¹ These Siting Rules specify a starting point for the information that must be provided to the PSC in the application in order for the PSC to perform the statutory balancing test. As a quasi-judicial entity, the PSC does not merely grant a siting certificate to any applicant that files the application with all proper documentation. Rather it uses this information to perform the statutory balancing test and determine if the project is in the best interest of the public, the state and local economy, and the applicant.

Differences arise when different parties of interest choose to place greater weight on one element of the balancing test. Neither the statute nor the Siting Rules provide for greater weight to be placed on any of the three factors, but rather each must be considered in accordance with the other two. In the instant matter, Appellants are seeking to place greater weight on the interests of the public. As is often the case in opposition to similar type projects, this group claims to represent the “public.” However, it is simply one entity that represents a group of interested people, honing in on one or a small number of pertinent factors. While the views of such interested people are important and must be acknowledged, the standard requires the PSC to give reasoned consideration to *each* of the pertinent factors.

Appellants in this case request that the Court provide additional guidance to the PSC for determining the issuance of a siting certificate. It is clear that there is already delineated statutory and regulatory guidance for the PSC. It is unnecessary to burden the Court with the responsibility of creating additional considerations for the PSC in granting or refusing a siting certificate.

¹ W. VA. CSR §150-30-3.

B. The Public Service Commission Properly Placed Conditions on the Continued Existence of the Siting Certificate

The PSC is permitted to issue siting certificates that are conditioned on the subsequent attainment of permits or approvals from state and federal governments. Appellants take issue with the PSC's conditioning of the siting certificate upon satisfying certain permits and approvals. The plain language of the applicable statute and the Siting Rules set forth by the PSC allow for a siting certificate to contain such conditions. West Virginia Code Section 24-22-11c(c) states that "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." The legislature clearly contemplated that certificates would be issued with conditions. The Siting Rules also specifically allow for a contingent certificate to be issued. Siting Rule 5.1 states that "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."

It is commonplace and necessary to grant a siting certificate that is effective upon the completion of certain conditions, such as the receipt of approval from other governmental agencies. In this instance, the PSC conditioned the siting certificate upon the completion of numerous conditions, such as historic preservation, environmental, and wildlife conservation approvals. In many of the situations that come before the PSC, it would be nearly impossible to complete any project in a timely manner if all governmental approvals were required before a siting certificate were to be entered. Contrary to Appellant's inference, the conditional siting certificate does not supplant the requirement for other governmental permits and approvals, but rather allows applicants to continue working with the governmental agency to provide for proper

compliance with all state and federal laws – laws that are designed to protect the interests of the economy, the applicant, and the public, such as Appellants.

As conditional siting certificates are permitted, statutorily and through regulation, the siting certificate issued in this instant matter should be upheld and conditional certificates should be permitted for all further PSC rulings.

III. CONCLUSIONS

For the above stated reasons, this amicus curiae, the West Virginia Oil and Natural Gas Association, respectfully requests that this Honorable Court uphold the Public Service Commission of West Virginia order granting a siting certificate.

WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of June, 2007, I served the foregoing "BRIEF AMICUS CURIAE OF THE WEST VIRGINIA OIL AND NATURAL GAS ASOCIATION IN SUPPORT OF APPELLEES' JOINT RESPONSE TO APPELLANTS' BRIEFS" and the "MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE WEST VIRGINIA OIL AND NATURAL GAS ASOCIATION IN SUPPORT OF APPELLEES' JOINT RESPONSE TO APPELLANTS' BRIEFS" and all accompanying affidavits and exhibits upon all parties of interest and counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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