

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,

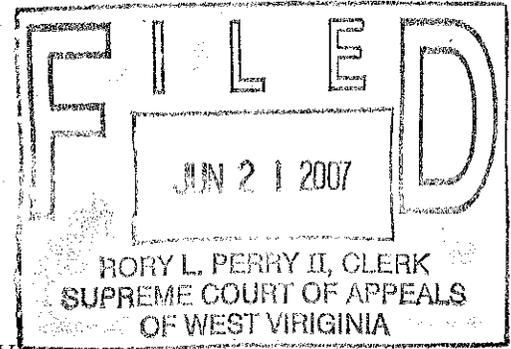
Appellant,

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**

**BEECH RIDGE ENERGY LLC'S JOINT RESPONSE
TO APPELLANTS' BRIEFS**

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COMES NOW Beech Ridge Energy LLC (“Beech Ridge”), by counsel, and pursuant to Rule 10(b) of the Rules of Appellate Procedure, hereby respectfully submits its Joint Response to the briefs filed by Mountain Communities for Responsible Energy (the “MCRE Brief”) and Alicia A. Eisenbeiss and Jeffrey C. Eisenbeiss (the “Eisenbeiss Brief”).

Succinctly, the Public Service Commission of West Virginia (the “Commission”), pursuant to the mandate of West Virginia Code § 24-2-11c, properly approved Beech Ridge’s application for a siting certificate for the construction and operation of a wholesale electric generating facility. Appellants have endeavored to pursue any and all avenues to prevent the construction of this project. Unable to find a single substantive reason that this project should not be built, the Appellants wish to inundate this Court with procedural minutiae, which, taken together, amounts to nothing. Appellants’ arguments do not specifically address any harm that will be caused by this project to cultural resources, environmental resources, or anything else. The reason is simple; they cannot. The Commission based its decision on thousands of pages of exhibits, 12 maps, 15 reports or studies, dozens of witnesses, six days of testimony, and two rounds of extensive, written briefing. Rather than address this evidence, Appellants largely focus on alleged procedural irregularities that, in the end, have no impact on the determination of this case. Accordingly, as discussed further below, this Court should uphold the determination of the Commission.

II. THE KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

These appeals both arise from two orders of the Commission regarding an application for a siting certificate for the construction and operation of a wholesale electric generating facility, including a transmission line (the “Application”), filed by Beech Ridge on

November 1, 2005. In essence, the project consists of a number of wind turbines used to convert renewable wind energy into electrical energy.

After a lengthy discovery process, six days of evidentiary hearings beginning on May 10, 2006, and significant and substantial briefing on the issues raised by all the parties, the Commission entered an Order conditionally granting Beech Ridge's Application for a siting certificate on August 28, 2006 (hereinafter "Commission Order I").

Commission Order I placed twenty-nine conditions on Beech Ridge's siting certificate. These conditions range from pre-construction requirements, requirements during the construction process and continuing obligations even after the project is constructed. Some of these conditions also relate to permits and approvals Beech Ridge is required to obtain. Indeed, Commission Order I provided, in part, that Beech Ridge must file with the Commission (i) evidence of necessary environmental permits or letters from agencies indicating compliance with rules or laws; (ii) approval of wetlands delineation; (iii) mitigation plans, if required, for endangered species or historical/archaeological sites; (iv) a final interconnection agreement with PJM; and (v) confirmation of exempt wholesale generator ("EWG") status with the Federal Energy Regulatory Commission (the "FERC"). (Commission Order I, at 87-91).¹

Several intervenors, including MCRE and Mr. and Mrs. Eisenbeiss, filed petitions asking the Commission to reconsider Commission Order I. Notably, these petitions did not raise any new issues, but, rather, essentially expressed the intervenors' displeasure with the Commission's ruling. After another round of briefing by the parties, the Commission denied the

¹ The number, thoroughness, complexity and specificity of these conditions render the Appellants' arguments largely immaterial. While the Commission has approved the certificate, Beech Ridge has additional requirements prior to the construction of the Project. Many—if not the vast majority—of Appellants' concerns are addressed by these conditions, and, indeed, the purpose for many of these conditions was, in part, to allay these concerns.

petitions to reconsider by an Order entered on January 11, 2007 (hereinafter “Commission Order II”). Importantly, this Order provided, among other things, that:

Beech Ridge shall notify the Commission when all pre-construction conditions have been met. Upon receipt of this notification from Beech Ridge, the Commission shall schedule a hearing regarding the pre-construction conditions. Beech Ridge shall have the burden of demonstrating that it has satisfied the Commission’s pre-construction conditions. Beech Ridge may not commence construction until the Commission’s review of the pre-construction conditions is complete.

(Commission Order II, at 59).² It is from these two Orders that the Appellants appeal.

III. STATEMENT OF THE CASE

A. Factual Background

1. Description and Location of the Project

Beech Ridge filed a siting certificate application with hundreds of pages of accompanying information including 12 maps, 15 reports or studies and other documents in support of its proposed construction and operation of a wholesale renewable wind energy generating facility in Greenbrier County, West Virginia (the “Facility”), and a Transmission support line (the “Transmission Support Line”) (together, the “Project”). (See Commission Order I, at 1). At a typical capacity factor, the Facility would produce renewable energy sufficient to provide annual electric power to 50,000 homes.

The Facility will be located along forested ridgelines in Northern and Western Greenbrier County, encompassing approximately 300 acres. (See *id.* at 69). Most of the 300 acres upon which the Facility will be constructed is owned by MeadWestvaco, a private forest

² This condition is an important corollary to Beech Ridge’s statement in footnote 1. The Commission has ordered that another hearing will occur prior to Beech Ridge’s construction of the Project. At that time, the Commission will ensure that all pre-construction requirements have been met. Thus, in essence, many of Appellants’ complaints concern issues that in all likelihood will be resolved as a result of Beech Ridge’s compliance with the pre-construction requirements. Moreover, Commission Order II expands upon and clarifies many of the issues raised in this appeal, including, for example, its reasons for concluding that Beech Ridge’s five-mile map was sufficient.

management company. (See id.) Other acreage where the Facility will be constructed is owned by Plum Creek Timber Company, Inc. (See id. at 43), and by other individual landowners. MeadWestvaco owns well over 100,000 contiguous acres surrounding the Project. (See id.) Presently the area consists of an actively managed forest. Much of the land has been extensively timbered and surface mined. (See id. at 70).

The two closest turbines to White Sulphur Springs, located on the opposite side of Greenbrier Mountain from the Facility, and Lewisburg, respectively, will be nearly 20 miles away, and more than 15 miles away. (See id. at 43). Beech Ridge has voluntarily provided a substantial setback of about one mile from any of the handful of residences that might be near a turbine, although setbacks in other jurisdictions and in West Virginia are much smaller distances.

2. Construction and Operation of the Project

Prior to commencing construction, Beech Ridge will file documentation with the FERC to become an EWG. (See id. at 70). As an EWG, Beech Ridge will be making only wholesale sales of electricity. (See id.)

Beech Ridge estimates that the Project will cost more than \$300,000,000. (See id. at 43). No public funding or financing will be used to construct the Project at any time. (See id.) The Project will be entirely privately funded. (See id.)

Construction of the Project will require approximately 215 workers. (See id. at 71). Beech Ridge has executed an Agreement with the Charleston Building and Construction Trades Council, AFL-CIO and the West Virginia State Building and Construction Trades Council, AFL-CIO (“Building Trades”) to be bound by a Project Labor Agreement with the Building Trades. (See id. at 72).

The Project will pay on average in excess of \$400,000 in annual property taxes. (See id. at 71). Beech Ridge has guaranteed to the Greenbrier County Commission that it will make an annual contribution to Greenbrier County in the event that its annual property taxes fall below \$400,000. (See id. at 46). Beech Ridge will be among the top five property taxpayers in Greenbrier County. The Project will also pay approximately \$200,000 annually in taxes to the State of West Virginia. (See id. at 71).³

Beech Ridge estimates the Project will spend over \$11,000,000 with West Virginia businesses during construction. (See id.). Upon commencement of operations, Beech Ridge will employ between 15 and 20 full time workers. (See id. at 44; 71). These permanent jobs will have full benefits, with an annual average salary of approximately \$35,000. (See id. at 44; 71).

B. Procedural History

On November 1, 2005, Beech Ridge filed the Application. (See id. at 1). Over the course of the proceedings before the Commission, Beech Ridge published notices in newspapers located in Greenbrier, Nicholas and Kanawha Counties four times regarding various aspects of the Project and Commission hearings. (See id. at 4-5). Also, it made Application materials available for review at seven public locations.

