

Section E. Existing Permits, Phase I

 West Virginia Public Service Commission Approvals and Orders for Beech Ridge Wind Energy Project

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the Public Service Commission of West Virginia, in the City of Charleston, on the 11th day of January, 2007.

CASE NO. 05-1590-E-CS (REOPENED)

BEECH RIDGE ENERGY LLC, a limited liability company,
Olney, Maryland.

Application for a Siting Certificate to Authorize the Construction and Operation of a Wholesale Electric Generating Facility and Related Transmission Support Line of Less than 200 kV and Associated Interconnection Facilities in Greenbrier County and Nicholas County, West Virginia.

COMMISSION ORDER

The points made in the petitions to reconsider were previously evaluated and resolved by the Commission. Accordingly, ~~other than providing further discussion and establishing a process for ensuring that the Commission-established conditions have been met, the Commission declines to reconsider its order granting a siting certificate.~~

BACKGROUND

Commission orders

On August 28, 2006, the Commission granted Beech Ridge Energy, LLC a siting certificate, pursuant to W. Va. Code §§ 24-2-1(c) and 24-2-11c, for a 186 megawatt (MW) wind-powered generating facility, to be located nine miles northeast of Rupert in Greenbrier County, and for a 13.8-mile 138 kV transmission line to connect the generating facility to Allegheny Power's Grassy Falls substation near Nettie in Nicholas County. The project is expected to have 124 1.5 megawatt (MW) wind turbines, mounted on 262-foot tubular steel towers, and 150 pole structures for the transmission line, at a total cost of \$300 million.

The Commission's grant of authority to Beech Ridge was contingent upon extensive conditions, including the following:

General Preconstruction and Construction Certificate Issues:

- (1) Prior to commencing construction, Beech Ridge must file a verified statement indicating that all pre-construction conditions and requirements of the certificate have been met.
- (2) Beech Ridge shall require all contractors to use standard noise buffers on all equipment and trucks.
- (3) Beech Ridge shall require contractors to use pile driving equipment which have the least noise impact and restrict pile driving, during the weekdays, to 7 a.m. to 7 p.m.
- (4) All construction activities should take place mostly during daylight hours.
- (5) Construction activities should be limited during church hours.
- (6) If dynamiting should become necessary, it should be limited to daylight hours and should follow all State and Federal rules, regulations, and laws.
- (7) Beech Ridge must dispose of all contaminated soil and construction debris in approved landfills in accordance with appropriate environmental regulations.
- (8) Beech Ridge must design, install and implement a fire protection system, using industrial best practices, in accordance with all applicable fire safety codes.
- (9) Beech Ridge must coordinate with fire, safety and emergency personnel during all stages of the project to promote efficient and timely emergency preparedness and response.
- (10) The siting and support transmission facilities certificates shall become invalid if Beech Ridge has not commenced a continuous course of construction within five years of the date the final certificate is granted or has not completed construction by the tenth year without petitioning the Commission for approval to expand these time frames, provided there are no material changes to the project that necessitate a reopening.
- (11) Beech Ridge must file with the Commission evidence of any necessary environmental permits and/or certifications prior to commencing construction (including any letters from U.S. Fish & Wildlife, West Virginia Division of Natural Resources, W. Va. Division of Cultural and History and West Virginia State Historic Preservation Office (SHPO) indicating either that Beech Ridge does not need to take further action or outlining what action Beech Ridge needs to take to be in compliance with that agency's rules/laws).

- (12) Beech Ridge must file evidence of approval and/or acceptance of the wetlands delineation (Beech Ridge needs to file with the Commission written evidence of the Wetlands survey being completed and approved); the final endangered species study with any required mitigation plans; and the historical/archeological significance study with any required mitigation plans prior to commencing construction.
- (13) Beech Ridge must file copies of the final Interconnection Agreements between Beech Ridge and PJM prior to commencing operation.
- (14) Beech Ridge must comply with the Endangered Species Act (16 USC § 1531 *et seq.*), the Migratory Bird Treaty Act (16 USC § 701 *et seq.*), and, if applicable, the National Environmental Policy Act of 1969 (42 USC § 4321 *et seq.*) in both the construction and operation of the Project. Should any authorized governmental agency or court with competent jurisdiction find that Beech Ridge is not complying with any one of the above three acts in either the construction or the operation of the Project, then Beech Ridge must notify the Public Service Commission in writing in this case of any such finding within ten (10) days of any such finding being made. Furthermore, the Commission may seek any legal remedies it has authority to seek, including injunctive relief, to address any such findings.
- (15) Beech Ridge must file evidence of its Exempt Wholesale Generator (EWG) status from the Federal Energy Regulatory Commission (FERC) prior to commencing operation.
- (16) Beech Ridge must have a decommissioning fund in place prior to commencement of operation. The fund will cover dismantling of the turbines and towers, as well as land reclamation. The fund should be an escrow account, or a bond or a surety that is held by an independent party, such as the County Commission. This fund shall not be a part of Beech Ridge's assets. Beech Ridge must hire an expert to assess, from time to time, the size of the fund that would be needed, taking into consideration resale or salvage value. Beech Ridge must obtain the Commission's approval of the evaluative expert, as well as Commission approval of the periodic reports. The Commission reserves the right to also hire its own evaluative expert to evaluate any of the periodic reports.
- (17) The construction of the I lines of turbines shall not occur unless all property owners agree to participate in the project.
- (18) Beech Ridge should provide, if it has not already, a copy of the guaranty agreement between Beech Ridge and the Greenbrier County Commission whereby Beech Ridge agrees to pay at least \$400,000 a year to the County.

The Greenbrier County Commission may designate a fund for this minimum payment.

General Operational Phase Certificate Issues:

- (1) This condition applies at anytime – not just in the operational stage: If Beech Ridge should transfer its certificate, Beech Ridge must, pursuant to *Siting Rule 7.1*, notify the Commission in writing of the identity of the transferee and submit an affidavit from the transferee attesting to its willingness to abide by the terms of a siting certificate as issued.
- (2) Beech Ridge must use licensed certified herbicide applicators.
- (3) Beech Ridge must have the Material Safety Data Sheet filed on the plant site for all herbicides used on the transmission line right-of-way.
- (4) Beech Ridge shall not use aerial spraying on its transmission line right-of-way.
- (5) Beech Ridge shall provide the PSC with copies of all future interconnection studies and any interconnection agreement.
- (6) Beech Ridge shall prohibit the use of lighting in the project area as much as possible. Beech Ridge may light the project as required by the Federal Aviation Administration (FAA), or any applicable fire or safety code, regulation or accepted good utility practice.
- (7) Beech Ridge will consult with a Technical Advisory Committee regarding the post-construction bat and bird studies. Membership shall be open to a representative of each of the following:

PSC

U.S. Fish and Wildlife Service

West Virginia Division of Natural Resources

Bat and Wind Energy Cooperative

A statewide environmental organization w/ 500+ members and in existence for at least 10 years

A statewide bird group

A private or academic institution with a background in avian issues

Beech Ridge shall consult with the Technical Advisory Committee on the following:

- (a) Three years of post-construction bat mortality and adaptive management studies, after operations commence, to assess 1) the

project's impact, if any, upon bat life, 2) the potential for adaptive management techniques to mitigate such impacts, and 3) the expected costs over a range of mitigation effectiveness levels.

- (b) Three years of post-construction bird studies, after operations commence, to assess the impact, if any, on birds.
 - (c) A one-year post-construction eagle/osprey study.
 - (d) If the project causes significant levels of bat or bird mortality and adaptive management techniques are proven effective and economically feasible, Beech Ridge and its successors will make a good faith effort to work with the Commission to apply parameters to implement facility-wide adaptive management strategies on an on-going basis.
- (8) Beech Ridge shall update the Commission in writing twice a year on the studies being conducted. The update shall be directed to the attention of the Commission's Executive Secretary. Unless Beech Ridge obtains Commission consent for other deadlines, the updates shall be filed on or before January 30 and July 31 each year. Beech Ridge shall provide a copy of each report to the members of the Technical Advisory Committee.
- (9) Beech Ridge's agreement to test adaptive management strategies shall be in effect immediately upon operation of the project. Beech Ridge may request modifications of its strategies in filings with the Commission.
- (10) There have been concerns expressed at the Backbone Mountain wind power site in Tucker County, under certain atmospheric conditions, that unnecessary lighting can contribute to additional bird mortality. Thus, Beech Ridge shall work with its employees and the FAA to minimize the impact that lighting will have upon the project's visibility.
- (11) All of these terms apply to Beech Ridge, and to any subsequent owners/operators.

Comm'n order pp. 87-91 (Aug. 28, 2006).

On September 5, 2006, the Commission briefly extended the time to petition to reconsider until September 18, 2006, and also concluded as follows:

- 4. As the detailed August 28, 2006, order establishes, the Commission reviewed in detail the various positions set forth in this case.

5. Parties are advised that reconsideration offers an opportunity to point out matters which the Commission overlooked, but is not for the purpose of considering new arguments or evidence not in the record.

Comm'n Order pp. 2-3 (Sept. 5, 2006).

Petitions to reconsider were filed by different parties on different days. On September 14, 2006, the Commission allowed each party to file by September 28, 2006, a consolidated response to the various petitions.

Petitions to reconsider

Stephanie Mendelson's petition to reconsider, September 5, 2006

Stephanie Mendelson, a *pro se* intervenor, wrote that while she was grateful that the Commission required a decommissioning fund, the construction and operating conditions "are extremely minimal with no avenue of accountability delineated." Petition p. 1.

She also said that Commission Staff had to use Mountain Communities for Responsible Energy's (MCRE's) five-mile map because Beech Ridge's map was insufficient. Further, Beech Ridge's map was submitted late, she wrote. Id.

Ms. Mendelson said that she submitted extensive local sites which the West Virginia Division of Culture and History considered to be of historical significance. Petition p. 1. While her surveys are now dated, they provide a starting place to investigate historical concerns. She also argued that her evidence was more extensive than anything Beech Ridge submitted. "I believe the onus is on Beech Ridge to assure that each of these hundreds of historical sites would not be negatively impacted," she wrote. Id.

Beech Ridge did not present assurances that the facility will not affect the physical and mental health of persons living near the turbines, she wrote. Petition p. 1. While 90% of the turbines will be more than a mile away from residences, the remaining 10% were not addressed, she said. Ms. Mendelson also wrote that LaCrosse encephalitis concerns should not be cavalierly dismissed. Id.

Although the Commission noted the project had local support, far more protests were filed, she said. Petition p. 1. Most support letters came from outside the county; and those from within Greenbrier County mainly came from the western end, with jobs being the reason for the support, Ms. Mendelson asserted. Id. Beech Ridge has never promised that the jobs would go to Greenbrier County residents, and it has not negotiated training courses with the local community college, she wrote.

While all Americans should be concerned about the health of the electric grid, the PSC's mandate is to protect interests specific to West Virginia, she said. Petition p. 2.

Ms. Mendelson also noted that Commission Staff recommended that certain turbines be moved. She argued that water, noise, ecological impact, health, negative economic impact, endangered species, viewshed, and historical impact are all reasons to dismiss the project. Alternatively, at a minimum, she asked the Commission to require more data and study. *Id.* p. 2.

Michael Woelfel's petition to reconsider, September 8, 2006

Michael Woelfel wrote that the Commission's order is contrary to the letter and spirit of W. Va. Code § 24-2-1(c). Petition p. 1. It is clearly wrong because it does not balance the interests of the parties and the public as W. Va. Code § 24-2-11c requires, and because it does not properly apply the Siting Rules, he wrote. *Id.*

He argued that the Commission arbitrarily ignored Staff's recommendation that some of the turbines could be moved or relocated to limit the project's visibility and to reduce the chance of creating noise problems. He cited the following statement by Staff:

... Staff feels that with the removal/movement of some or all of the turbines mentioned above (I1-5, H1-2, A1-18, B1-7, B1-12, B16, C1-6, D3-8, and D-19-22), the balancing becomes even stronger in favor of granting the certificate because that would eliminate most of the potential negative impacts of this project. . .

Petition pp. 1-2.

Mr. Woelfel also said that the order prejudiced his fundamental property rights without due process; violated his equal protection; is affected by legal errors and factual inaccuracies; is clearly wrong in view of the entire record; is arbitrary, capricious and an abuse of discretion; and is the result of selective application and enforcement of the Siting Rules. *Id.* pp. 2-3.