Petitions to intervene were filed in this case by twelve individuals or groups, including West Virginia State Building and Construction Trades Council, AFL-CIO (“Building Trades”); Mountain Communities for Responsible Energy (“MCRE”); and Jeffrey C. Eisenbeiss and Alicia A. Eisenbeiss. (See id. at 4, n. 4 and 5).

³ On March 9, 2007, the West Virginia Legislature passed Senate Bill 441, which will increase state taxes approximately 140% and county property taxes approximately 30% above the amounts found in the record and set forth herein.

The evidentiary hearing began on May 10, 2006 and continued for a total of six days. (See id. at 6). Over the course of the hearing, Beech Ridge presented the testimony of fifteen witnesses on a variety of issues, including avian studies, hydrology studies, traffic studies, bat studies, viewshed analysis, acoustical studies, interconnection to the power grid, cultural resources, wetlands assessment, tourism, property values, Beech Ridge's Application, MeadWestvaco's support, turbine locations and wildlife issues. (See id. at 6-7). Building Trades presented one witness on the issue of Beech Ridge's agreement to use local labor and one expert witness who testified on the very substantial positive economic impact of the construction of the Project. (See id. at 7). The remaining intervenors presented sixteen witnesses (including twelve witnesses for MCRE, and Mr. Eisenbeiss, himself) on various issues, including wildlife, viewshed, the efficiency of wind turbines, historical surveys, turbine location, noise, health, property values and the potential effect on historic sites. (See id. at 7-8). The Staff of the Public Service Commission (the "Staff") presented witnesses who testified regarding all aspects of the Project. (See id.).

On August 28, 2006, the Commission entered Commission Order I conditionally granting Beech Ridge's Application for a siting certificate for the Project. Subsequently, four intervenors filed Petitions for Reconsideration. (See Commission Order II, 6-10). On January 11, 2007, the Commission entered Commission Order II denying the Petitions for Reconsideration.

IV. SUMMARY OF ISSUES PRESENTED

This brief addresses two issues. The first issue is that this Court should uphold the Commission's decision because, contrary to MCRE's assertions, Beech Ridge's Application and supporting materials complied with the applicable rules regarding applications for siting

certificates, the conditions imposed by the Commission were proper, the Commission properly exercised its discretion in this case and the Commission's Orders contained sufficient findings of fact and conclusions of law to support its decision.

The second issue is that the Eisenbeiss Brief does not raise any reasoned argument as to why this Court should overturn the Commission's decision below. Indeed, the Commission was not required to appoint an expert witness; the Eisenbeiss' arguments regarding noise studies and the Commission's Noise Task Force ignore the record and misconstrue the reasons for the Commission's discontinuance of the Task Force; Beech Ridge's evidence disproves Mr. and Mrs. Eisenbeiss' arguments regarding property values; the record demonstrates that the Eisenbeiss' arguments regarding the economic impact of the Project are untenable; and the Commission's Orders adequately address the Eisenbeiss' concerns regarding wildlife.

V. POINTS AND AUTHORITIES RELIED UPON

1. ““[A]n order of the public service commission based upon its finding 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).’ Syllabus Point 5, in part, *Boggs v. Public Service Comm'n*, 154 W.Va. 146, 174 S.E.2d 331 (1970).” Syllabus Point 1, *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).

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 . . . 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 Comm’n, 166 W. Va. 423, 276 S.E.2d 179 (1981).

3. This Court has held that it “will not substitute [its] judgment for that of the Public Service Commission on controverted evidence.” Syl. pt. 2, Chesapeake and Potomac Telephone Company v. Public Service Commission of W. Va., 171 W. Va. 494, 300 S.E.2d 607 (1982). Accordingly, “[f]indings of fact made by the Public Service Commission will be overturned as clearly wrong when there is no substantial evidence to support them.” Id. at syl. pt. 3.

4. The interpretation of a statute or regulation presents a purely legal question that is subject to *de novo* review. See Syl. pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

5. “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. 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.” W. Va. Code § 24-2-11c(c).

6. The Commission exercises quasi-judicial powers. Appalachian Power Co. v. Public Service Comm’n of W. Va., 170 W. Va. 757, 296 S.E.2d 887 (1982).

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).

8. A public service commission and/or a board designed to oversee the siting of energy facilities may properly condition a certificate on the subsequent attainment of permits or approvals from state and federal agencies. See, e.g., Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 858 N.E.2d 294 (Mass. 2006); Clear Wisconsin, Inc. v. Public Service Comm'n of WI, 700 N.W.2d 768 (Wis. 2005); Town of Andover v. Energy Facilities Siting Bd., 758 N.E.2d 117 (Mass. 2001); Responsible Use of Rural and Agricultural Land v. Public Service Comm'n of WI, 619 N.W.2d 888 (Wis. 2000).

9. An administrative agency must comply with its own remedies and procedures. See Syl. pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

10. "Although the interpretation of regulations to ascertain their purpose is a question of law . . . the determination of whether conduct is in substantial compliance with these regulations, *i.e.*, whether their purpose is effectuated is a question of fact." Stensrud v. Mayville State College, 368 N.W.2d 519, 523 (N.D. 1985) (citations omitted).

11. "The agency's construction, while not controlling upon the courts, nevertheless constitutes a body of experience and informed judgment to which a reviewing court should properly resort for guidance. The weight that must be accorded an administrative judgment in a particular case will depend upon (1) the thoroughness evident in its consideration, (2) the validity of its reasoning, (3) its consistency with earlier and later pronouncements, and (4) all those factors which give it power to persuade, if lacking power to control." Cookman Realty Group, Inc. v. Taylor, 211 W. Va. 407, 417-18, 566 S.E.2d 294, 304-05 (2002) (Starcher, J., concurring).

12. "Substantial compliance" means "one has performed the 'essential requirements' of a statute." J.C. Evans Contr. Co., Inc. v. Travis Central Appraisal District, 4 S.W.3d 447, 451 (Tex. App. 1999) (quoting Missouri Pac. R.R. Co. v. Dallas County Appraisal Dist., 732 S.W.2d 717, 721 (Tex. App. 1987)).

13. "Where an administrative agency is required to find facts or state reasons as a basis for its order, the order must contain findings of fact, rather than conclusory statements, so as to withstand judicial scrutiny. Syl. pt. 3, Mountain Trucking Co. v. Public Service Comm'n, 158 W. Va. 958, 216 S.E.2d 566 (1975).

14. “Although [an] agency does not need to extensively discuss each proposed finding, such rulings must be sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed.” Syl. pt. 4, St. Mary’s Hosp. v. State Health Planning and Dev. Agency, 178 W. Va. 792, 364 S.E.2d 805 (1987).

15. A trial court has the discretion to appoint an expert, but “[d]ivergence of opinions among the experts of the parties does not require that the court appoint experts to assist it in resolving such conflicts.” Georgia-Pacific Corp. v. U.S., 640 F.2d 328, 334 (Ct. Cl. 1980).

VI. DISCUSSION OF LAW

A. Standard of Review

This Court’s standard of review with respect to this matter was enunciated in syllabus point one of Sexton v. Public Service Comm’n, 188 W. Va. 305, 423 S.E.2d 914 (1992), as follows:

““[A]n order of the public service commission based upon its finding 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).’ Syllabus Point 5, in part, *Boggs v. Public Service Comm'n*, 154 W.Va. 146, 174 S.E.2d 331 (1970).” Syllabus Point 1, *Broadmoor/Timberline Apartments v. Public Service Commission*, 180 W.Va. 387, 376 S.E.2d 593 (1988).

Furthermore, this Court has held that:

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 Comm'n, 166 W. Va. 423, 276 S.E.2d 179 (1981). This Court has held that it “will not substitute [its] judgment for that of the Public Service Commission on controverted evidence.” See Syl. pt. 2, Chesapeake and Potomac Telephone Company v. Public Service Commission of W. Va., 171 W. Va. 494, 300 S.E.2d 607 (1982). Accordingly, “[f]indings of fact made by the Public Service Commission will be overturned as clearly wrong when there is no substantial evidence to support them.” Id. at syl. pt. 3. On the basis of the foregoing, the standard of review applicable to the Commission’s decisions is clearly a deferential one.

MCRE contends that there is a matter of statutory interpretation or regulatory interpretation at issue in this case, and, as such, a *de novo* standard of review applies to this Court’s review of every aspect of Commission Orders I and II. (MCRE Brief, at 30). It is true that the interpretation of a statute or regulation presents a purely legal question that is subject to *de novo* review. See Syl. pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). However, such a standard of review would only apply in those instances in which Appellants can demonstrate that the Commission actually interpreted a statute or regulation, rather than merely determining that an applicant substantially complied with the same. That is not the case in the instant matter, and the *de novo* standard of review is inappropriate. Regardless, Commission Orders I and II should be upheld no matter the standard of review.

- B. The Commission properly denied MCRE’s Motion to Dismiss; Beech Ridge’s Application and supporting documents were compliant with the applicable regulations, and the Commission’s application of its own rules and regulations was reasonable and appropriate.**
- 1. MCRE misapprehends the statutory scheme used by the Commission to analyze applications for siting certificates.**

Pursuant to W. Va. Code § 24-2-11c, Beech Ridge sought approval of a siting certificate. This code section is the guiding star for the Commission's analysis. Section 24-2-11c(c)—which governs the analysis of the issues before this Court—reads in pertinent part:

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. 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.

(emphasis added). In other words, the Commission must embark on a tripartite balancing test in granting a siting certificate, which includes consideration of public interests, the applicant's interests and the interests of the state and local economy. The Commission did so in a number of discrete conclusions of law. (See Commission Order I, at 75-82).

MCRE, however, focuses on the very narrowest aspect of the Commission's mandate, namely, one very small piece of the public interest, while totally ignoring positive aspects of the Project on the public interest, the support for the Project from many members of the public, the interests of the state and local economy, and the interests of the applicant. Thus, what MCRE advocates is a small part of the public interest outweighs all else in the balancing test. Yet, the Legislature made it clear that all three of these statutory interests are equal; such is the very nature of a balancing test. Moreover, MCRE represents only a small portion of the "public," and, in fact, there are numerous members of the public who support the Project. (See

Commission Order I, at 3-4; 8-10). Thus, MCRE does not truly speak for the “public;” rather, MCRE speaks for itself and its members. Because MCRE does not have any basis to challenge the Commission’s findings regarding Beech Ridge’s interests, the interests of the state and local economy, other components of the public interest, or the support of other members of the public, MCRE focuses on alleged procedural deficiencies under the Commission’s administrative rules. This reliance is unavailing.

The Rules Governing Siting Certificates for Exempt Wholesale Generators, W. Va. Code St. R. tit. 150, § 150-30-1, et seq. (the “*Siting Rules*”) were promulgated by the Commission in order to guide an applicant in terms of the form and contents of an application for a siting certificate or an application to modify, amend or transfer a siting certificate. The *Siting Rules* represent the information that is the starting point, but not the end, of the Commission’s inquiry. MCRE would have the Court believe that the materials filed in support of an application conclude the Commission’s fact-finding process. This inference is not correct. Indeed, the *Siting Rules* make it clear that in addition to the materials supplied with the application:

[U]pon request of the Commission or Commission Staff, the applicant for a Siting certificate shall provide the Commission or Commission Staff with any additional information pertinent to Commission review of the Siting certificate. This rule does not impact the rights of other parties to seek discovery pursuant to the Commission’s Rules of Practice and Procedure.

Siting Rule 1.7. Consequently, any other party is permitted to seek discovery pursuant to W. Va. Code St. R. tit. 150, § 150-1-1, et seq. (the “*Procedural Rules*”). Notably, the Commission’s process is not a purely ministerial one; indeed, the Commission exercises quasi-judicial powers. See Appalachian Power Co. v. Public Service Comm’n of W. Va., 170 W. Va. 757, 296 S.E.2d 887 (1982). As such, an applicant does not merely file an application for a siting certificate, and, if it meets the requirements of the *Siting Rules*, the Commission simply “rubberstamps” the

application. Thus, while the *Siting Rules* provide a benchmark of the information that is required to be submitted with an application, it does not conclude the process. MCRE's repeated reliance on the *Siting Rules* as the end-all be-all of this process is misplaced.

Finally, MCRE refers to the Commission's order in Longview Power, LLC, Case No. 03-1860-E-CS (Nov. 21, 2005) as controlling the analysis under West Virginia Code § 24-2-11c. Put simply, the statute—not the Longview case—controls the analysis before the Commission. Nevertheless, MCRE's reliance on this case is misplaced for two reasons. First, the Commission did in fact consider each and every one of the factors the Commission identified in Longview. Second, the doctrine of *stare decisis* does not normally apply to administrative decisions. See Chesapeake and Potomac Telephone Company, at syl. pt. 5. It appears, therefore, that MCRE's argument is that Commission Order I is defective because it did not mention the Longview case by name. This argument is meritless; the statute controls and the Commission considered each and every issue the statute requires. As discussed further below, it is evident that the Commission's decision in this case satisfied not only the letter, but the spirit of W. Va. Code § 24-2-11c.

2. The documentation filed with Beech Ridge's Application satisfied the requirements of the *Siting Rules*.

a. Beech Ridge's Application sufficiently addressed cultural matters.

MCRE places a great deal of emphasis on Beech Ridge's alleged failure to comply with the requirements of the *Siting Rules* concerning cultural impact, and specifically the subpart entitled "Landmarks." It bears mentioning that MCRE does not cite a single example of a historical or cultural site that will be harmed by this Project. Thus, for all of MCRE's complaints about the alleged deleterious effects of the Project, its brief is entirely devoid of any

argument that the Project will actually cause some harm to any “landmark.” Regardless, the *Siting Rules* state as follows:

3.1.o. 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.

Siting Rule 3.1.o. Despite MCRE’s arguments to the contrary, this section of the *Siting Rules* does not require a cultural resource study. Moreover, it seems clear from the title “Landmarks” that this subsection refers to something unique or special and so designated, or generally understood to be. That is why reliance on the West Virginia Division of Culture and History, State Historic Preservation Office (“SHPO”) is necessary.⁴ Beech Ridge filed its Application with the Commission and reported that it was working with SHPO. It updated that information with data responses, testimonies and briefs. Beech Ridge has stated at numerous times, including in briefs that it will comply with SHPO’s final report and recommendations.

The Commission has conditioned Beech Ridge’s siting certificate in this case on that compliance. Indeed, Commission Order I stated as follows:

Beech Ridge must file with the Commission evidence of any environmental permits and/or certifications prior to commencing construction (including any letter from . . . [the] West Virginia State Historic Preservation Office indicating either that Beech Ridge does not need to take any further action or outlining what

⁴ MCRE intimates in its Petition that SHPO somehow disapproved of Beech Ridge’s five-mile map. This is inaccurate, at best. The map referred to in the letter written by Susan M. Pierce—State Deputy Historic Preservation Officer—and cited by MCRE actually refers to a viewshed map in a preliminary report to SHPO, not the five-mile map.

action Beech Ridge needs to take to be in compliance with that agencies rules/laws).

(Commission Order I, at 88). Further, in Commission Order II, the Commission stated that:

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 outlines what action Beech Ridge must take to be in compliance with that agency's rules/laws, and that Beech Ridge files the historical/archeological significance study with any required mitigation plans prior to commencing construction.

(Commission Order II, at 53). Therefore, there is no doubt that prior to construction, Beech Ridge—in conjunction with SHPO—will ascertain precisely what impact there will be on “landmarks,” and Beech Ridge will mitigate these impacts in compliance with SHPO's findings. Furthermore, to suggest that the Commission was unaware of cultural resources in the area discounts the evidence in the record regarding this issue from both Beech Ridge and the intervenors. Beech Ridge provided mapping and testimony regarding resources from West Virginia and Greenbrier County publications and sources. Intervenors provided their own information that Beech Ridge believes did not constitute cultural resources. Thus, the Commission had all of this cultural evidence in the record from both parties.

Nevertheless, MCRE contends that it is improper for the Commission to allow Beech Ridge to move forward with this process after the Application has been conditionally granted. However, the *Siting Rules* explicitly state that:

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.

Siting Rule 5.1. In other words, the *Siting Rules* specifically allow Beech Ridge to continue to work with SHPO in this regard even after the granting of the Application. MCRE's arguments to the contrary ignore the plain language of the *Siting Rules*.⁵

More importantly, however, it is critical to note that SHPO is required to review all undertakings permitted, funded, licensed or otherwise assisted by the State of West Virginia. Indeed, the West Virginia Code provides as follows: “[t]he 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) (emphasis added); see also W. Va. Code St. R. tit. 82, § 2-5-5.1 (“[t]he Division of Culture and History will review all undertakings permitted, funded, licensed or otherwise assisted, in whole or in part, by the state for the purposes of furthering the duties outlined in W. Va. Code 29-1-8.”). The practical importance of this fact is twofold. First, SHPO is required by law to review a project such as the one at issue in this case. Second, SHPO does not truly become involved in a project until after the applicant receives a permit or license from the State. Thus, the fact that the Commission conditioned its issuance of the siting certificate in this case on a review by SHPO is consistent with West Virginia law.

MCRE seeks to put the cart before the horse by requiring an applicant to seek SHPO's review prior to the issuance of a certificate. Not only is this legally incorrect, it is also realistically impossible. Until a project is certificated, there is no way to state with any degree of precision what the impact on cultural resources will be because the applicant will not know for certain the exact location, scope and contours of the project beforehand. The possible impact on and mitigation of such resources is, therefore, a fluid process.