Building Trades' response to Woelfel & Mendelson, September 18, 2006

The West Virginia State Building and Construction Trades Council, AFL-CIO (Building Trades) noted that Rule 19.3 of the Commission's Rules of Practice and Procedure, 150 C.S.R. Series 1, requires petitions to reconsider to be verified, and Ms. Mendelson's petition was not. Petition p. 2. Since her petition was not properly filed, it should be rejected, Building Trades argued.

In its September 5, 2006, order the Commission advised that reconsideration is not an opportunity to present new arguments or evidence. Instead, the parties are to bring matters to the Commission's attention which had been overlooked. *Id.* p. 2. Ms. Mendelson and Mr. Woelfel "simply fail to provide the Commission with any 'matters which the Commission overlooked,' but instead urge this Commission, in essence, to rebalance the various

interests,” Building Trades wrote. Mr. Woelfel urges the Commission to adopt Staff’s position on certain matters and argues, in an unspecified manner, that the Commission’s order is clearly wrong. Id. p. 2. Similarly, Ms. Mendelson says the Commission should have adopted Staff’s recommendations. Id. p. 3. Both argue that the Commission did not sufficiently balance the interests, Building Trades wrote. Although Mr. Woelfel asserts that the order is arbitrary and capricious, “saying that the Order violates the Constitution or is arbitrary or capricious does not make it so,” Building Trades argued. Id. p. 3.

Building Trades asserted that the Commission’s work was complete and needed no reconsideration. Id. p. 3.

Jeffrey and Alicia Eisenbeiss’ petition to reconsider, September 18, 2006

Jeffrey and Alicia Eisenbeiss wrote that W. Va. Code § 24-2-11(c) requires the Commission to balance the interests of the public, the general interests of the state and local economy and Beech Ridge. Petition p. 1. A siting certificate may be issued only if the Commission determines that the terms and conditions of any public funding/property tax abatement do not offend the public interest, and the facility will have a substantial positive impact on the local economy and local employment. Id. p. 2.

As *pro se* intervenors, they said that they attempted to educate the Commission “of our legitimate concerns . . . through the submission of supporting documents. It is unreasonable of the commission to expect ‘pro se’ intervenors to provide expert witnesses for every aspect of the issues raised in relation to the development of a large-scale industrial project as such,” they wrote. Id. p. 2. If the Commission had provided independent experts as they had asked, Beech Ridge’s studies and experts could have been refuted, Mr. and Mrs. Eisenbeiss argued. Id. p. 2. Although the Commission declared that, on balance, the facility’s negative impacts would be minimally disruptive, they asserted that “in actuality there has been no balance for pro se intervenors like ourselves.” Id. pp. 2-3.

Mr. and Mrs. Eisenbeiss said that Dr. Nina Pierpont’s clinical and scientific documents “give logic and justification to defend our concerns.” Id. p. 3. The Commission did not accept the documents as evidence, but demoted them to public comment, even though they were participating without an attorney, they said. They asked the Commission to weigh their documents as evidence. Id. They asked the Commission to address topics that Dr. Pierpont covered, including noise, a set back and health effects. Id. pp. 3-4.

Mr. Eisenbeiss criticized the selection of ambient noise site 6 as too noisy because the site is along Spring Creek and a mountain spring which goes through a culvert. Accepting this location, because it was selected by Beech Ridge’s acoustics expert, disregards Mr. Eisenbeiss’ testimony, they wrote. Petition p. 4.

Mr. and Mrs. Eisenbeiss also objected to the Commission’s June 8, 2006, decision, in a separate proceeding, to terminate a Noise Rule Task Force. Id. pp. 4-5. “By dissolving

the Task Force, not providing any independent expertise in relation to noise, essentially disregards, overlooks and fails to balance the public interest in siting industrial wind turbines,” they wrote. Id. p. 5.

They criticized Beech Ridge’s sound evidence because structures on their property do not appear on all of the maps. Id. p. 5. Thus, this evidence is not accurate, they argued. Id.

Mr. and Mrs. Eisenbeiss also alleged that the potential negative economic impact has been grossly overlooked. Petition p. 6. “Clearly, the record indicates that an industrial wind turbine facility would adversely and materially affect the property values of a landowner in close proximity to such a project as a result of view shed degradation, noise pollution, light pollution and the associated health risks of such a facility,” they wrote. Id. p. 6.

Jay Goldman testified for Beech Ridge that adverse noise, lack of view and light pollution could be external obsolescence, but Mr. Goldman’s report does not provide the methodology to define external obsolescence, they complained. Further, the MeadWestvaco witness’ conclusion, that declining property value concerns were not justified, was based on speculation and substantially understated the negative impacts, they wrote. Petition pp. 6-7. Mr. and Mrs. Eisenbeiss urged the Commission to reconsider accepting Mr. Goldman’s study as the best prediction of property values. Id. p. 7.

They also asked the Commission to reconsider accepting MCRE’s viewshed maps, which do not reflect any vegetation, to determine the project’s visual impact because leaves appear only six months of the year. Id. p. 7.

The project’s economic viability “is hard to justify without the huge federal tax subsidies and accelerated depreciation granted to businesses such as Beech Ridge,” Mr. and Mrs. Eisenbeiss wrote. Petition p. 7. These benefits create a tax burden on Greenbrier County residents and state citizens, which offends the public interest, they argued.

Mr. and Mrs. Eisenbeiss also urged the Commission to receive the U.S. Fish and Wildlife letters as evidence, instead of as public comment. Petition p. 8. They argued that U.S. Fish and Wildlife did not have an opportunity to assess the project’s impacts and to intervene before the evidentiary hearing. Since Congressman Alan B. Mollohan wrote that U.S. Fish and Wildlife is the primary federal agency to enforce federal wildlife laws, they asked the Commission to weigh Fish and Wildlife’s recommendations more heavily. Id.

Mr. Eisenbeiss testified that he has seen a mountain lion on his property and his testimony was unrefuted. Petition p. 8. Thus, they asked the Commission to reconsider requiring pre-construction studies, as were recommended by U.S. Fish and Wildlife. Id. pp. 8-9.

The order violates their due process rights because it too heavily weighs Beech Ridge’s interests, they asserted. Petition p. 9. “The record clearly indicates too numerous

deceptions, and outright inaccuracies with the studies Beech Ridge provided for the requirements of a siting certificate," they wrote.

*MCRE's petition to reconsider,*¹ September 18, 2006

Mountain Communities presented the following arguments:

1. The Commission should have granted MCRE's and Mr. Woelfel's motions to dismiss for failure to comply with the *Siting Rules*.

Due process requires the PSC to abide by its own rules, and the Commission should have found the application insufficient under the rules, Mountain Communities argued. Petition pp. 1-2.

- A. Beech Ridge did not comply with Siting Rules 3.1.h.1(A-G) (five-mile map) and 3.1.o.1.A-B (cultural impacts).

Petition pp. 2-4. Beech Ridge's five-mile map used a smaller scale because the project was too large to fit on a single sheet, and that choice results in the area being much smaller than required, making it difficult to distinguish relevant local features, Mountain Communities argued. *Id.* p. 4. The Commission accepted Beech Ridge's scale, preferring to have the project on one page.

At the hearing, Beech Ridge tried to introduce two new five-mile maps, with the proper scale, to show the new transmission line route. MCRE objected, and then ultimately adopted one of the new Beech Ridge maps as evidence, to show that Beech Ridge was attempting to rehabilitate its original maps, MCRE wrote. Petition pp. 4-5.

Beech Ridge's original map does not show existing utility corridors, major transportation routes, water bodies, topographic contours, recreational areas, churches and cemeteries, historical areas, and land-use classifications, MCRE argued. Petition pp. 5-8. The map failed to even substantially comply with the requirement to set forth cultural landmarks, the group alleged. *Id.* pp. 9-10. Beech Ridge has not yet completed a cultural resource study, but has only consulted with SHPO. In late April 2006, just weeks before the evidentiary hearing, Beech Ridge had not completed the Phase I A cultural resource study, which Beech Ridge promised in its application. *Id.* p. 11.

In a May 12, 2006, letter, Culture and History asked the PSC "within its authority to assure that this project can reasonably avoid substantial direct or indirect adverse effects to historic resources." *Id.* pp. 11-12. Yet, the Commission's order contained no findings or conclusions regarding historical or cultural sites, or plans to mitigate any potential adverse impacts, MCRE asserted. Instead, the Commission conditioned the siting certificate upon

¹ On September 28, 2006, Justin R. St. Clair filed notice that he was substituting as counsel for MCRE.

Beech Ridge obtaining any necessary permits from SHPO. *Id.* pp. 12-13. However, a five-mile map which identifies areas of cultural significance is a condition precedent to approval of a siting certificate, MCRE argued.

B. The motions to dismiss relied upon the Commission's own rules and prior orders.

Siting Rules 3.1.h.1(A-G) (five-mile map) and 3.1.o.1.A-B (cultural impacts) were promulgated to provide the Commission with information to weigh a project's impacts on local communities, MCRE wrote. Petition pp. 13-15. Thus, when the information is not disclosed, the Commission is denied information it should consider as part of W. Va. Code § 24-2-11(c)'s balancing test. *Id.* p. 15. Since the PSC commissioners cannot know every nook and cranny of the state, an applicant must provide local information, MCRE argued.

The Commission was asked to dismiss Beech Ridge's application due to the insufficiency of its map, just as the Commission dismissed AEP's application on May 10, 1993, in Case Number 93-0123-E-CN, MCRE wrote. *Id.* pp. 15-16 (citing from the Commission's AEP order, "The plain language of the rule requires a 'map.' The purpose of the rule to give the Commission, parties and the public an overview of the potential impacts of siting the line.")

The Commission adopted Staff's position that Beech Ridge's filing minimally complied with the rule, and once a threshold filing is made, the Commission may consider all evidence in the record, including materials from other parties, MCRE wrote. Petition p. 16. However, this effectively places the mapping burden on the intervenors, even though the rule places the burden on the applicant, the group complained. *Id.* pp. 17-18. Generally, project applicants have far greater resources than community members, and project applicants should be held strictly responsible for any insufficiencies in their applications. *Id.* p. 18. Moreover, on May 5, 2006, the Commission advised that "each party in a case is responsible for presenting his or her own position." *Id.* p. 18. Thus, in moving to dismiss, MCRE reasonably relied on the Commission's ruling, the plain language of the Siting Rules and Commission precedent. *Id.*

Beech Ridge began investigating the location in May 2003 and decided to develop the site in July 2005. Given Beech Ridge's vast resources and the length of time Beech Ridge Energy evaluated the site, there is no excuse to prepare an insufficient map, MCRE argued, *Id.* p. 19.

Because the Commission has refused to require Beech Ridge to provide cultural landmark information, the intervenors have been deprived of the right to litigate the importance of these matters, MCRE wrote. *Id.* p. 20. Instead of balancing the various factors, the Commission passed the buck to another state agency, MCRE argued. *Id.*

Although Beech Ridge argued that it is customary for certificates of need and siting certificates to be granted, subject to completion of SHPO requirements, this is the first case to be decided under the Siting Rules and, thus, no one has any experience under these rules, MCRE argued. Petition p. 21.

There are no findings or conclusions to support the Commission's statement that Beech Ridge's map was sufficient to allow the application to be fully debated, MCRE argued. Id. p. 22. If necessary, MCRE will request on appeal that matter be remanded for findings and conclusions regarding Beech Ridge's substantial compliance with the siting regulations, MCRE wrote. Id. p. 22.

2. The Commission's order improperly weighed the interests of other states as part of W. Va. Code § 24-2-11(c)'s balancing test.

The Commission placed too much emphasis upon the region's need for renewable energy resources, MCRE argued. Petition p. 23. Beech Ridge refers to the PJM region, where several states have developed, or are developing, renewable energy portfolio standards. Thus, it is clear that Beech Ridge considered the need in other states for renewable energy as a major factor, if not the most important factor, MCRE wrote. Id. p. 23.

However, the West Virginia Legislature has not announced a renewable energy policy, nor are West Virginia utilities required to supply energy from renewable sources, MCRE said. Id. p. 24. W. Va. Code § 24-1-1(a) requires the Commission to encourage the well-planned development of utility resources consistent with state needs, including the productive use of the state's energy resources, including coal, but there is no provision authorizing the PSC to weigh the interests of other states against those of West Virginia citizens, MCRE wrote. Thus, it was clearly wrong for the Commission to consider those needs, MCRE argued. Id. pp. 24-25.