⁵ Interestingly, MCRE appears content to pick and choose which of the *Siting Rules* is controlling. This rule is, in fact, dispositive of the issue regarding SHPO, despite MCRE's arguments to the contrary.

Further, MCRE argues that SHPO's process does not provide intervenors with the ability to participate in the review process, and, as such, MCRE will be denied its due process rights under the procedure set forth by the Commission. MCRE is correct that SHPO does not appear to provide any formal administrative hearing for its process.⁶ Nevertheless, the Commission has given MCRE—and any other affected party—the ability to challenge SHPO's findings and the ultimate mitigation plan in this case. Importantly, Commission Order II provides, among other things, that:

Beech Ridge shall notify the Commission when all pre-construction conditions have been met. Upon receipt of this notification from Beech Ridge, the Commission shall schedule a hearing regarding the pre-construction conditions. Beech Ridge shall have the burden of demonstrating that it has satisfied the Commission's pre-construction conditions. Beech Ridge may not commence construction until the Commission's review of the pre-construction conditions is complete.

(Commission Order II, at 59). Accordingly, Commission Order II actually gives MCRE more rights than those to which it is entitled under West Virginia law. Thus, rather than “passing the buck,” the Commission gave affected parties the opportunity to test SHPO's conclusions, together with any of the other pre-construction conditions. As a result, the Commission actually imposed a higher burden on Beech Ridge than that required by West Virginia law. MCRE's arguments to the contrary are meritless.

b. Beech Ridge's map complied with the requirements of the *Siting Rules*.

⁶ In its brief, MCRE relies on certain regulations regarding SHPO to support its position that the Commission “passed the buck” to SHPO. Put simply, the review process cited by MCRE does not apply in this case. Indeed, the regulations make it clear that “[t]he following review process will be conducted on lands owned or leased by the state, or on private lands where investigation and development rights have been acquired by the state by lease or contract” W. Va. Code St. R. tit. 82, § 2-5-5.1 (emphasis added). MCRE's reliance on these standards is, therefore, misplaced.

The *Siting Rules* require the submission of no less than 8 maps and 12 reports or studies as supplemental information to an application for a siting certificate. In fact, Beech Ridge submitted 12 maps and 15 reports or studies. MCRE finds fault with only one of these twenty-seven filings—the so-called “five-mile map.” The *Siting Rules* set forth a number of items that the five-mile map should contain. MCRE does not contend that Beech Ridge failed to submit the map, but, instead, that the five-mile map Beech Ridge submitted was incomplete under MCRE’s interpretation of the *Siting Rules*. Tellingly, out of all the requirements imposed by the *Siting Rules* and all the maps and documents Beech Ridge submitted in support of its Application, MCRE’s argument is that the considerable amount of work done by the Commission and the parties should be summarily discarded because MCRE believes that Beech Ridge’s five-mile map contains some minor defects. On its face, this argument is extremely narrow and trivial when compared to the broader duty of the Commission to carefully balance the interests of the public, the general interests of the state and local economy and the interests of Beech Ridge.⁷

Indeed, counsel for MCRE has conceded that, at most, Beech Ridge omitted certain historical and cultural items. In briefing related to another wind power case before the Commission, MCRE’s counsel argued as follows:

Although the issue before the Commission in this case is similar to that raised in the *Beech Ridge* case, there is a great difference in the maps submitted in each case. In the *Beech Ridge* case the 5-mile radius map contained land use data although it was difficult to understand. The *Beech Ridge* map contained some, but not all, historic sites, churches, schools and cemeteries. The *Beech*

⁷ Despite intervening in this case on December 7, 2005, MCRE filed its motion to dismiss on May 17, 2006, the last day of the evidentiary hearings in this case. The irony of MCRE’s position is that while it bemoans the contents of Beech Ridge’s five-mile map, it is abundantly clear that the map was sufficient to put MCRE—and other interested parties—on notice as to the area affected. MCRE had sufficient information to meaningfully respond to Beech Ridge’s Application. MCRE’s argument is greatly undermined by its own tactical decision to raise this issue at the last possible minute in the hopes of ambushing Beech Ridge. Simply put, MCRE’s arguments in this regard are untenable. See Syl. pt. 1, *Baltimore & O.R. Co. v. Public Service Comm’n*, 90 W. Va. 1, 110 S.E. 475 (1922).

Ridge map did not depict recreational areas or hunting and fishing areas. In response to the motion to dismiss, Beech Ridge argued that much of the data that the intervenors complained was left off the map simply resulted from the intervenors different interpretations of the rule (e.g. whether a picnic pavilion was a recreational area or whether a transmission line was a major utility corridor).

This case can be distinguished from the *Beech Ridge* case because the issue in this case is not the level of compliance with the rule; that is whether each and every private cemetery must be on the map or whether a certain item is required to be placed on the map as a result of different interpretations of ambiguous provisions. In this case the issue is Liberty Gap's complete disregard of entire sections of EWG Siting Rule 150 C.S.R. § 30-3-3.1.h. Unlike the Beech Ridge map, Liberty Gap's 5-mile radius map does not depict land use classifications. In this case the issue is not whether Liberty Gap missed some cemeteries, schools, historic places, hunting or fishing areas, and other recreational areas. Liberty Gap's map does not depict any of this information. Given the gross similarities between the maps in the two different cases, it is apparent that Liberty Gap's map is even more deficient than the 5-mile radius map filed in the *Beech Ridge* case.

(Initial Brief of Intervenor Friends of Beautiful Pendleton County, Inc., available at <<http://www.psc.state.wv.us/imagined_files/Docket/2007_05/dck20070517154236.pdf>>)

(emphasis added). Thus, MCRE's counsel has essentially admitted the fact that the issues with regard to Beech Ridge's five-mile map are picayune.

Based on a review of the map itself and the regulatory requirements, Beech Ridge's five-mile map was sufficient.⁸ Within the items required to be contained in the five-mile

⁸ The *Siting Rules* state, in pertinent part, as follows:

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

1. 5-mile 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;

map, MCRE does not appear to question the presence of major population centers and geographic boundaries or major institutions. Therefore, Beech Ridge will not address these issues herein. As discussed further below, it is apparent that the alleged deficiencies in Beech Ridge's map are either entirely illusory or nothing more than disagreements regarding the meaning of certain words.

i. Scale.

The *Siting Rules* require that an applicant submit an ANSI size D map of 1 inch: 4800 feet scale. (Commission Order I, at 17). The scale of Beech Ridge's five-mile map was 1 inch: 5,416.89 feet. (*Id.*). Beech Ridge submitted the map with a slightly smaller scale in order to ensure that the map fit on one page. In essence, Beech Ridge could not provide a map that complied with both the ANSI size D requirements and the scale set forth in *Siting Rule* 3.1.h.1 without producing at least two maps. Indeed, an ANSI size D map is 22" X 34". (*Id.* at 18 n. 5). The distance covered by the Transmission Support Line is simply too large to fit on a single ANSI size D map at the scale set forth in the *Siting Rules*. (*Id.*). MCRE complains that the scale

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- 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 and classifications; including residential, urban, manufacturing, commercial, mining, transportation, utilities, wetland, forest and woodland, pasture and crop land[.]

Siting Rule 3.1.h. It is important to note that these terms are undefined, and, as Beech Ridge presented the first application to be heard by the Commission under the *Siting Rules*, there were no prior cases to guide Beech Ridge.

of Beech Ridge's map was too small, notwithstanding the fact that the Commission's clear preference is for the entire Project to be depicted on a single map. (*Id.*). Indeed, this preference makes sense for any number of reasons, not the least of which is the fact that it is much easier to reference one map, rather than several, in order to put the Project in perspective in terms of the other items contained therein. More critically, however, the difference in scale is very small. A one inch line on a 1 inch: 4,800 feet scale map would be about nine/tenths of an inch on a 1 inch: 5,416.89 feet scale map. (Commission Order II, at 25). Accordingly, MCRE's argument is that the entire map was defective because of a difference of one tenth of an inch. To suggest that an application for a project as large and complex as the one proposed by Beech Ridge should fail over the matter of a difference of one tenth of an inch on one of 27 maps and reports is the ultimate example of the elevation of form over substance.

ii. Major transportation routes and utility corridors.

As to the issue of major transportation routes, it is evident that MCRE's arguments rely upon an erroneous reading of the *Siting Rules*. It is undisputed that Beech Ridge's five-mile map both shows and names the county routes that traverse the Project. These routes are County Route 10/1 and County Route 1. (Commission Order I, at 18). Nevertheless, MCRE argues that Beech Ridge's map is somehow defective because it does not label access roads to Williamsburg or Friars Hill. MCRE conveniently ignores the fact that these roads would not be considered "major transportation routes." They also are not going to be used in construction or operation of the Project. Moreover these roads are shown on the five-mile map, and are easily identifiable based on the presence of town names.⁹ MCRE's arguments are meritless.