The Commission's order does not have findings or conclusions regarding the project's potential impact on West Virginia's economy, MCRE wrote. Id. p. 25. The Legislature has charged the PSC with encouraging the development of utility resources, and West Virginia produces coal and exports energy. The Commission's Order does not address the potential cumulative effect this and other similar projects may have on the demand for energy from other West Virginia plants. Any decrease in energy demand from West Virginia plants could result in loss of jobs and other negative impacts on the West Virginia economy, MCRE wrote. Id. p. 25.

3. Beech Ridge has failed to justify need for the project.

Beech Ridge relies on increased demand for the PJM Region, MCRE wrote. Petition pp. 26-27. Also, Beech Ridge testified that the project will produce less electricity in summer, when demand peaks. Such need cannot be balanced against the potential long-term adverse impacts in Greenbrier County, MCRE wrote. Id.

4. The Commission's order contains no findings/conclusions regarding the use of public funds to upgrade roads affected by the project.

In discovery, Beech Ridge advised that County Road 1 between Rupert/U.S. 60 and Clearco may need upgraded, but Beech Ridge did not commit to pay for the work. Petition pp. 27-28. MCRE argued that the Commission's order was silent on this issue, and it was not clear whether public funding would maintain and repair the county roads affected by the project. Id. p. 28.

5. The Commission unfairly excluded evidence from intervenors, but freely allowed Beech Ridge's experts to discuss materials they did not prepare.

The Commission regarded materials from Dr. Pierpont and U.S. Fish and Wildlife as public comment, because the authors were not subjected to cross-examination. Petition pp. 28-29. Since matters in evidence are tested via cross-examination, the Commission said it would rely more heavily on matters in evidence, than matters in public comment. Id. p. 29. Since the Commission is not bound by the technical rules of evidence, MCRE asked the Commission to receive the letters from Dr. Pierpont and U.S. Fish & Wildlife as evidence. Id.

Beech Ridge's witnesses testified about studies they did not prepare, MCRE argued. Petition p. 29. George Sterzinger's study concerning wind turbines and property values was never moved into evidence, and Mr. Groberg's direct testimony is replete with articles concerning wind turbines and tourism, which were prepared by various wind energy associations, MCRE complained.

5. The Commission's order does not adequately weigh the project's long-term benefits against the long-term adverse impacts.

While the construction phase will provide short-term economic benefits to the state and region, the economic benefits become marginal after the project is built, MCRE argued. Petition p. 30. The energy produced and the renewable energy credits will be sold to foreign utilities, but the adverse impacts in Greenbrier County will last for decades. The findings and conclusions do not reflect that the Commission weighed these long-term costs and benefits to the local communities, region and state, MCRE wrote. Id. pp. 30-31.

7. The Commission disregards Staff's attempt to mitigate local effects.

On May 5, 2006, the Commission noted that Staff's role is to thoroughly analyze the evidence, balance all interests and provide the Commission with an unbiased recommendation. Petition p. 31. In its recommendation, Staff suggested that removing or relocating some turbines would eliminate most of the potential negative effects, making the balancing even stronger in favor of granting the certificate. Id.

No one can say for sure which turbines will be most visible, and Staff sought a middle ground, picking the area Beech Ridge and MCRE agreed had the most potential visibility, MCRE wrote. Id. p. 32.

Staff also recognized noise as a major concern and suggested moving or relocating turbines to mitigate noise impacts. Id. p. 33. The Commission's order contains no findings or conclusions as to why Staff's suggestions were ignored, nor does the order indicate any attempt to mitigate the project's potential adverse impact on local communities, MCRE wrote. Id.

8. The Commission's bat findings/conclusions are based on inaccurate facts and are clearly wrong.

There is no doubt that Appalachian wind farms kill thousands of bats, most at low speeds, MCRE wrote. Petition p. 34. To mitigate this, Beech Ridge plans to lower the cut-in speed, but MCRE argued that the modified cut-in speed was too low and would not effectively prevent bat kills. Id. p. 35.

MCRE and Beech Ridge witnesses both testified that a cave 6.5 miles away has been historically considered an Indiana bat hibernaculum, and Beech Ridge did not survey that cave, MCRE said. Id. p. 35. Thus, the Commission could not conclude that Indiana bats do not live near the project.

Beech Ridge's witness testified that bats do not swarm more than five miles from their home cave, but male Indiana bats have been found almost 10 miles from the home cave during swarming, MCRE wrote. Id. p. 36. U.S. Fish and Wildlife says that Indiana bats migrate between the home cave and the summer maternity habitat, with records ranging from 30 to 300 miles. Given these considerations, "it is highly possible that Beech Ridge Energy's project will result in a take of an Indiana bat," MCRE wrote.

9. The Commission improperly concluded that the intervenor's economic concerns re: property values and tourism were speculative.

Beech Ridge's economic impact studies were not scientific and were conducted with flawed methodologies, MCRE wrote. Petition p. 36. Jay Goldman is a real estate appraiser, and, thus, his comments are just as speculative as any other individual's comments, MCRE argued. Id. p. 36. Beech Ridge should have called Tucker County business owners to establish an increase in tourism, MCRE asserted. Id. pp. 36-37.

Ms. Phillips-Weikle's study was based upon hotel/motel tax receipts, but there are few, if any, hotels in western Greenbrier County, MCRE wrote. Id. p. 37. The typical tourism activities in western Greenbrier County – scenery, outdoor activities – do not generate tax receipts.

10. The Commission overstated the project's local, regional, and state support.

The Commission cannot give Beech Ridge's interests more weight than the public interests, and the majority of the public does not want this project, MCRE argued. Petition pp. 37-38. The Commission does not adequately address the fact that most comments are in opposition. *Id.* p. 38. The few towns in western Greenbrier County begging for temporary jobs are in the minority, MCRE asserted. *Id.* pp. 38-39.

11. The Commission should have dismissed the application when it became apparent that Beech Ridge was moving the transmission line.

Siting Rule 2.4 requires Beech Ridge to file all information about the transmission line with the application, but Beech Ridge changed the transmission line location prior to the hearing and did not disclose the change until the hearing's fifth day. Petition p. 39. As a result, MCRE was not able to conduct field studies, the Commission was deprived of information, and the Commission has to rely upon Beech Ridge's assertion that the reroute was minor, MCRE argued. *Id.* p. 40.

12. The Commission incorrectly concluded that intervenor participation resulted in important changes.

MCRE objected to the Commission's discussion that the project changed as a result of intervenor participation, because Beech Ridge's application was granted in its entirety. Petition p. 40.

Building Trades' Reply Brief to MCRE & Eisenbeiss, September 27, 2006

The Commission has long held that a petition to reconsider will be rejected unless the petition establishes new and convincing arguments or issues that had not been previously considered by the Commission. Reply pp. 2-3. The Eisenbeisses bring nothing new, so their petition should be rejected, Building Trades argued. *Id.* p. 3. In Browning v. Halle, 632 S.E.2d 29 (2005), the West Virginia Supreme Court noted that when motions for reconsideration add nothing of substance to original arguments, there is no error in failing to grant such a motion. *Id.* p. 3. The Eisenbeisses ask the Commission to rebalance the interests and provide additional weight to information in public comments. *Id.* pp. 3-4. The proposed rebalancing is unnecessary and should be denied, Building Trades argued.

Most of the MCRE petition again concerns the adequacy of the five-mile map, Building Trades wrote. *Id.* p. 4. Although MCRE argues that the map rule is mandatory, MCRE does not recognize that a mandatory rule can only be applied to unambiguous and objective requirements. Yet, MCRE considers the roads to Williamsburg and Friars Hill as major transportation routes, and others do not agree. State law allows regulations to be interpreted when they are ambiguous, and agency interpretations are to be accorded much weight. *Id.* p. 4, citing CAD v. PSC, 182 W. Va. 152, 386 S.E.2d 650, 654 (1989). Since

the Siting Rules are new regulations, it is clear that the Commission may interpret them, Building Trades argued. Id. pp. 4-5.

The Commission concluded that Beech Ridge's five-mile map was sufficient, and MCRE has not added anything of substance to its original argument, Building Trades wrote. Id. p. 5.

The Commission should note 1) the overall positive economic impact is uncontroverted; and 2) the purported adverse impact on Greenbrier County is not supported by the record, said Building Trades. Id. p. 5.

The group disagreed with MCRE's contention that the intervenors' concerns did not result in project changes. Petition pp. 5-6. The Commission included 18 pre-construction and construction conditions and 11 general operation conditions "that can reasonably be said to have resulted – in very large part – from the concerns and issues raised by the Intervenors including MCRE," Building Trades wrote. Id. p. 6.

The Commission's work is complete and needs no reconsideration, Building Trades asserted.

Beech Ridge's consolidated response, September 28, 2006

Beech Ridge responded to all of the petitions to reconsider as follows:

1. MCRE's five-mile map arguments.

Mountain Communities' position is based on its motion to dismiss, and those arguments are being made to the Commission for the fourth time, Beech Ridge wrote. Response p. 2. Thus, these arguments "have definitely not been overlooked," Beech Ridge said. Id. p. 2 n. 1. MCRE argues that its opinion of what the map must show is the only possible interpretation, Beech Ridge asserted. MCRE also argues that it is deprived of due process, to the extent that the Commission does not agree with MCRE. Id. pp. 2-3.

MCRE grossly exaggerates the alleged deficiencies of the five-mile map, Beech Ridge asserted. Id. p. 3. Beech Ridge changed the scale to comply with the ANSI D requirement, and a one-inch line on one scale is about nine-tenths of an inch on the other scale. If Beech Ridge had submitted the map on two sheets, MCRE would have moved to dismiss the map because the regulations require one map, Beech Ridge asserted.

MCRE does not use "major" when it suggests that transportation routes and utility corridors have been omitted, Beech Ridge wrote. Id. pp. 3-4. The access roads to Williamsburg and Friars Hill are not major routes and they will not be used for the project. "Moreover, these roads are shown on the map" as county roads, Beech Ridge wrote. Similarly, a utility line is not a corridor, when it serves few customers. Id. p. 4.

“MCRE does not assert that the streams are not on the first map, it just says that they are ‘in greater detail’ on the second map,” Beech Ridge wrote. *Id.* p. 4. Water bodies which will be affected by the project must be shown on the five-mile map, and the project will not affect any water bodies, Beech Ridge said.

MCRE also objects because contour lines, which are on the first map, are more easily recognizable on Beech Ridge’s second map. Response p. 4. Land use classifications are on the first five-mile map, Beech Ridge said. *Id.* p. 5. Further, Beech Ridge’s map – which shows recreational areas, 11 churches, three cemeteries, and three historical sites – is based upon data from West Virginia University’s Geographic Information Systems (GIS) Technical Center; SHPO for historical and cultural areas; and local brochures for recreation, tourism and cultural areas. *Id.* MCRE’s map shows family cemeteries, picnic sites and purported Indian mounds. *Id.* Beech Ridge acknowledges that MCRE interprets “community areas” differently. MCRE does not question Beech Ridge’s five-mile map regarding population centers, geographic boundaries or major institutions. *Id.* pp. 5-6.

MCRE overstates when it claims that Mr. Groberg conceded that MCRE’s five-mile map was correct, Beech Ridge wrote. Mr. Groberg testified that he had no reason to doubt the features appearing on MCRE’s map existed, but he did not agree that the information on MCRE’s map was required. Response pp. 6-7.

Beech Ridge prepared a second map to show the transmission line reroute, not to cure any alleged deficiencies. *Id.* p. 7. Beech Ridge took the opportunity to respond to various complaints about its five-mile map, even though Beech Ridge believed its five-mile map was acceptable. *Id.*

MCRE and Mr. Woelfel both challenge Beech Ridge’s notation for landmarks. The rule does not require a cultural resource study as MCRE suggests. *Id.* p. 7. The rule requires a plan to mitigate adverse impacts on meaningful landmarks, and meaningful landmark means something more than any 50-year-old house, Beech Ridge argued. “It would appear that landmark means something unique or special and so designated, or generally understood to be so. That is why reliance upon SHPO is necessary,” Beech Ridge wrote. *Id.* p. 8.

When Beech Ridge filed its application, Beech Ridge advised that it was working with SHPO, and it continues to do so. The Commission conditioned the certificate on compliance with SHPO’s final report. *Id.* p. 8.

MCRE relies upon *C&P v. PSC*, 171 W. Va. 708, 301 S.E.2d 798 (1983), to say that an agency must abide by its rules. However, in that case, the PSC altered a long-standing rule on cash working capital calculations three weeks prior to a rate hearing. In the present case, there is no long-standing rule; “it’s a case of first impression on interpretation of a new rule,” Beech Ridge wrote. *Id.* p. 8.