⁹ Furthermore, all roads are identified and depicted in the traffic study report required by the *Siting Rules*. Thus, the Commission had before it appropriate information to determine if a road was a "major transportation route."

MCRE also takes issue with the fact that Beech Ridge did not depict a utility line on the five-mile map. (Commission Order II, at 16). It is apparent that a single utility line is not a “major utility corridor” within the meaning of the *Siting Rules*. If this line is a major corridor then every electric line is one. Again, if the Commission was interested in the location of every single utility line in a project area, it would have said so. It did not, and MCRE’s arguments in this regard only succeed if one ignores the plain language of the *Siting Rules*.

iii. Bodies of water.

The *Siting Rules* require that an applicant depict bodies of water that will be directly affected by the facility. The *Siting Rules* do not require the depiction of each and every body of water contained in a project area, as MCRE seems to allege. Beech Ridge’s expert witness, Dr. Laidley Eli McCoy, head of West Virginia’s Water Resources Division for 17 years, testified that the Project would not impact any water within the Project area. (Commission Order I, at 80). His testimony was essentially unrefuted at the hearing. In the end, there was no evidence of any impact on any body of water within the area of the Project. That is the water that must be shown on the five mile map, and there is none. Moreover, the “unaffected” bodies of water are depicted on other maps. MCRE’s argument in this regard is untenable.

iv. Topographic contours.

Simply put, Beech Ridge’s five-mile map contained topographic contours. There is no reasoned argument to the contrary. It is true that because the map contained both land use classifications and typical map features, the topographic contour lines were lighter in some places. Furthermore, some of the lines are very close together due to the fact that the land in the area surrounding the Project is generally very steep. However, the topographic contours are still

visible, and they are undoubtedly contained on the map. MCRE's arguments otherwise are simply inaccurate. Additionally, topographic contours are also found on other maps.

v. Land use classification.

Succinctly, Beech Ridge's five-mile map contains land use classifications. Even MCRE's counsel has admitted as much in the filing referenced above. Not only is this fact obvious based on a cursory review of the map, the legend also designates specific land uses and corresponding colors denoting the same. As such, there is no question that Beech Ridge met this requirement.

vi. Public or private recreational areas, hunting or fishing areas; historic scenic areas or places; religious places; archaeological places; or places otherwise of cultural significance.

Of all of the issues regarding the items contained in an applicant's map under the *Siting Rules*, this provision is the least specific for several reasons. First, these terms are largely undefined. Second, the nature of these sites depends heavily on the beholder. Finally, there is the issue of accessibility and publicity. In other words, an applicant such as Beech Ridge cannot map a feature to which it does not have access or that is unknown except to a very few, select people (i.e., a private cemetery hidden away on someone's property). In short, an assessment of these features will always depend—to some extent—on the judgment of the applicant and the discretion of the Commission. MCRE's argument is that the five-mile map is insufficient because it did not contain each and every feature that MCRE believed should be included on the map, or, if the feature was on the map it was not labeled as MCRE would want it labeled. However, the logical extension of MCRE's argument—if adopted by this Court—would be that every application for a siting certificate will devolve into the opponents of a project litigating every conceivable feature that might fall within the language of the rule in the hope of derailing

the application. Such an approach would be both unduly burdensome and ultimately contrary to the mandate of the Legislature. Furthermore, as discussed below, Beech Ridge's map substantially complied with the requirements of this subsection of the *Siting Rules*.

Beech Ridge's five mile map shows eleven churches, three cemeteries, and three historic or cultural sites. (Commission Order II, at 27). In order to locate these sites, Beech Ridge consulted West Virginia University's GIS center for recreation sites and churches, SHPO for historical and cultural areas, and Greenbrier County and West Virginia tourist brochures and websites for recreation, historical and cultural areas. (*Id.*). Moreover, Beech Ridge does not believe that the *Siting Rules* contemplated some of the locations found on the MCRE map such as family cemeteries, picnic sites, and a "reported Indian mound." Beech Ridge also did not believe that it was required to show MeadWestvaco's private land as a public recreation site. While it is true that MeadWestvaco permits public access to its land for activities such as hunting, berry picking and picnicking (Commission Order I, at 70), it is also true that such access is at the will and pleasure of MeadWestvaco. More simply, MeadWestvaco does not operate a public park, it merely permits public access.¹⁰ Carried further, MCRE's analysis would include—for example—the property of any landowner who permits people to hike or ride all terrain vehicles thereon. Leaving aside for the moment the issue of whether this would even constitute a public or private recreation area, how would an applicant know of this use?

Beech Ridge acknowledges that MCRE interprets community areas differently and would include as features areas that Beech Ridge was unable to map through the reliable sources it consulted. Beech Ridge attempted through reliable sources to locate features and located many of those features. Notwithstanding Beech Ridge's efforts, it did not locate all of

¹⁰ Moreover, this use of MeadWestvaco's land was not unknown to the Commission. Beech Ridge offered a MeadWestvaco witness to testify regarding public use of MeadWestvaco's property and the fact that this use would not be affected in any fashion by the Project.

the features that MCRE believes should be placed on the five-mile map. This is not lack of compliance. Instead, Beech Ridge's efforts indicate that it sought to represent accepted and well-known sites on its map. That there exist strongly held differences of opinion in this regard amply demonstrates the reasonableness of Beech Ridge's Application. Whether a picnic table constitutes a public or private recreation site is largely a matter of opinion. Beech Ridge submits, however, that MCRE's interpretation of the *Siting Rules* requires an overly technical construction that would force an applicant to place any conceivable feature on a map in order to avoid dismissal. Additionally, it may force an applicant to trespass on private land in an effort to locate these features. Such a result was clearly not contemplated by either the Legislature or the Commission, and the Court should reject this argument.

MCRE has tried to strengthen this argument by inferring that Beech Ridge's witness—David Groberg—conceded that MCRE's five-mile map was correct. But this overstates what Mr. Groberg acknowledged. What Mr. Groberg said was he had no reason to doubt the accuracy of the existence of features placed on MCRE's five-mile map. What was not "conceded" or "accepted" was that all of the points marked on MCRE's map represented things that were called for by any regulations or that MCRE's characterization of something as "historical" or "recreational" meant that such was the proper treatment of the feature under the *Siting Rules*. (Hrg. Tr. Day 5, at 99-102).

Beech Ridge made a considerable effort to locate features that were responsive to this subpart of the *Siting Rules*. MCRE would have placed some other features and would have labeled some identified features differently. However, Beech Ridge's map provided sufficient information for the Commission and the parties to assess the cultural impact of the Project. As such, the five-mile map substantially complied with the requirements of this subpart.

In summary, there is no doubt that Beech Ridge complied with subparts (A) – (E) and (G) of *Siting Rule* 3.1.h. There is similarly no doubt that Beech Ridge substantially complied with subpart (F). In fact, the only place where the Commission was required to exercise any discretion was with regard to subpart (F) and issues regarding the scale of the map. Furthermore, Beech Ridge complied with *Siting Rule* 3.1.o. As discussed further below, the Commission certainly had the discretion to conclude that Beech Ridge's five-mile map met the requirements of the *Siting Rules*, and the Commission's interpretation was reasonable.

3. The conditions imposed by the Commission are reasonable and appropriate.

MCRE argues that the Commission's conditional approval of Beech Ridge's siting certificate was defective. MCRE apparently concedes, as it must, that certain permits for environmental matters, for example, can only be issued after the project is certificated. Additionally, MCRE states that:

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.

(MCRE's Brief, at 40). It appears, therefore, that MCRE primarily takes issue with the Commission's conditioning of the certificate upon satisfying SHPO's process. As discussed in detail above, SHPO is required by law to review all undertakings permitted, funded, licensed or otherwise assisted by the State of West Virginia. See W. Va. Code § 29-1-8. By its own terms, this requirement depends on the issuance of an actual permit or license, among other things. Accordingly, it is entirely appropriate for the Commission to condition a siting certificate upon satisfying SHPO's review procedure.

Moreover, the siting statute itself states that “[a]ll 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.” W. Va. Code § 24-2-11c(c). Furthermore, the *Siting Rules* explicitly state that:

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.

Siting Rule 5.1. Under the siting regime established by the Legislature and the Commission, the Commission is able to issue a siting certificate conditionally. Additionally, the applicable regulations expressly allow the Commission to issue a siting certificate contingent upon both permits and approvals. In this instance, the Commission issued a certificate conditioned upon SHPO’s approval, among other things. Under West Virginia law, the Commission has the authority to do so, and, as a result, this condition cannot be reversible error.