MCRE also relies upon AEP, Case Number 93-0123-E-CN (1993), but that holding also supports the Commission in this case, Beech Ridge argued. In AEP, dismissal occurred because AEP's map issues were so substantial to impede the Commission's and other's understanding of the application, said Beech Ridge. Response p. 8.

2. MCRE's objection to regional need for renewable resources.

MCRE's arguments are "replete with erroneous statements or outright misrepresentations," Beech Ridge wrote. Id. p. 9. The Commission's deliberations went further than considering only the renewable resource needs of other states. The true reasons for this site selection were the wind energy potential, the distance from environmentally significant areas, the location near major electricity transmission facilities, the availability of privately-owned land with compatible uses, and the absence of known critical habitat for listed species, Beech Ridge said. Id. p. 9.

It is misplaced to argue that the Legislature only desires coal resources to be developed, Beech Ridge wrote. Response p. 9. Section 24-1-1 deals only with public utilities and was drafted before the EWG statutes. Id. pp. 9-10. Even if the statute applies, it requires the Commission to encourage development of all of the state's energy resources, including wind. Id. p. 10.

It is false to suggest that the Commission weighed only the interests of other states, Beech Ridge wrote, citing the Commission's Conclusion of Law 11, which reads as follows:

This case has been very difficult. Many people and organizations have objected to this project. Their concerns have been sincere, eloquently presented, and have been brought before us in public comment throughout the entirety of this proceeding. A peaceful home, attractive surroundings, steady or increasing property values, and so forth, are universal goals. The Commission must, though, balance these ideals against other common objectives, such as to increase the proportion of power generated by renewable resources, to provide power without generating harmful emissions, and to advance the state and local economies. The law also requires the Commission to consider Beech Ridge's interests.

Id. p. 10. The Commission also reiterated the strong support for the project and the economic benefits, said Beech Ridge.

MCRE's suggestion is misplaced that renewable portfolios were the reason for the Commission decision, argued Beech Ridge. "The Commission Order's findings on renewable power are obviously meant to demonstrate that the huge need for this type of power will assure that Beech Ridge's entire generation will be used and sold," Beech Ridge wrote. Response p. 10.

MCRE's statement that the Commission failed to consider the impact on West Virginia utility resources is also wrong. *Id.* p. 11. Beech Ridge demonstrated that wind energy reduces demand for foreign oil and foreign liquified natural gas (LNG). "MCRE is arguing, in essence, that it is not in the interest of the State of West Virginia to reduce air and water pollution, conserve finite resources (including water, coal and natural gas), fight climate change, or have a diverse electric fuel supply," Beech Ridge wrote. *Id.* p. 11. "It is, in essence, arguing that the Commission can consider impacts on birds and bats, but not on children with asthma or senior citizens with respiratory ailments or pregnant mothers who need to reduce their exposure to mercury," Beech Ridge wrote.

3. MCRE's argument re: justification of need for the project.

MCRE repeats arguments made in its post-hearing briefs, particularly that wind projects contribute less to summer needs than during the remainder of the year, Beech Ridge asserted. Response p. 11. However, the East Central Area Reliability Council (ECAR)² region needs new generation, and there is increased demand for reusable generation in the PJM³ market. *Id.* pp. 11-12. In summer, some contribution to peak need is still being made. Further, no one has refuted that every single kilowatt hour will be purchased, Beech Ridge wrote. *Id.* p. 12.

4. MCRE's argument re: no public funding.

² ReliabilityFirst Corporation (RFC) replaced ECAR, effective January 1, 2006.

ReliabilityFirst is a not-for-profit company whose goal is to preserve and enhance electric service reliability and security for the interconnected electric systems within its territory. ReliabilityFirst was approved by the North American Electric Reliability Council (NERC) to become one of eight Regional Reliability Councils in North America and began operations on January 1, 2006.

ReliabilityFirst is the successor organization to three former NERC Regional Reliability Councils: the Mid-Atlantic Area Council, the East Central Area Coordination Agreement, and the Mid-American Interconnected Network organizations.

³ PJM Interconnection Association is a regional transmission organization (RTO), and it

- coordinates the movement of electricity through all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia
- ensures the reliability of the largest centrally dispatched electric grid in the world
- operates the largest competitive wholesale electricity market in the world
- plans generation and transmission expansion to ensure reliability
- operates independently and neutrally, and
- provides real-time information to its members/customers to support their decision-making

MCRE offered no evidence and made no previous comment on whether Beech Ridge would fund road improvements, Beech Ridge argued. Response p. 12. However, Beech Ridge has repeatedly stated that it seeks no public funds or property tax abatement. Moreover, its data responses make clear that road upgrades are a line item in Beech Ridge's project construction costs budget, Beech Ridge wrote. Id.

5. MCRE's argument re: exclusion of evidence.

Ms. Pierpont's letter, attached to the Eisenbeiss reply brief, was received as public comment, and the order discussed at some length the U.S. Fish & Wildlife letters, said Beech Ridge. Response p. 13. "To infer that these letters were not considered is misleading," Beech Ridge wrote. The intervenors want to offer these letters to provide proof of what the documents contain, and the authors were not present to be tested on cross-examination under oath, Beech Ridge noted. Id.

Although MCRE complains that the Commission allowed certain Beech Ridge testimony about documents prepared by others, Beech Ridge's testimony was not to establish proof of what the documents said. Id. p. 13. Regarding the Sterzinger report, both Mr. Groberg and Mr. Miller reached their own conclusions, after they did research, including the Sterzinger report. MCRE did not object to Beech Ridge's pre-filed testimony which discussed the Sterzinger report, and MCRE did not cross-examine either witness about it. "And if the witness could not discuss Sterzinger's study, or if the cross-examination had found parts of the Sterzinger report that differed from the point made or conclusion advanced by the witness, then the Commission could have decided the Groberg or Miller testimony on property values had little weight. MCRE had that opportunity to cross-examine but did not," Beech Ridge wrote. Id. p. 13.

6. MCRE's argument re: failure to weigh long-term benefits and adverse impacts.

Although MCRE concedes that construction has positive economic effects, MCRE minimizes the project's permanent jobs and tax revenues. Response p. 14. MCRE did not mention state B&O taxes of \$212,000 per year, payroll taxes, construction purchases of \$11 million per year, and local operation purchases of \$11 million per year, Beech Ridge wrote.

7. MCRE's argument re: Staff comments to move turbines.

It is wrong to say that Staff "balanced" the interests when it concluded that 50 turbines could be removed from the eastern part of the project, Beech Ridge argued. Response p. 15. To the contrary, if 50 turbines were removed, the project could not be built. Instead, Staff advised that its recommendation to grant the siting certificate could be even stronger, Beech Ridge wrote as follows:

What Staff did say about movement of turbines was that movement of some or all of the fifty turbines designated caused the balancing test to become even stronger in favor of granting the certificate.

Id. p. 15.

8. MCRE's argument re: impact on bats.

MCRE misrepresents the evidence on bat mortality and endangered species, Beech Ridge argued. Response p. 16. Beech Ridge clearly stated that the turbines will be braked, that is, the turbines will not turn, at wind speeds below 3.5 meters per second. This is not a cut-in speed⁴ mitigation technique, Beech Ridge said. "It is a mitigation technique for speeds below cut-in, something that was not done at Mountaineer or Meyersdale, where turbine blades spin as soon as wind blows." Id. In Mr. Romme's expert opinion, this technique will reduce bat mortality. Id. Further, Beech Ridge, in conjunction with others, has established a post-construction protocol and adaptive management strategy to respond to bat mortality. Id. p. 17.

MCRE's quotation from U.S. Fish & Wildlife's March 7, 2005, letter deals with the cut-in speed only, not braking of the turbines. "Thus, the quotation is not even relevant to the braking issue," Beech Ridge wrote. Id. p. 16.

"MCRE's claims about Indiana bats are outrageous," Beech Ridge wrote. Id. p. 17. Although MCRE claims it is highly possible that an Indiana bat will be taken, an Indiana bat has not been found since 1990, and then only three were found. No Indiana bat has found in any of the studies since 1990, including the cave study in 2006, Beech Ridge wrote. None were mist-netted in the 2005 mist-netting study. The study protocols were established by the Indiana Bat Recovery Team and approved by the U.S. Fish and Wildlife Service.

9. MCRE's argument re: tourism and property values.

MCRE does not address Jay Goldman's expert opinion on property values, Beech Ridge asserted. Response p. 18. "Moreover, the lack of property value testimony from any opponent, other than a comment or two from Mr. Eisenbeiss about real estate prices in Greenbrier County rising in the last several years, demonstrates that there is no real case from opponents on this issue," Beech Ridge wrote. Id. p. 18.

Although MCRE complains that the Commission gave too much weight to Beech Ridge's two tourism studies, MCRE does not mention that no opponent presented any evidence on this issue, said Beech Ridge. Id. p. 18. Several intervenors commented that tourism would be affected, but the Commission rightly concluded that this was conjecture.

⁴ The cut-in speed is the speed at which electricity begins to be generated.

In contrast, Mr. Groberg recounted his experience in several situations when wind energy projects were promoted as tourism attractions. Response p. 18. Mr. Goldman traveled to Tucker County and spoke with businesses there. Id. p. 19. Ms. Phillips-Weikle presented considerable research on tourism in Greenbrier County, including the Midland Trail Scenic Highway Association, and Western Greenbrier County strongly supports the project, Beech Ridge said. Id. pp. 19-20.

10. MCRE's argument re: project support.

MCRE wants the count of letters filed for and against the project to decide the case, Beech Ridge wrote. Response p. 20. However, the Commission also should consider that Building Trades represents thousands of workers who wholeheartedly support the project; West Virginia's Sierra Club has more than 2,000 members and it supports the project; business associations, including the West Virginia Manufacturers' Association and the West Virginia Forestry Association spoke on behalf of the project; more than 800 letters of support were filed; and the majority of the 2,000 opposition letters were form letters, said Beech Ridge. Id. pp. 20-21. Thus, many more people support the project than appears from the number of protest letters received. Id. p. 21.

11. MCRE's argument re: transmission line route.

MCRE repeats the motion it made at the hearing, Beech Ridge argued. Id. p. 22. MCRE claims that it was ambushed by the minor change, although the environmental benefits and the landowner benefits are significantly positive, said Beech Ridge. Id. p. 22. The Commission's order noted that Beech Ridge could not disclose the change until after the Corps of Engineers' wetlands assessment was completed on April 18, 2006.

12. MCRE's argument re: effect of intervenor participation.

MCRE simply disagrees with the Commission order, Beech Ridge wrote. Response p. 22. Before the application was filed, Beech Ridge removed nine turbines from the easternmost part of the project to accommodate visual concerns, reducing it from 200 MW to 186 MW. Id. p. 23. Beech Ridge also voluntarily is locating all but a few turbines more than one mile from residences, in response to visual and noise concerns. The Technical Group will advise on post-construction bird and bat studies, and adaptive management plans, which are in part a response to intervenor concerns. Staff's conditions were driven at least in part by intervenor concerns. The posting of a removal bond and a guarantee of a minimum property tax payment were driven by intervenor concerns, as was the study on impacts on the local 911 communication system, Beech Ridge said. Id. p. 23. Also, Mr. Lively's concerns relating to the I line were accommodated. Id. p. 24.

13. Mr. Woelfel's arguments.

Mr. Woelfel takes fault with the Commission order as a whole, without any specific reference to matters that the Commission overlooked, Beech Ridge argued. Id. p. 24. To a very large extent, he recites precepts of constitutional and statutory law, but without citations to the record or Commission order. Thus, he does not provide any basis for the Commission to reconsider its decision, said Beech Ridge. Id. p. 24. Pursuant to Longdale Iron Co. v. Quesenberry, 50 W. Va. 451, 40 S.E. 487 (1901), a statement that is only a conclusion of law, without facts or opinion, is insufficient, argued Beech Ridge.

The one particular argument he makes is that the Commission ignored Staff's recommendation regarding the placement of certain turbines. Response pp. 24-25. However, Staff indicated that the certain locations engendered more controversy than others, Beech Ridge argued. Id. p. 25. "Staff did not make the movement of these turbines a condition of its recommendation that the siting certificate be granted," Beech Ridge wrote. Based on the entirety of Staff's recommendation, the balance weighs in favor of granting the certificate.

14. Ms. Mendelson's arguments.

Her pleading is not verified, as Procedural Rule 19.3 requires, so the Commission should strike her filing, Beech Ridge wrote. Response p. 26.

Ms. Mendelson rehashes issues which have been addressed several times. She seeks to re-litigate this matter, instead of set forth matters which the Commission overlooked. Id.

She says that Staff found the Beech Ridge map incomplete. However, Staff said that the five-mile map was not so deficient that it does not show the project's impact.

She also concedes that her surveys should be only a starting place for further investigation; but she ignores that Beech Ridge is conducting a study and will report to SHPO. Response pp. 26-27. The order is contingent upon Beech Ridge getting SHPO's final approval, and thus, the Commission has already addressed her concerns, Beech Ridge wrote.

She generally raises health concerns, but there is no properly authenticated evidence, subjected to cross examination, regarding health risks from the project, Beech Ridge argued. Response p. 27. Moreover, the information regarding Wind Turbine Syndrome involved an older turbine that produced more low frequency noise. Id. p. 27.

Ms. Mendelson is simply wrong when she claims that most of the support letters refer to employment, and she asserts that Beech Ridge has never promised the jobs would go to locals, said Beech Ridge. The local unions entered into a Memorandum Agreement in May 2006, which requires that construction jobs be filled with local individuals and it applies to any subsequent owner of the facility. Id. p. 28. Mr. Groberg testified that Beech Ridge

would provide extensive training to permanent employees. Id. It is not necessary for local colleges to offer classes, because the union members are trained in construction work, Beech Ridge said.

Although she says the Commission need not be concerned with the health of the grid, Siting Rule 3.1.b.1 requires a statement of need to contain “references to any available long term electric supply and demand projections, such as those produced [by ECAR]. It is therefore axiomatic that the ‘health of the grid’ is in fact a relevant inquiry of the Commission,” Beech Ridge wrote. Id. p. 29.

15. Mr. and Mrs. Eisenbeiss’ arguments.

Beech Ridge wrote that the Eisenbeisses petition was not verified, and that the Eisenbeisses seek to relitigate this matter, so the pleading should be stricken. Response p. 29.

On May 5, 2006, the Commission denied their motion to appoint scientific and economic experts, Beech Ridge wrote. Id. p. 30. Intervenors may participate in all facets of a PSC proceeding, but the state is not required to pay for an intervenor to attempt to prove his or her case, Beech Ridge said. Staff provides an unbiased review, and the Eisenbeisses do not indicate that Staff failed in this duty. To prevail, intervenors must submit more persuasive evidence than the applicant, not simply more evidence. Id. p. 30.

Although they argue that the clinical and scientific information they want considered as evidence is unbiased, the authors were not subject to cross-examination, so whether the information is unbiased could not be tested, Beech Ridge argued. Id. pp. 30-31. In contrast, Beech Ridge offered 15 witnesses under oath or by stipulation, and those witnesses were available for questioning.

Similarly, Mr. Eisenbeiss asks the Commission to accept his opinion on the location of the sound device, over the expert’s opinion. Response p. 31. Mr. Eisenbeiss is a lay person on this issue, without specialized experience and knowledge, and he objected to only one location. Id. pp. 31-32. The Commission did not ignore his testimony; it preferred the expert’s testimony, Beech Ridge argued. Id. p.32.

For the first time, the Eisenbeisses refer to the Noise Task Force. They also object to Beech Ridge’s noise maps. Id. p. 33. However, the record amply demonstrates that their home is located within, at most, one mile of two turbines.

While they argue that an industrial wind facility will harm property values, the evidence shows otherwise. Mr. Goldman presented evidence of property values in Tucker and Putnam Counties. Response pp. 33-34.

They ask the Commission to use the MCRE viewshed analysis, which has no vegetation, but, MCRE's witness said its maps were a starting point and that vegetation should be included. Id. p. 34.

They contend that federal tax subsidies and accelerated depreciation will create a tax burden on West Virginia residents. Id. p. 34. However, they ignore that Greenbrier County will receive at least \$400,000 a year, and that Beech Ridge will pay about \$212,000 a year in state B&O taxes. Id. pp. 34-35.

They take issue with the possible harm of endangered species, but they do not acknowledge the conditions placed on the siting certificate, Beech Ridge wrote. Id. p. 35. That Mr. Eisenbeiss has seen one mountain lion on his property does not mean there will be a taking of endangered species or an adverse impact on the habitat of a listed species, argued Beech Ridge. Id. pp. 35-36.

They also contend the Commission's order violates their due process rights, but they confuse due process with prevailing in litigation, Beech Ridge argued. Id. p. 36. Due process is notice and the opportunity to be heard, and the Eisenbeisses clearly had notice and participated in this proceeding. Id. p. 36.

DISCUSSION

Sufficiency of Beech Ridge's five-mile map

MCRE complained about the scale of Beech Ridge's map. The Commission addressed the scale of Beech Ridge's map in its August 28, 2006, order. On page 18, the Commission recited Beech Ridge's explanation about the ANSI D requirement, and in footnote 5 on that page, the Commission accepted Beech Ridge's map, preferring to have the entire project depicted on a single page. We agree with Beech Ridge that MCRE exaggerated the alleged deficiencies because a one-inch line on one scale is about nine-tenths of an inch on the other scale. As MCRE has presented nothing new for the Commission to consider, the Commission should reject this issue.

MCRE also argues that Beech Ridge's map does not sufficiently reflect utility corridors, major transportation routes, cultural and historical landmarks, and so forth. We agree with Beech Ridge and Building Trades that whether these items 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.

We also agree with Beech Ridge that this issue has been extensively presented to the Commission in prior pleadings. For instance, on pages 16 through 18 of the August 28, 2006, order, we addressed Mr. Woelfel's May 17, 2006, motion to dismiss Beech Ridge's application because the maps supporting the application were inadequate; Mountain

Communities's similar motion of May 18, 2006; Mountain Communities renewal of its motion during the evidentiary hearing; Mountain Communities' supplementation of its motion in its June 26, 2006, Initial Brief; and Beech Ridge's response to those motions. On page 33, we noted that Staff advised that, while the Beech Ridge map was not perfect, it showed the majority of the area's cultural and historical interests. We addressed more of Mountain Communities' concerns about the five-mile map at pages 40 and 41. We noted Staff's position in its Reply Brief on page 58. We summarized Beech Ridge's arguments from its Reply Brief at pages 63 and 64. Then, in Conclusion of Law Number 4, on page 73, the Commission agreed with Staff that Beech Ridge's map was sufficient to allow the application to be fully debated and the application should not be dismissed.

The Commission stands by its earlier decision in this regard. Since cultural and historic landmarks are the most strongly contested issue regarding Beech Ridge's five-mile map, the Commission will supplement its Conclusion of Law Number 4 to state that, while Beech Ridge's five-mile map was not perfect, it showed the majority of the area's cultural and historical interests.

It should also be noted that the Commission has taken great care throughout this proceeding to require that Beech Ridge's maps provide adequate information. Very early in this case, the Commission ruled that the map Beech Ridge published with its initial notice was insufficient, and therefore the Commission required Beech Ridge to publish a revised map.⁵

The Commission conditioned Beech Ridge's siting certificate upon Beech Ridge filing any necessary certifications prior to commencing construction, and the Commission expressly named SHPO in this regard. See General Preconstruction and Construction Conditions 11 & 12, Comm'n Order p. 88. MCRE argues that the Commission must instead have such certifications in hand when an application is filed. The Commission disagrees. 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. SHPO, not the PSC, is staffed with individuals who can assess the

⁵ The Commission addressed this on page 5 of the August order as follows:

On February 6, 2006, the Commission ruled that the map Beech Ridge published in the Notice of Filing Order was very difficult to review, due, in part, to its size, inadequate reference markers and the inclusion of topographical lines. The Commission ordered Beech Ridge to publish the Notice of Filing again, one time in Nicholas, Greenbrier and Kanawha counties, with a different map, taking into account the Commission's concerns. Comm'n Order p. 25. Beech Ridge published notice of its application, with a revised map, in the *Charleston Gazette* in Kanawha County on February 24, 2006; *The West Virginia Daily News* in Greenbrier County on February 27, 2006; and *The Nicholas Chronicle* in Nicholas County on March 2, 2006. See Affidavits of Publication (Mar. 17, 2006).

relative importance of cultural and historical locations. It would be grossly inefficient to require applicants to proceed through the various regulatory processes in serial fashion. 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. Thus, the Commission stands 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.

We recognize that compliance with the requirements of sister agencies is indeed part of the siting certificate process. However, we do not require all other state 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, and 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. Furthermore, Beech Ridge must satisfy this condition before it can commence construction.

MCRE also argues that it was deprived of the right to litigate the importance of the cultural landmarks because Beech Ridge's map was insufficient. The Commission disagrees. Beech Ridge's map – which shows recreational areas, 11 churches, three cemeteries, and three historical sites – is based upon data from WVU's GIS Technical Center; SHPO for historical and cultural areas; and local brochures for recreation, tourism and cultural areas. Upon these facts, that is a sufficient showing to allow the application to proceed. The Commission has not passed the buck to another agency, as MCRE alleges. The Commission required a substantial showing of important community areas, and MCRE prefers a more extensive showing of community highlights. MCRE disagrees with the Commission's assessment that Beech Ridge sufficiently represented community highlights. The Commission agrees with Beech Ridge that MCRE's is not deprived of due process, to the extent that the Commission does not agree with MCRE.

MCRE also relied upon a 1993 order in AEP to ask the Commission to dismiss Beech Ridge's application, due to map insufficiencies. This argument was made repeatedly 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). The Commission agrees with Beech Ridge that 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. The Commission will supplement its Conclusions of Law in this regard.

We agree with Beech Ridge that MCRE overstates when it claims that Mr. Groberg conceded that MCRE's five-mile map was correct. Mr. Groberg testified that he had no reason to doubt the features appearing on MCRE's map existed, but he did not agree that the information on MCRE's map was required.

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

Project need

W. Va. Code § 24-1-1(a) requires the Commission to encourage the well-planned development of utility resources consistent with state needs, including the productive use of the state's energy resources, which include coal and wind energy. West Virginia has long been a net-exporting state of energy. Thus, to adequately consider the well-planned development of utility resources, it has long been necessary for the PSC to consider West Virginia's position relative to that of other states. Therefore, the Commission should reject MCRE's contention that the PSC cannot consider regional needs for energy from renewable resources.

Since the Commission may consider regional needs for energy from renewable resources, the Commission may consider applications, such as Beech Ridge's, prior to any development by the Legislature of a policy for renewable energy requirements within West Virginia.

MCRE predicts dire consequences – wind projects may decrease energy demand from West Virginia, which could result in job losses or other negative impacts – may occur if wind projects are developed in West Virginia. However, there is no evidence in the record to support this position. Therefore, the Commission should reject MCRE's assertions in this regard.

The renewable resource needs of other states was among the Commission's deliberations, but the Commission evaluated many other equally important factors. Among them, the Commission also considered the site's wind energy potential, the distance from environmentally significant areas, the location near major electricity transmission facilities, the availability of privately-owned land with compatible uses, and the absence of known critical habitat for listed species. Further, the Commission concluded that it is undisputed that energy is needed in the east coast region, where it is estimated that the reserve margin will be reduced from 18.3% in 2005 to as low as 4.1% in 2014, causing the region to exceed its reliability design limit; and that generating capacity for this region is aging, with as much as 76% of the generating facilities older than 30 years, and 36% older than 40 years by 2010.

Still further, the Commission considered the benefits of providing power without generating harmful emissions, and of advancing the state and local economies. See Comm'n Order pp. 70, 75, 76 (Finding of Fact Nos. 3, 4; Concl. of Law Nos. 11, 13-16).

MCRE also objected because the project will produce less electricity in summer, when demand peaks, and such need cannot be balanced against the potential long-term adverse impacts in Greenbrier County.

The Commission disagrees. It is undisputed that Beech Ridge's project will would contribute some energy during summer peaks, helping to reduce capacity margins. The Commission addressed this in the August 28, 2006, order at pages 46, 59 and 76. In Conclusion of Law Number 15, the Commission wrote as follows:

Several disagree with Beech Ridge's estimates of how many homes its turbines can power. They also point out that Beech Ridge's power output will not be at its maximum during the summer, when the need for energy peaks. However, the Commission agrees with Beech Ridge that these concerns do not change the fact that Beech Ridge's project will power hundreds of homes, even at its lowest productivity. Nor do these concerns change the fact that the project's output will assist in meeting the peak summertime demands.