It is important to note that conditioning certificates of this kind on various approvals and permits is not out of the ordinary, and, indeed, it is quite commonplace. At least two different courts have held that a public service commission and/or a board designed to oversee the siting of energy facilities may properly condition a certificate on the subsequent attainment of permits or approvals from state and federal agencies in analogous circumstances. See, e.g., Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 858 N.E.2d 294 (Mass. 2006) (“[t]here was nothing improper in the board’s decision to issue a conditional permit.”); Clear Wisconsin, Inc. v. Public Service Comm’n of WI, 700 N.W.2d 768 (Wis. 2005) (“it is not error for the PSC to rely on the DNR’s expertise and regulatory approval process when making its finding . . . even if those determinations are forthcoming.”); Town of

Andover v. Energy Facilities Siting Bd., 758 N.E.2d 117 (Mass. 2001) (holding that the board did not improperly delegate its responsibility to another agency by waiting to establish final, binding emission limits until the other agency acted); Responsible Use of Rural and Agricultural Land v. Public Service Comm'n of WI, 619 N.W.2d 888 (Wis. 2000) (rejecting argument that PSC could not issue a certificate until developer obtained all the permits it must obtain prior to construction). The Responsible Use case presents a particularly compelling parallel to the instant matter. In that case, the Village of Rockdale argued that the PSC improperly placed a condition on the certificate issued to the developer. The court held as follows:

Rockdale contends that the PSC also improperly placed conditions on the certificate that delegated the PSC's authority over land use considerations to RockGen [the developer]. For example, the PSC ordered that 'RockGen Energy shall confer, consult and work with the town of Christiana to develop and execute a landscape plan that reasonably harmonizes the Facility landscaping with the surrounding area.' Order at 9. Rockdale points to no authority, and we know of none, suggesting that such a condition is improper.

Responsible Use, 619 N.W.2d at 910. Similarly, in this case, MCRE argues that the Commission improperly delegated decisionmaking authority to SHPO. However, Responsible Use indicates that such a condition is not improper. In addition, unlike the condition in Responsible Use, SHPO actually has the affirmative obligation to review projects licensed or permitted by the State of West Virginia. As such, the conditions imposed by the Commission were a reasonable exercise of its authority.

4. The Commission has the discretion to determine the sufficiency of an application for a siting certificate.

MCRE appears content to focus on a very narrow reading of the Commission's *Siting Rules* in order to argue that Beech Ridge's Application was insufficient, and should have been denied upon a motion to dismiss. The filing of the application, however, does not end the

Commission's inquiry. The purpose of proceedings before the Commission is to do substantial justice. In this regard, the *Rules of Practice and Procedure* state that "[i]n the investigations, preparations and hearings of cases, the Commission shall not be bound by the technical rules of pleadings and evidence, but in that respect it may exercise such discretion as will facilitate its efforts to understand and learn all the facts bearing upon the right and justice of the matters before it." *Rule of Practice and Procedure*, 13.1 (emphasis added). MCRE's contention is that the Commission has no discretion to augment the matters contained in an applicant's map with other matters it may learn during the course of a case. This argument is wrong as the *Rules of Practice and Procedure* make clear.

The Code provision authorizing the Commission's review of siting certificates also leaves little doubt that the Commission has the authority and discretion to pass upon whether an application is sufficient. Indeed, West Virginia Code § 24-2-11c(d) states that "[t]he commission may require an applicant for a siting certificate to provide such documents and other information as the commission deems necessary for its consideration of the application." In other words, the Legislature expressly stated that the Commission is the ultimate arbiter of whether an applicant has provided sufficient information for the Commission to consider a siting application. Therefore, under West Virginia Code § 24-2-11c(d), the Commission clearly has the discretion to determine if an application (and the material submitted therewith) is adequate. To be sure, the Commission must comply with its own remedies and procedures. See Syl. pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). However, the argument in this case is not that the Commission allowed Beech Ridge to forego the submission of a five-mile map, but, rather, that in MCRE's opinion the map was insufficient. While MCRE may disagree with the Commission on this point, the fact remains that the Legislature explicitly provided that the

sufficiency of the supporting documents and other information to support an application was within the sound discretion of the Commission. In its discretion, the Commission determined that Beech Ridge's Application and supporting materials were sufficient.

MCRE argues repeatedly that the purpose of the *Siting Rules* is to provide the Commission with information necessary to carry out its duties under W.Va. Code § 24-2-11c. By the same token, MCRE also argues that Beech Ridge's initial submissions were insufficient to accomplish this task. The Commission is the arbiter of whether an application for a siting certificate meets the requirements of its rules, and, moreover, whether the application should be granted. In this case, the Commission unequivocally stated that "[t]he Commission agrees with Staff that Beech Ridge's map was sufficient to allow the application to be fully debated." (Commission Order I, at 73). It is not enough for MCRE to say that it disagrees with the result in this case; it must show that the Commission abused or exceeded its authority. MCRE cannot make such a showing.

MCRE seeks to reduce this case to an issue regarding the Commission's "interpretation" of the *Siting Rules*. MCRE apparently believes that the Commission's determination that Beech Ridge substantially complied with the *Siting Rules* is a question of law that necessarily involves a legal conclusion as to what the *Siting Rules* mean. MCRE is wrong. As the Supreme Court of North Dakota observed, "[a]lthough the interpretation of regulations to ascertain their purpose is a question of law . . . the determination of whether conduct is in substantial compliance with these regulations, *i.e.*, whether their purpose is effectuated is a question of fact." Stensrud v. Mayville State College, 368 N.W.2d 519, 523 (N.D. 1985) (citations omitted). Thus, contrary to MCRE's argument, there is no legal issue raised by the Commission's determination that Beech Ridge substantially complied with the *Siting Rules*.

Rather, this determination is factual. As such, this issue does not even implicate the various canons of regulatory construction, and, as discussed further below, there were adequate findings of fact in this regard.

Even if the Commission's determinations regarding the five-mile map can properly be construed as "interpretation," the Commission's actions are still entitled to deference from this Court. MCRE states that "[t]here does not appear to be a clear test for determining whether an agency's interpretation of an ambiguous administrative rule is proper." (MCRE's Brief, at 32). Thus, MCRE applies this Court's holding in Appalachian Power Co. v. State Tax Dept. of W. Va., 195 W. Va. 573, 466 S.E.2d 424 (1995). Nevertheless, as MCRE acknowledges, Appalachian Power Co. is not truly applicable to the situation at bar. However, this Court has applied a test that is instructive in the matter at bar. In his concurring opinion in Cookman Realty Group, Inc. v. Taylor, 211 W. Va. 407, 411, 566 S.E.2d 294, 298 (2002) (*per curiam*), Justice Starcher articulated the following analysis with regard to an agency's construction of its own legislative rule:

The agency's construction, while not controlling upon the courts, nevertheless constitutes a body of experience and informed judgment to which a reviewing court should properly resort for guidance. The weight that must be accorded an administrative judgment in a particular case will depend upon (1) the thoroughness evident in its consideration, (2) the validity of its reasoning, (3) its consistency with earlier and later pronouncements, and (4) all those factors which give it power to persuade, if lacking power to control.

Cookman, 211 W. Va. at 417-18, 566 S.E.2d at 304-05 (Starcher, J., concurring). This Court subsequently applied this analysis in an analogous circumstance in Family Medical Imaging, LLC v. W. Va. Health Care Authority, 218 W. Va. 146, 624 S.E.2d 493 (2005) (*per curiam*). While this Court applied this analysis in a *per curiam* decision, it still provides a beneficial

framework to analyze the issue regarding the Commission's so-called "interpretation" of the *Siting Rules*.

In the instant case, it is evident that the Commission thoroughly considered the issues raised by MCRE regarding the *Siting Rules*. Indeed, the Commission spent a considerable amount of time in both Commission Order I and Commission Order II addressing these issues. In the end, the Commission concluded that the materials submitted by Beech Ridge were sufficient to allow the Project to be fully debated. (Commission Order I, at 73). This, of course, is precisely the point of the *Siting Rules*; namely, to give the Commission and interested parties sufficient notice to be able to address the merits of an application. In this regard, the Commission's reasoning is entirely valid. "Substantial compliance" means "one has performed the 'essential requirements' of a statute." J.C. Evans Contr. Co., Inc. v. Travis Central Appraisal District, 4 S.W.3d 447, 451 (Tex. App. 1999) (quoting Missouri Pac. R.R. Co. v. Dallas County Appraisal Dist., 732 S.W.2d 717, 721 (Tex. App. 1987)). In this case, the Commission's conclusion that Beech Ridge substantially complied with the requirements of the *Siting Rules* reflects that the parties and the Commission had sufficient information to debate Beech Ridge's Application. MCRE cannot seriously contend otherwise. MCRE had sufficient information to launch its opposition and to generate its own evidence in rebuttal, which, of course, it did. As discussed in detail above, the regulatory scheme at issue here does not begin and end with the filing of the application. The Staff and other parties were free to conduct additional discovery, and, in fact, they did so in this case. Accordingly, the Commission's reasoning on this issue was valid.