Id. p. 76. Thus, we agree with Beech Ridge that MCRE has presented nothing new for the Commission to consider.

Road funding

On reconsideration, MCRE alleges that it is not clear whether public funding will be required to maintain and repair the county roads affected by the project. The Commission agrees with Beech Ridge that this topic has never been presented to the Commission. Therefore, the petition to reconsider should be denied in this regard.

The Commission also agrees with Beech Ridge that the record is clear that Beech Ridge seeks no public funding and that road costs are a line item in Beech Ridge's project construction costs budget.

Evidence/public comment

Several intervenors asked the Commission to treat letters from Dr. Pierpont and U.S. Fish and Wildlife as evidence, instead of public comment. Beech Ridge objected, because the letters were offered to prove the truth of their contents and because the alleged truths could not be tested through cross-examination.

In the August 28, 2006, order, the Commission spent considerable time discussing those letters and the weight to be accorded them. Comm'n Order pp. 9 (Eisenbeiss provides

Pierpont documents); 10 (John Walkup provides Pierpont documents); 11-12 (Congressman Mollohan discusses U.S. Fish & Wildlife letter, Staff advises U.S. Fish & Wildlife letter to come, Sierra Club supports U.S. Fish & Wildlife recommendations); 14 (MCRE supports U.S. Fish & Wildlife recommendations); 14-15 (U.S. Fish & Wildlife letter summarized); 20 (Beech Ridge's objection to Pierpont letters, PSC's protective treatment on its own motion); 21 (Ms. Mendelson supports U.S. Fish and Wildlife recommendations); 23-24 (MCRE's Dr. Gannon re: U.S. Fish & Wildlife recommendations); 24 (Mr. Walkup re: U.S. Fish & Wildlife Service recommendations); 28 (Mr. Young suggests U.S. Fish & Wildlife be part of advisory group); 30 (Staff discussion of Pierpont report); 31 (Beech Ridge's Mr. Romme discusses U.S. Fish and Wildlife); 35 (Staff's proposed conditions re: U.S. Fish and Wildlife); 51 (Beech Ridge's initial brief re: U.S. Fish and Wildlife guidelines); 56-57 (Mr. Walkup's Reply Brief supporting U.S. Fish and Wildlife recommendations); 60 (Beech Ridge's reply brief re: Pierpont letter), 61 (U.S. Fish and Wildlife recommendations) & 65 (Staff's recommended conditions), 68-69 (Eisenbeisses discuss Pierpont letter in reply brief); 71 (Find. of Fact No. 15 re: pre-construction studies); 74 (Concl. of Law Nos. 6-7 re: Dr. Pierpont's letter); 74-75 (Concl. of Law No. 8 re: protective treatment on Commission's own motion); 80 (Concl. of Law No. 38 re: pre-construction studies); 81 (Concl. of Law Nos. 39 re: U.S. Fish & Wildlife letter, 41 re: advisory committee, 42-43 re: bat study recommendations); 85 (Concl. of Law Nos. 61 re: adaptive strategies, 62-63 re: pre-construction studies); 86 (Concl. of Law Nos. 64-66 re: U.S. Fish & Wildlife letter); 87 (ordering paragraph accepting Pierpont letter as public comment); 88 (ordering paragraph re: certificate conditions); 90 (ordering paragraph re: advisory group).

As these citations make clear, the Commission exhaustively addressed these letters and explained that matters in evidence are tested via cross-examination, which allows the Commission to rely more heavily on matters in evidence, than matters in public comment. As nothing new has been presented to the Commission on reconsideration, the Commission should deny the petition in this regard.

Although MCRE complains that the Commission allowed certain Beech Ridge testimony about documents prepared by others, the Commission agrees with Beech Ridge that such testimony was not offered to establish proof of what the documents said. Instead, Beech Ridge's witnesses provided their own opinions, based upon various experiences, including review of the Sterzinger study. The Beech Ridge witnesses were available for questioning on cross-examination, but no intervenor asked them questions. Accordingly, it was appropriate for the Commission to receive this evidence from the Beech Ridge witnesses.

Long-term benefits vs. adverse impacts

While the construction phase will provide short-term economic benefits to the state and region, the economic benefits become marginal after the project is built and the adverse impacts in Greenbrier County will last for decades, MCRE asserted.

The Commission agrees with Beech Ridge that MCRE minimizes the project's permanent jobs and tax revenues, although MCRE concedes that construction has positive economic effects. Also, MCRE does not provide citations in the record to support its conclusion as to adverse impacts. Furthermore, the Commission weighed the economic information and concluded that Building Trades' provided the best assessment.⁶ We conclude that MCRE simply disagrees with the result we reached in the final order. There being nothing new for the Commission to address, the petition to reconsider should be denied in this regard.

Staff comments to move turbines

In its recommendation, Staff advised the Commission to grant Beech Ridge a siting certificate because the positives outweighed the negatives, especially when considering mitigating factors. However, Staff suggested that removing or relocating some turbines would eliminate most of the potential negative effects, making the balancing even stronger in favor of granting the certificate. Staff's Initial Brief p. 17. The Commission views the Staff comments as suggesting that turbines could be removed or relocated if the Commission believed that was necessary before the Commission could determine that the project, on balance, should be issued a siting certificate. As indicated in this order, the Commission had no such belief, but encouraged Beech Ridge to continue working with individuals on this issue.

⁶ In Finding of Fact Number 19, for instance, the Commission wrote as follows:

The Commission agrees with Staff that IMPLAN is a widely used economic model that can be employed for a multitude of activities. Using IMPLAN, Dr. Christopher Thompson of Johns Hopkins University estimated that Beech Ridge's project will have these effects:

1. 265 to 1,089 jobs, in low and high impact scenarios.
2. \$25.3 to \$104 million of additional private sector output.
3. \$11.3 to \$46.4 of value added, including \$7.3 to \$30 million of additional construction and employee compensation.
4. \$528,000 to \$2.2 million of additional indirect business taxes.
5. \$1.9 to \$7.9 million in federal tax revenue.
6. \$817,000 to \$3.4 million in state tax revenues, half of which would be state personal income tax.

Mr. and Mrs. Eisenbeiss complain about Dr. Thompson's study, but they did not offer any evidence to refute Dr. Thompson's testimony. Accordingly, the Commission should accept Dr. Thompson's testimony as the best indicator of economic effect.

Comm'n order p. 77 (Aug. 28, 2006).

Several intervenors try to merge these separate recommendations, and argue that the Commission must require Beech Ridge to remove or relocate some turbines as a condition of receiving a siting certificate.

The Commission disagrees. Staff's recommendation is not entitled to any more weight than other evidence received in a proceeding. Moreover, Staff's recommendation must be fairly and fully read. The Commission cannot ascribe to Staff a recommendation that Staff did not make.

On page 86, in Conclusion of Law Number 67, the Commission addressed the situation as follows:

Finally, the Commission recognizes that Beech Ridge has offered to make minor adjustments to further lessen the impact of this project on the community. The Commission, though, cannot assess the impact of moving the turbines Beech Ridge identified in its Reply Brief as candidates to move or remove, if the Commission so desired. The Commission consents to any such adjustments (move/remove) as are disclosed in the record of this proceeding, provided that Beech Ridge obtains the agreement of any adjoining residents within one mile. If the landowner is different from the resident, then Beech Ridge must also obtain the agreement of the landowner.

At the hearing, and in its briefs, Beech Ridge advised that it was continuing to work cooperatively with landowners, and that it was possible that certain turbines could be moved to accommodate landowner concerns about visibility and noise. However, the Commission was not presented with exact locations for any such changes.

The Commission encourages such cooperative efforts to continue, and, to the extent that any affected landowners are able to reach agreement with Beech Ridge for minor location-changes which will mitigate any perceived adverse impacts, the Commission has cleared the way for such modifications.

The Commission cannot, based upon the record, conclude that unspecified turbine locations are in the public interest. The Commission has assessed the locations which were identified in the case file and concluded that, when all of the factors are considered, the project's benefits outweigh its detriments. If the balance can be further tipped to lessen the project's detriments, the Commission encourages Beech Ridge and the landowners to make such minor modifications to turbine locations.

Recognizing its duty to consider the interests of affected landowners, the Commission will not allow an alternate turbine location unless the landowner prefers it. If the landowner prefers it, the Commission will not require the case to be reopened for further formal proceedings. The Commission does, though, require that such agreements to modify turbine locations be reduced to writing.

Impact on bats

Beech Ridge correctly notes that MCRE's petition mixes braking the turbines with cut-in speeds. When turbines are braked, the blades do not move; the cut-in speed is the point when the blades begin to generate electricity. Experience at other Appalachian wind farms shows that most bat kills occur at low wind speeds. Beech Ridge will reduce the time when the turbine blades rotate, by not engaging the blades at all when winds are too slow to produce electricity. On select turbines, Beech Ridge will also increase the cut-in speed, to see if bat kills are reduced. This is quite different from other Appalachian wind farms, where the blades rotate any time the wind blows. Thus, the Commission will deny MCRE's petition as it relates to braking/reducing the cut-in speed.

MCRE also alleges that it is highly likely that an Indiana bat will be taken by the project, and Beech Ridge strenuously objects because no Indiana bats have been seen since 1990. The Commission considered extensive evidence regarding the project's possible impact on bats. See Comm'n Order pp. 3 (studies attached to Beech Ridge's application); 6 (according cave locations protected treatment, Mr. Romme's testimony for Beech Ridge); 7 (Dr. Gannon's testimony for MCRE); 10 (Hamm's public comment); 11 (Lipton's and Mollohan's public comment); 13 (Sierra Club's public comment); 14-15 (U.S. Fish & Wildlife's public comment); 20-21 (Mendelson's initial brief); 23-24 (Walkup's initial brief); 26-28 (Young's initial brief); 28, 30-31, 37 (Staff's initial brief); 41 & 44 (MCRE's initial brief); 51-52, 56-57, 61 (Beech Ridge's initial brief); 56 (MCRE's reply brief); 56-58 (Mr. Walkup's reply brief); 61 (Beech Ridge's reply brief); 71 (Finding of Fact No. 10); 72 (Finding of Fact No. 19); 74-75 (Conclusion of Law No. 8 re: protective treatment of cave locations); 80 (Conclusion of Law No. 38); 81-82 (Conclusion of Law Nos. 42-46); 90 (ordering paragraphs re: advisory group). There is no expert testimony consistent with this MCRE allegation. Instead, MCRE creates its argument by combining several outermost possibilities from information contained in public comment. MCRE presents nothing new for the Commission to consider. Therefore, the Commission should deny the petition in this regard.

Tourism and property values

MCRE argues about the weight the Commission accorded Beech Ridge's evidence regarding the project's economic impact on tourism and property values. MCRE suggested that Jay Goldman's testimony be weighed the same as comments from individuals. The Commission disagrees. Mr. Goldman has decades of experience in appraising property and he conducted studies of economic impacts of utility projects in Putnam and Tucker Counties. We agree with Beech Ridge that the only other evidence was from Mr. Eisenbeiss, who is also an experienced appraiser, but who did not conduct a study. Thus, the Commission is not inclined to revisit its decision that Mr. Goldman provided the best evidence in this regard.

MCRE similarly downplays the relative weight of Ms. Phillips-Weikle's study, but MCRE did not present a witness to address this issue. Ms. Phillips-Weikle researched data and presented an opinion, where various public commentators did not provide a researched basis for their remarks. Moreover, Mr. Groberg testified as to his experience with other wind farm projects.

MCRE did not present anything new for the Commission to consider, but argues with the result of the Commission's decision. Accordingly, the Commission should not reconsider in this regard.

Public support/opposition

MCRE also disagreed with the weight that the Commission accorded the various public comments, arguing that the Commission should reject the project because the number of comments in opposition was greater than the number of supporting remarks. Beech Ridge, though, says that the Commission is not bound by a simple for-against count, and that the Commission should consider that several of the support letters and comments are from groups whose individual members also support the project.

Public comment has been vital to this process and the Commission recognized its value at footnote 4 on page 8 of the August 28, 2006, order. The Commission conducted two public hearings in Lewisburg, where hundreds attended and not all could be heard. At the beginning of the evidentiary hearing in Charleston, the Commission received additional public comment. Again, more people wanted to comment than could be heard. Thus, the Commission advised that it would continue to receive public comment until the decision issued.

In the August 28, 2006, order, the Commission summarized much of the additional written comment filed after the evidentiary hearing, including additional information and arguments from *pro se* intervenors:

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| May 10, 2006 | Beech Knob's three full-time residents, as well as 10 others, filed letters in support. Barry Glick of Sunshine Farm and Gardens filed comments in opposition. |
| May 12, 2006 | Town of Rainelle, the Town Council of Rupert, the Midland Trail Scenic Highway Association, and Geoffrey Skaggs filed comments in support. Mr. and Mrs. Eisenbeiss filed 84 documents in opposition, including some by Dr. Nina Pierpont. |
| May 16, 2006 | The Pocahontas County Convention & Visitors Bureau asked that accurate interpretations of the viewshed analysis and aesthetic impacts be part of the decision making process. |

May 20, 2006	E. Waddell filed comments in support.
May 23, 2006	Ken Bryan filed comments in support. Dr. Rhonda Hamm, a Greenbrier County doctor, and Doshia Webb filed comments in opposition.
May 24, 2006	David Buhrman filed comments in opposition, including a 20-minute video disk. William M. Balfour filed comments in opposition.
May 26, 2006	B.J. Sharp-Gudmundsson filed comments in opposition, including a video disk.
June 21, 2006	Mr. Walkup filed several comments in opposition, including newspaper stories from Virginia and England; an article from <i>West Virginia Wildlife</i> ; a study by Frits G.P. van den Berg, University of Groningen in the Netherlands; and Dr. Pierpont's testimony before the New York Legislature's Energy Committee regarding health concerns.
June 27, 2006	Lesli R. Forbes commented in support, including two videos.
July 10, 2006	Holly Katchuk filed comments in opposition, including a map of other proposed wind project locations.
July 10, 2006	Josh Lipton commented on a June 2005 United States Forest Service Technical Guide regarding bat survey methodologies.
July 26, 2006	Congressman Alan B. Mollohan filed comments in opposition.
August 9, 2006	Mr. Walkup urged the Commission to consider additional information from Fish and Wildlife.
August 14, 2006	The Sierra Club, West Virginia Chapter, advised that it supported Beech Ridge's project, with conditions.
August 17, 2006	U.S. Fish and Wildlife Service filed a copy of a letter it sent to Beech Ridge's Mr. Romme, which included recommendations for conditions on the project's construction and operation

See Comm'n Order pp. 4-15. Although there has been considerable public opposition to this project, there also has been considerable public support. The Commission rejects the argument that this issue can be determined simply by counting the numbers on either side of the issue. Moreover, MCRE has presented nothing new for the Commission to consider, but

has disagreed with the result reached by the Commission. Thus the Commission should not reconsider its order in this regard.

Transmission line route

MCRE argues that Siting Rule 2.4 requires the Commission to deny the application, because Beech Ridge did not file the final transmission line location with its application. Instead, toward the end of the hearing, Beech Ridge advised that it had made a minor change, at a landowner's request.

MCRE repeats a request that the Commission handled in Conclusion of Law Number 5 on page 74 of the August 28, 2006, order. Upon these facts, the revised location crosses the same landowner, but in a different location; seven stream crossings are avoided; and the line is moved farther away from any other properties. Beech Ridge could not disclose the change until after a wetlands assessment was complete, and the U.S. Army Corps of Engineers provided its wetlands approval on April 18, 2006. We concluded that, under these circumstances, it was not unreasonable for Beech Ridge to request a minor route modification during the hearing. Indeed, it would be against the public interest if the Commission could not consider project changes, during the course of a proceeding, which lessen the project's impact.

As MCRE has presented nothing new for the Commission to consider, the petition to reconsider should be denied in this regard.

Effect of intervenor participation

MCRE objected to the Commission's discussion that the project changed as a result of intervenor participation, because Beech Ridge's application was granted in its entirety. Beech Ridge responded that MCRE simply disagrees with the Commission order, and we agree with Beech Ridge.

Here are several examples of changes due to public participation:

- Before the application was filed, Beech Ridge removed nine turbines from the easternmost part of the project to accommodate visual concerns, reducing it from 200 MW to 186 MW.
- Beech Ridge is voluntarily locating all but a few turbines more than one mile from residences, in response to visual and noise concerns.
- The Technical Group will advise on post-construction bird and bat studies, and adaptive management plans, which are in part a response to intervenor concerns.
- Staff's conditions were driven at least in part by intervenor concerns.

- The posting of a removal bond and a guarantee of a minimum property tax payment were driven by intervenor concerns, as was the study on impacts on the local 911 communication system.
- Mr. Lively's concerns relating to the I line of turbines were accommodated.
- Beech Ridge and Building Trades entered into a Memorandum of Understanding requiring the hiring of local workers.

MCRE's assertions are not supported by the record, and the petition to reconsider should be denied in this regard.

Mr. Woelfel's arguments

We agree with Beech Ridge and Building Trades that nearly all of Mr. Woelfel's petition to reconsider was a recitation of legal precepts, without any application of those precepts to the Commission's order. *See Staff comments to move turbines*, above. Therefore, pursuant to well-settled law and Commission practice, it is reasonable to deny Mr. Woelfel's petition in this regard.

Mr. Woelfel was specific, though, in asking the Commission to follow Staff's recommendation. As we discussed above, Staff's position is one of several that the Commission weighs, and Staff's opinion has equal weight with other parties. The Commission's discussion above would apply to Mr. Woelfel's request as well, and therefore, we should deny Mr. Woelfel's petition to reconsider.

Ms. Mendelson's arguments

Building Trades and Beech Ridge both correctly note that Ms. Mendelson's petition to reconsider is not verified as Procedural Rule 19.3 requires, and they ask the Commission to strike her filing.

In this instance, the Commission will exercise its discretion and consider Ms. Mendelson's petition, in recognition of her consistent participation in this proceeding and her *pro se* status. The Commission wishes to make clear that its decision to accept this particular pleading should not be construed as any guarantee that the Commission would accept future pleadings which do not comply with our Procedural Rules.

Ms. Mendelson, like MCRE, argued that Beech Ridge's five-mile map was insufficient. Like MCRE, she repeats arguments she has already asked the Commission to consider. The Commission's discussion above applies equally to Ms. Mendelson. *See Sufficiency of Beech Ridge's five-mile map*, above. Thus, the Commission should deny her petition to reconsider in this regard.

Similarly, the Commission's discussion of the number of protest letters for and against the project equally applies to Ms. Mendelson's arguments. *See Public support/opposition*, above. The Commission should deny her petition to reconsider in this regard.

Ms. Mendelson's argument regarding local employment does not take into consideration the Memorandum of Understanding, which requires Beech Ridge to hire locally. Similarly, she suggests that Beech Ridge must work with local colleges to provide training, but she overlooks that union workers are already trained and that Beech Ridge will provide extensive training to permanent employees. As these requests are contrary to the record, they should be denied.

Ms. Mendelson argues that the PSC's mandate is to protect interests specific to West Virginia, and that the Commission should not be so concerned with the health of the interstate electric grid. MCRE made a similar argument, and the Commission's discussion above applies equally to Ms. Mendelson. Accordingly, in this regard her petition should be denied.

Ms. Mendelson asks the Commission to consider health concerns, which she presented by way of public comment and in her briefs. The Commission did take those arguments and comments into account. Since she has presented nothing new for the Commission to consider, the petition to reconsider should be denied in this regard.

Overall, we agree with Beech Ridge and Building Trades that Ms. Mendelson disagrees with the Commission's order and, in essence, urges the Commission to rebalance the various interests. As she has not raised anything new for the Commission to consider, we should decline to reconsider our decision.

Mr. and Mrs. Eisenbeiss' arguments

Beech Ridge is incorrect to state that Mr. and Mrs. Eisenbeiss's petition was not verified. The Commission received the verification on September 19, 2006. Therefore, the Commission should deny Beech Ridge's request to strike this petition to reconsider.

Mr. and Mrs. Eisenbeiss renewed their arguments that the Commission should have provided expert opinions for them, as *pro se* intervenors. They also wrote that Dr. Nina Pierpont's clinical and scientific documents "give logic and justification to defend our concerns." They asked the Commission to reconsider treating their documents as public comment and to weigh them as evidence.

On May 5, 2006, the Commission denied their motion to appoint scientific and economic experts.⁷ We agree with Beech Ridge that intervenors may participate in all facets

⁷ Conclusion of Law Number 5 reads as follows:

of a PSC proceeding, but the state is not required to pay for an intervenor to attempt to prove his or her case. The Eisenbeisses have not presented anything new for the Commission to consider. Therefore, the petition to reconsider should be denied in this respect.

We also are not persuaded to modify our order as it discusses public comment and evidence. As the citations above reflect, the Commission reviewed in detail public comment and evidence. The Commission has also explained that, when matters are disputed, it is reasonable to accord evidence more weight than public comment, because positions provided in evidence have been tested through cross-examination. This is well settled, and the Eisenbeisses present no reason to depart from this principle. Therefore, the petition to reconsider should also be denied in this regard.

Mr. Eisenbeiss criticized the selection of ambient noise site 6 as too noisy, and he argues that the Commission disregarded his testimony, when it accepted the testimony of Beech Ridge's acoustics expert. Beech Ridge responds that Mr. Eisenbeiss is a lay witness, without specialized experience and knowledge, and he objected to only one location. The Commission did not ignore his testimony; it preferred the expert's testimony, as Beech Ridge wrote. Therefore, the petition to reconsider should be denied in this regard.

Mr. and Mrs. Eisenbeiss objected to the Commission's June 8, 2006, decision, in a separate proceeding, to terminate a Noise Rule Task Force. The Commission agrees with Beech Ridge that the petition to reconsider is the first time that this argument has been presented to the Commission. Moreover, the separate proceeding was to consider whether the Commission should amend its Siting Rules, and ultimately the Commission chose not to do so. That proceeding is not relevant to this siting certification application by Beech Ridge. Therefore, the Commission should deny the petition to reconsider in this regard.

Mr. and Mrs. Eisenbeiss also challenge the accuracy of Beech Ridge's noise maps because structures on their property do not appear on all of the maps. Beech Ridge responds that the record amply demonstrates that their home is located within, at most, one mile of two turbines. This single map discrepancy noted by Mr. and Mrs. Eisenbeiss is outweighed by the rest of the evidence as to turbine locations and their proximity to local structures. Therefore, the petition to reconsider should be denied in this regard.

Mountain Communities, Jeffrey and Alicia Eisenbeiss and Michael Woelfel have asked the Commission to require its Staff to hire technical experts to evaluate Beech Ridge's application. However, each party in a case is responsible for presenting his or her own position. Staff's role in a proceeding is to thoroughly analyze the evidence, balance all of the interests and provide the Commission with an unbiased recommendation. Accordingly, it would be inappropriate to require Staff to evaluate Beech Ridge's technical information from the perspective of any of the parties. Therefore, the Commission should deny these motions.

Comm'n Order p. 8 (May 5, 2006).

Mr. and Mrs. Eisenbeiss also alleged that the potential negative economic impact has been grossly overlooked. In this regard, they are asking the Commission to revisit its balancing of the evidence, but they do not offer specific items that the Commission overlooked. Moreover, the Commission indicated above that the information about economic impact was conflicting, and that it weighed testimony, such as Mr. Goldman's and Building Trades', more heavily than public comment to resolve this issue. Therefore, the Commission should stand by its previous decision and deny the petition to reconsider in this regard.

Mr. and Mrs. Eisenbeiss complained that Mr. Goldman testified that adverse noise, lack of view and light pollution could be external obsolescence, but Mr. Goldman's report does not provide the methodology to define external obsolescence. Mr. Eisenbeiss pursued external obsolescence with Mr. Goldman on cross-examination. Tr. pp. 103-120, 176-186 (May 16, 2006). Therefore, this issue has been fully litigated, and the Commission is not convinced it should reconsider.

They also assert that the MeadWestvaco witness' conclusion, that declining property value concerns were not justified, was based on speculation. However, as the Commission set forth above, MeadWestvaco's testimony was based upon the witness' experience as the long-time property owner and upon research. Therefore, the Commission is not convinced that it should reconsider.

Mr. and Mrs. Eisenbeiss asked the Commission to rely on MCRE's viewshed maps, which do not reflect any vegetation, because leaves appear only six months of the year. However, Beech Ridge correctly asserted that MCRE's witness said its maps were a starting point and that vegetation should be included. Therefore, the Commission should deny the petition in this regard.