As to the issue of consistency with earlier and later pronouncements, MCRE cites the Commission decision in Appalachian Power Company, Case No. 93-0123-E-CN (May 10,

1993) (the “APCO case”) in support of its argument that the Commission’s decision is contrary to its earlier precedent. However, the APCO case actually supports the Commission’s decision in this matter below. To begin, the rules referenced in the APCO case related to the Commission’s “Electric Rules,” which required a “detailed” showing of various features. The term “in detail” is not present in the *Siting Rules*. Further, unlike the instant case, the omissions in the APCO case were “so substantial as to impede the Commission’s and others’ understanding of the application.” That is clearly not the case in the instant matter. Moreover, the APCO case clearly countenanced the idea that another application might substantially comply with the rules:

We believe that the failure of APCO to supply an appropriate map as required under the rules is a fatal flaw in the filing requiring dismissal. We choose not to express an opinion on an application which would substantially comply with the rule but which fails to show one or more of the listed geographical features. In this case, however, we view APCO’s failure in this proceeding to label the listed features combined with their admitted omissions to be so substantial as to impede the Commission’s and other interested parties’ and person’s understanding of the application. Such a substantial failure to comply with our rules requires that we dismiss the application.

Appalachian Power Company, at 7. This passage is important for two reasons. First, it is determinative of the purpose of the map appended to an application, which is to allow the Commission and other parties to understand the application. Second, it indicates that a map might substantially comply with the rules even if it lacks one or more geographical features. Accordingly, the Commission’s decision in this case that Beech Ridge’s map substantially complies with the *Siting Rules* is borne out by the Commission’s earlier pronouncements.

Finally, the Commission’s “interpretation” is persuasive. The Commission is the arbiter of whether or not an application is sufficient to meet its rules. If the Commission’s findings in this regard are not entitled to some deference by this Court, proceedings before the

Commission will simply become an exercise in arguing over technicalities. The Commission has the discretion to address procedural matters that come up in the course of a case, and it must also determine whether those matters are sufficient to prevent the Commission from fulfilling its statutory duties. The Commission made a determination in this case, and, based on the foregoing, its judgment is entitled to deference from this Court.

5. The Commission Orders contained sufficient findings of fact and conclusions of law on all of the issues the Commission was required to address.

MCRE contends that the Commission Orders lack sufficient findings of fact and conclusions of law that address the effect of the Project on locations required to be mapped by the *Siting Rules*. As an initial matter, it is important to note that the Legislature spoke directly to what matters the Commission was required to address in its findings of fact and conclusions of law concerning siting certificates. Indeed, the West Virginia Code states that “[t]he commission shall enter an order that includes appropriate findings of fact and conclusions of law that address each factor specified in this subsection.” W. Va. Code § 24-2-11c(c). In turn, the factors specified by the Legislature were “the interests of the public, the general interests of the state and local economy, and the interests of the applicant.” *Id.* Furthermore, this Court has held that “[w]here an administrative agency is required to find facts or state reasons as a basis for its order, the order must contain findings of fact, rather than conclusory statements, so as to withstand judicial scrutiny. Syl. pt. 3, Mountain Trucking Co. v. Public Service Comm’n, 158 W. Va. 958, 216 S.E.2d 566 (1975). This Court has also held that “[a]lthough [an] agency does not need to extensively discuss each proposed finding, such rulings must be sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed.” Syl. pt. 4, St. Mary’s Hosp. v. State Health Planning and Dev. Agency, 178 W. Va.

792, 364 S.E.2d 805 (1987). With these principles in mind, it is abundantly clear that the Commission Orders contained sufficient findings of fact and conclusions of law.

To begin, Commission Order I is ninety-two pages in length, containing some twenty-six findings of fact and sixty-seven conclusions of law. Commission Order II is fifty-nine pages long, containing fifty-nine findings of fact and fifty-six conclusions of law. Indeed, both of the Commission Orders in this case are exhaustive, and they thoroughly consider the matters at issue in this case.

In addition to the sheer volume of the Commission Orders, it is also apparent that the Commission considered each of the issues required to be balanced by West Virginia Code § 24-2-11c(c) in Commission Order I. In fact, Commission Order I contains thirty-nine discrete conclusions of law balancing the various factors required by West Virginia Code § 24-2-11c(c) including: (1) Beech Ridge's ability to operate the Project; (2) the nature of the energy produced by the turbines, its ultimate destination and the overall needs of the power grid; (3) the economic impacts of the Project on both the local and state level, such as tax payment, new jobs and other economic benefits; (4) tourism; (5) issues involving view and visual analyses; (6) issues involving impacts on local traffic; (7) issues involving noise; (8) issues involving the continued use of MeadWestvaco's property for recreation purposes; (9) issues regarding effects on local waters; (10) issues involving birds and bats, and other aviary life; and (11) issues involving public funding and property tax abatement. In short, the Commission did precisely what the law requires: it balanced the interests of the public, Beech Ridge and the state and local economies. That balance dictated that the Commission approve the siting certificate. In the end, West Virginia Code § 24-2-11c is the guiding star by which the Commission determines if a siting

certificate must issue, and the Commission properly concluded in this case that a certificate was appropriate.

MCRE, however, argues that Commission Order I does not contain adequate findings and conclusions regarding the very narrow issue of the sufficiency of Beech Ridge's five-mile map and its representations regarding cultural matters. This argument fails for two reasons. First, and most importantly, the Legislature did not specifically require that the Commission set forth particular findings and conclusions regarding the adequacy of the materials attached to an application for a siting certificate. MCRE has not cited any authority from this Court, the Commission or the Legislature that the contents of one map of 27 maps and reports are supposed to dictate the entirety of the analysis to be undertaken by the Commission. In fact, it is patently obvious that the Legislature believed the Commission should be involved in making broader decisions regarding the overall impact of such projects on the public and the State. This is precisely the task discharged by the Commission. Second, the Commission expressly addressed the arguments of MCRE and others regarding the map. In Commission Order I, the Commission concluded that "[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." (Commission Order I, at 73). In reaching that conclusion of law, the Commission addressed the sufficiency of the map extensively. (Commission Order I, at 16-18, 33, 40-41, 58, 63-64 and 73).

In Commission Order II, the Commission presented another exhaustive analysis of the issues regarding the map and the cultural and historic landmarks. Indeed, in 15 discrete conclusions of law, the Commission stated as follows:

2. The Commission addressed the scale of Beech Ridge's map in its August 28, 2006, order, and accepted Beech Ridge's map, preferring to have the entire project depicted on a single page. See Comm'n Order p. 18 & n. 5. As MCRE has presented nothing new for the Commission to consider, the Commission should reject this issue.
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 historical interests, as well as the 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. See, e.g., pp. 16-18, 33, 40-41, 58, 63-64 & 73 (Concl. of Law 4). 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 this proceeding to require that Beech Ridge's maps provide adequate information.
7. Utility and EWG applicants must satisfy the requirements of several state agencies. It is common practice, and in the best interests 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 outlines what action Beech Ridge must take to be

in compliance with that agency's rules/laws, and that Beech Ridge files the historical/archeological 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 the 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 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. See Comm'n Order pp. 17 (MCRE's motion to dismiss & Beech Ridge's response), 56 (MCRE's reply brief).

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.

15. 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 utility corridor. Therefore, there was no long-standing rule to be applied, as there was in C&P.

(Commission Order II, at 52-53). Accordingly, MCRE's argument that the Commission did not address these issues adequately is both misleading and incorrect.

The record in this case clearly discloses that the Commission carefully considered MCRE's arguments regarding the sufficiency of the five-mile map and cultural matters, and, in its authority and discretion, concluded that the map was sufficient for the parties to debate the merits of Beech Ridge's Application. There were sufficient findings of fact and conclusions of law to support the Commission's rationale. Consequently, MCRE's argument must fail.

C. **The Eisenbeiss Brief does not provide any reasoned basis for this Court to overturn the Commission's decision.**

The Eisenbeiss Brief presents, in large part, the very same issues set forth in their Petition for Reconsideration and their Petition for Appeal before this Court. These concerns are not meritorious, and they do not require this Court to reverse the Commission Orders.

1. **The Commission was not required to appoint experts to attempt to support Mr. and Mrs. Eisenbeiss' positions in the hearings below.**

Mr. and Mrs. Eisenbeiss contend that the Commission's decision in this case was affected by the fact that the Commission declined to appoint an "independent expert" at their request.¹¹ Intervenors are entitled to participate in all facets of the Commission's proceedings. See Procedural Rule 12.6.a. That does not mean, however, that the State of West Virginia is required to pay for an intervenor to attempt to prove his or her case. The Commission employs the Staff to provide an unbiased assessment of the technical and economic elements of a project

¹¹ The Eisenbeiss Brief does not reference any authority requiring the Commission to appoint experts. It is true that the West Virginia Rules of Civil Procedure allow a trial court to appoint an expert. See W. Va. R. Evid. 706. However, it is also true that the Commission is not bound by this rule. See Procedural Rule 13.1. Nevertheless, even if Rule 706 controlled, it is abundantly clear that this rule would not require the appointment of an expert. Under Rule 706, a trial court has the discretion to appoint an expert, but mere divergence of opinions between the parties does not require a court to appoint an expert. See Georgia-Pacific Corp. v. U.S., 640 F.2d 328, 334 (Ct. Cl. 1980) (interpreting the nearly identical counterpart of this rule contained in the Federal Rules of Civil Procedure). Therefore, even if Rule 706 governed matters before the Commission, it would still be within the sound discretion of the Commission to refuse a motion to appoint an expert and its failure to do so cannot give rise to error. See Oklahoma Natural Gas Co. v. Mahan & Rowsey, Inc., 786 F.2d 1004, 1007 (10th Cir. 1986).

such as this one. The Eisenbeiss Brief does not indicate that the Staff failed in this duty in any way.

2. Mr. and Mrs. Eisenbeiss' arguments regarding Beech Ridge's noise studies do not provide any basis for this Court to overturn the Commission's decision.

In this same regard, Mr. and Mrs. Eisenbeiss contend that the testimony of Mr. Eisenbeiss refutes Beech Ridge's noise study with respect to location 6. Mr. Eisenbeiss testified that he went to the location, "[a]nd it appeared to [him] that it was a very noisy site from [his] observations." (Hrg. Tr. Day 4, at 223). By way of contrast, Beech Ridge's expert—Jim Barnes—testified that he placed ambient noise monitors at representative locations throughout the Project area using his professional judgment and experience. (James D. Barnes Rebuttal Testimony "JDBR-1", at 2). Mr. Barnes is an expert in matters involving noise and acoustics. The placement of the monitor was based on his experience as an expert. Mr. Eisenbeiss—on the other hand—is a lay person with no particular experience in noise or acoustical issues. Thus, while the location might have "appeared" noisy to him, that does not make it so. Additionally, Mr. Eisenbeiss's testimony only related to one of six locations on which the ambient acoustic study was based. (See "Acoustical Study of Proposed Beech Ridge Wind Farm Greenbrier County, WV" dated May 2006). Thus, the Commission did not ignore Mr. Eisenbeiss' testimony; it concluded that Mr. Barnes was able to select an appropriate location based on his qualifications as an expert in the field. (Commission Order I, at 80).

Additionally, Mr. and Mrs. Eisenbeiss complain that Beech Ridge did not take any nighttime sound measurements, but the record discloses that Mr. Barnes' acoustical study followed the *Siting Rules* and "measured day-night sound levels" (See "Acoustical Study of Proposed Beech Ridge Wind Farm Greenbrier County, WV" dated May 2006). It becomes

increasingly clear based on these assertions that there is no evidence—no matter how compelling—that would satisfy these intervenors on any facet of this Project unless it is based on their own opinions and experiences. These arguments should be disregarded in their entirety.

3. **The evidence tendered by Beech Ridge with regard to property values demonstrates that Mr. and Mrs. Eisenbeiss' arguments concerning the alleged negative impact on property values are untenable.**

Mr. and Mrs. Eisenbeiss argue that “the record indicates that an industrial wind turbine facility would adversely affect the property [values] of a landowner in close proximity to such a project” (Eisenbeiss Brief, at 13). In fact, the record clearly shows otherwise. Beech Ridge proffered the expert testimony of certified appraiser Jay Goldman on this point. Mr. Goldman evaluated the impact of a wind project in Tucker County on property values. In addition to the interviews of real estate professionals, local public officials, business people active in the real estate business, and persons living in the vicinity of the Tucker County wind turbines, Mr. Goldman examined records of the sales of property in the viewshed area that have been sold since the project was completed in 2002. These records demonstrate appreciation of the property. Contrary to Mr. and Mrs. Eisenbeiss' arguments, Mr. Goldman's analysis demonstrates that the property values in Greenbrier County will not depreciate as a result of this Project, and, in fact, his analysis shows the very opposite. None of the intervenors placed any study or expert testimony into the record to disprove Mr. Goldman. It is based on their opinion, and their opinion alone. The Commission properly determined that there was no competent evidence in this case that the Project will cause the adjacent property values to decline.

4. **Mr. and Mrs. Eisenbeiss' arguments concerning the economic impact of the Project ignore the record in the case below.**

Mr. and Mrs. Eisenbeiss' concerns regarding the economic viability of this Project are wide of the mark. Mr. and Mrs. Eisenbeiss essentially contend that federal tax

subsidies and accelerated depreciation will create a tax burden on citizens of both Greenbrier County, and West Virginia as a whole. They ignore the fact that Greenbrier County will receive at least \$400,000 per annum, and, as a result, Greenbrier County is guaranteed at least eight million dollars in property taxes over 20 years. (David Groberg Rebuttal Testimony "DGR-1" at 9). Further, Beech Ridge expects to pay B&O taxes to West Virginia of approximately \$212,000 per annum.¹² (DGR-1, at 10). Thus, Mr. and Mrs. Eisenbeiss disregard the huge influx of taxes this Project will bring, the \$11 million dollars in local purchases during construction, the wages and benefits of 215 construction workers and 15-20 permanent workers and the nearly \$150 million in positive economic impact estimated by Building Trades' expert witness, Dr. Thompson.

5. Mr. and Mrs. Eisenbeiss' concerns regarding endangered species are baseless; the Commission Orders appropriately protect local wildlife.

Mr. and Mrs. Eisenbeiss' arguments with regard to the protection of endangered species are similarly unavailing. Mr. and Mrs. Eisenbeiss appear to take issue with the possibility of harm to endangered species; yet, they do not acknowledge all of the conditions placed on the Project in this regard. For example, Beech Ridge is required to submit any letters received from USFWS concerning whether Beech Ridge needs to take further action and what action, if any, is necessary to comply with the USFWS' rules and/or laws. (Commission Order I, at 88). In addition, Beech Ridge is required to comply with the laws governing the protection of endangered species and other animal and bird life. (*Id.*). Beech Ridge must also notify the Commission if any court of competent jurisdiction or any authorized governmental agency determines Beech Ridge is out of compliance with these laws, and the Commission has stated it will seek any remedies it is authorized to seek if Beech Ridge is found to be out of compliance.

¹² As discussed in footnote 3, recent legislation will increase West Virginia B & O taxes to about \$400,000 per annum and local property taxes by 30%.

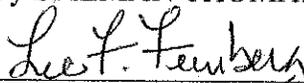
(Id.). Moreover, USFWS and the West Virginia Department of Natural Resources were invited to participate in a Technical Advisory Committee to study certain effects of the Project. (Id. at 90). In short, there are more than adequate protections and assurances in place to ensure that endangered species will not be harmed by the Project. Mr. and Mrs. Eisenbeiss acknowledge that Commission Order I requires that Beech Ridge comply with various federal laws concerning endangered species and other bird and animal life. They contend, however, that Mr. Eisenbeiss' testimony concerning a mountain lion on his property was not cross-examined or refuted. The fact that Mr. Eisenbeiss has purportedly seen one mountain lion on his property on one occasion does not mean that there will be a taking of a listed species or an adverse impact on the habitat of an endangered species. In sum, Mr. and Mrs. Eisenbeiss' position either ignores or misinterprets the conditions placed on Beech Ridge with respect to wildlife. In conclusion, therefore, Mr. and Mrs. Eisenbeiss have provided no reasoned basis for the Court to reverse the Commission's decision.

VII. PRAYER FOR RELIEF

For the reasons set forth herein, Beech Ridge Energy LLC respectfully requests that the Court affirm the decision of the Commission below.

BEECH RIDGE ENERGY LLC

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CERTIFICATE OF SERVICE

I, Lee F. Feinberg, hereby certify that on June 21, 2007, I served **Beech Ridge Energy LLC's Joint Response to Appellants' Briefs** upon all parties of interest by United States mail, postage prepaid, to the following:

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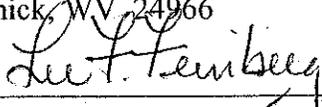
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