They complained that the project cannot be justified without federal tax subsidies and accelerated depreciation granted to businesses such as Beech Ridge, and that these benefits create a tax burden on Greenbrier County residents and state citizens, which offends the public interest. The costs and benefits of particular tax requirements are evaluated by lawmakers, not the Commission. Moreover, we agree with Beech Ridge that Mr. and Mrs. Eisenbeiss did not establish that Beech Ridge's tax treatment will create any type of tax burden in West Virginia. Beech Ridge expects to pay \$500,000 annually in real property taxes to Greenbrier County, and it has executed a guaranty, by which it will pay at least \$400,000 annually to the county, even if its local tax bill falls below that amount. Beech Ridge also has asked for no special tax treatment or any public funding. Thus, the Commission should deny the petition in this regard.

Mr. and Mrs. Eisenbeiss also urged the Commission to receive the U.S. Fish and Wildlife letters as evidence, instead of as public comment. The Commission's discussion above applies equally to Mr. and Mrs. Eisenbeiss. See Evidence/public comment, above. Moreover, their assertion that U.S. Fish and Wildlife did not have an opportunity to assess

the project's impacts and to intervene before the evidentiary hearing is contrary to testimony about Beech Ridge's contacts and Staff's contacts with U.S. Fish and Wildlife. Accordingly, the Commission should deny the petition in this regard.

Mr. Eisenbeiss testified that he has seen a mountain lion on his property and his testimony was unrefuted. He does not, though, recognize that the Commission has required Beech Ridge to comply with federal laws relating to endangered species. Thus, the Commission has accommodated his concern. The Commission agrees with Beech Ridge that the facts that Mr. Eisenbeiss has seen one mountain lion on his property does not mean there will be a taking of endangered species or an adverse impact on the habitat of a listed species.

Finally, they argue that the order violates their due process rights because it too heavily weighs Beech Ridge's interests. We agree that they have confused due process with prevailing in litigation. Due process is notice and the opportunity to be heard, and the Eisenbeisses clearly had notice and participated in this proceeding. They have presented nothing new for the Commission to consider, but ask the Commission to rebalance the interests to reach their preferred result. Upon this record, the Commission declines to do so.

Satisfaction of pre-construction conditions

Upon this additional review of the issues, the Commission concludes that it is reasonable to modify its order and require Beech Ridge to notify the Commission when all pre-construction conditions have been met. Upon receipt of this notification from Beech Ridge, the Commission will schedule a hearing regarding the pre-construction conditions. At that hearing, Beech Ridge will have the burden of demonstrating that it has satisfied the pre-construction conditions. Beech Ridge may not commence construction until the Commission's review of the pre-construction conditions is complete.

Beech Ridge shall file its pre-construction conditions notice in this proceeding, Case Number 05-1590-E-CS, which shall be reopened for the limited purpose of considering Beech Ridge's satisfaction of the Commission's conditions. In all other respects, the Commission's final order shall remain in full force and effect.

FINDINGS OF FACT

1. On August 28, 2006, the Commission granted Beech Ridge a siting certificate, pursuant to W. Va. Code §§ 24-2-1(c) and 24-2-11c, for a 186 megawatt (MW) wind-powered generating facility, to be located nine miles northeast of Rupert in Greenbrier County, and for a 13.8-mile 138 kV transmission line to connect the generating facility to Allegheny Power's Grassy Falls substation near Nettie in Nicholas County. The project is expected to have 124 1.5 megawatt (MW) wind turbines, mounted on 262-foot tubular steel towers, and 150 pole structures for the transmission line, at a total cost of \$300 million.

2. The Commission's grant of authority to Beech Ridge was contingent upon extensive conditions, including the following:

General Preconstruction and Construction Certificate Issues:

- (1) Prior to commencing construction, Beech Ridge must file a verified statement indicating that all pre-construction conditions and requirements of the certificate have been met.
- (2) Beech Ridge shall require all contractors to use standard noise buffers on all equipment and trucks.
- (3) Beech Ridge shall require contractors to use pile driving equipment which have the least noise impact and restrict pile driving, during the weekdays, to 7 a.m. to 7 p.m.
- (4) All construction activities should take place mostly during daylight hours.
- (5) Construction activities should be limited during church hours.
- (6) If dynamiting should become necessary, it should be limited to daylight hours and should follow all State and Federal rules, regulations, and laws.
- (7) Beech Ridge must dispose of all contaminated soil and construction debris in approved landfills in accordance with appropriate environmental regulations.
- (8) Beech Ridge must design, install and implement a fire protection system, using industrial best practices, in accordance with all applicable fire safety codes.
- (9) Beech Ridge must coordinate with fire, safety and emergency personnel during all stages of the project to promote efficient and timely emergency preparedness and response.
- (10) The siting and support transmission facilities certificates shall become invalid if Beech Ridge has not commenced a continuous course of construction within five years of the date the final certificate is granted or has not completed construction by the tenth year without petitioning the Commission for approval to expand these time frames, provided there are no material changes to the project that necessitate a reopening.
- (11) Beech Ridge must file with the Commission evidence of any necessary environmental permits and/or certifications prior to commencing construction (including any letters from U.S. Fish & Wildlife, WVDNR, W. Va. Division of Cultural and History and West Virginia State Historic Preservation Office

(SHPO) indicating either that Beech Ridge does not need to take further action or outlining what action Beech Ridge needs to take to be in compliance with that agency's rules/laws).

- (12) Beech Ridge must file evidence of approval and/or acceptance of the wetlands delineation (Beech Ridge needs to file with the Commission written evidence of the Wetlands survey being completed and approved); the final endangered species study with any required mitigation plans; and the historical/archeological significance study with any required mitigation plans prior to commencing construction.
- (13) Beech Ridge must file copies of the final Interconnection Agreements between Beech Ridge and PJM prior to commencing operation.
- (14) Beech Ridge must comply with the Endangered Species Act (16 USC § 1531 *et seq.*), the Migratory Bird Treaty Act (16 USC § 701 *et seq.*), and, if applicable, the National Environmental Policy Act of 1969 (42 USC § 4321 *et seq.*) in both the construction and operation of the Project. Should any authorized governmental agency or court with competent jurisdiction find that Beech Ridge is not complying with any one of the above three acts in either the construction or the operation of the Project, then Beech Ridge must notify the Public Service Commission in writing in this case of any such finding within ten (10) days of any such finding being made. Furthermore, the Commission may seek any legal remedies it has authority to seek, including injunctive relief, to address any such findings.
- (15) Beech Ridge must file evidence of its Exempt Wholesale Generator (EWG) status from the Federal Energy Regulatory Commission (FERC) prior to commencing operation.
- (16) Beech Ridge must have a decommissioning fund in place prior to commencement of operation. The fund will cover dismantling of the turbines and towers, as well as land reclamation. The fund should be an escrow account, or a bond or a surety that is held by an independent party, such as the County Commission. This fund shall not be a part of Beech Ridge's assets. Beech Ridge must hire an expert to assess, from time to time, the size of the fund that would be needed, taking into consideration resale or salvage value. Beech Ridge must obtain the Commission's approval of the evaluative expert, as well as Commission approval of the periodic reports. The Commission reserves the right to also hire its own evaluative expert to evaluate any of the periodic reports.
- (17) The construction of the I lines of turbines shall not occur unless all property owners agree to participate in the project.

- (18) Beech Ridge should provide, if it has not already, a copy of the guaranty agreement between Beech Ridge and the Greenbrier County Commission whereby Beech Ridge agrees to pay at least \$400,000 a year to the County. The Greenbrier County Commission may designate a fund for this minimum payment.

General Operational Phase Certificate Issues:

- (1) This condition applies at anytime – not just in the operational stage: If Beech Ridge should transfer its certificate, Beech Ridge must, pursuant to *Siting Rule 7.1*, notify the Commission in writing of the identity of the transferee and submit an affidavit from the transferee attesting to its willingness to abide by the terms of a siting certificate as issued.
- (2) Beech Ridge must use licensed certified herbicide applicators.
- (3) Beech Ridge must have the Material Safety Data Sheet filed on the plant site for all herbicides used on the transmission line right-of-way.
- (4) Beech Ridge shall not use aerial spraying on its transmission line right-of-way.
- (5) Beech Ridge shall provide the PSC with copies of all future interconnection studies and any interconnection agreement.
- (6) Beech Ridge shall prohibit the use of lighting in the project area as much as possible. Beech Ridge may light the project as required by the Federal Aviation Administration (FAA), or any applicable fire or safety code, regulation or accepted good utility practice.
- (7) Beech Ridge will consult with a Technical Advisory Committee regarding the post-construction bat and bird studies. Membership shall be open to a representative of each of the following:
 - PSC
 - U.S. Fish and Wildlife Service
 - West Virginia Division of Natural Resources
 - Bat and Wind Energy Cooperative
 - A statewide environmental organization w/ 500+ members and in existence for at least 10 years.
 - A statewide bird group.
 - A private or academic institution with a background in avian issues.

Beech Ridge shall consult with the Technical Advisory Committee on the following:

- (a) Three years of post-construction bat mortality and adaptive management studies, after operations commence, to assess 1) the project's impact, if any, upon bat life, 2) the potential for adaptive management techniques to mitigate such impacts, and 3) the expected costs over a range of mitigation effectiveness levels.
 - (b) Three years of post-construction bird studies, after operations commence, to assess the impact, if any, on birds.
 - (c) A one year post-construction eagle/osprey study.
 - (d) If the project causes significant levels of bat or bird mortality and adaptive management techniques are proven effective and economically feasible, Beech Ridge and its successors will make a good faith effort to work with the Commission to apply parameters to implement facility-wide adaptive management strategies on an on-going basis.
- (8) Beech Ridge shall update the Commission in writing twice a year on the studies being conducted. The update shall be directed to the attention of the Commission's Executive Secretary. Unless Beech Ridge obtains Commission consent for other deadlines, the updates shall be filed on or before January 30 and July 31 each year. Beech Ridge shall provide a copy of each report to the members of the Technical Advisory Committee.
- (9) Beech Ridge's agreement to test adaptive management strategies shall be in effect immediately upon operation of the project. Beech Ridge may request modifications of its strategies in filings with the Commission.
- (10) There have been concerns expressed at the Backbone Mountain wind power site in Tucker County, under certain atmospheric conditions, that unnecessary lighting can contribute to additional bird mortality. Thus, Beech Ridge shall work with its employees and the FAA to minimize the impact that lighting will have upon the project's visibility.
- (11) All of these terms apply to Beech Ridge, and to any subsequent owners/operators.

Comm'n order pp. 87-91.

3. On September 5, 2006, the Commission advised the parties as follows:

As the detailed August 28, 2006, order establishes, the Commission reviewed in detail the various positions set forth in this case.

Parties are advised that reconsideration offers an opportunity to point out matters which the Commission overlooked, but is not for the purpose of considering new arguments or evidence not in the record.

Comm'n Order pp. 2-3 (Sept. 5, 2006) (Concl. of Law Nos. 4 & 5).

4. Ms. Mendelson petitioned to reconsider on September 5, 2006.
5. Mr. Woelfel petitioned to reconsider on September 8, 2006.
6. Building Trades responded to Mr. Woelfel and Ms. Mendelson on September 18, 2006.
7. Mr. and Mrs. Eisenbeiss petitioned to reconsider on September 18, 2006.
8. MCRE petitioned to reconsider on September 18, 2006.
9. Building Trades responded to MCRE and Mr. and Mrs. Eisenbeiss on September 27, 2006.
10. Beech Ridge responded to all of the petitions to reconsider on September 28, 2006.
11. A one-inch line on the scale set forth in the Siting Rules would be about nine-tenths of an inch on the scale provided in Beech Ridge's five-mile map.
12. Beech Ridge's map – which shows recreational areas, 11 churches, three cemeteries, and three historical sites – is based upon data from WVU's GIS Technical Center; SHPO for historical and cultural areas; and local brochures for recreation, tourism and cultural areas.
13. Mr. Groberg testified that he had no reason to doubt the features appearing on MCRE's map existed, but he did not agree that the information on MCRE's map was required. Tr. pp. 99-102 (May 17, 2006).
14. On February 6, 2006, the Commission ruled that the map Beech Ridge published in the Notice of Filing Order was very difficult to review, due, in part, to its size, inadequate reference markers and the inclusion of topographical lines. The Commission ordered Beech Ridge to publish the Notice of Filing again, one time in Nicholas, Greenbrier and Kanawha counties, with a different map, taking into account the Commission's concerns. Comm'n Order p. 25. Beech Ridge published notice of its application, with a revised map, in the *Charleston Gazette* in Kanawha County on February 24, 2006; *The West Virginia*

Daily News in Greenbrier County on February 27, 2006; and *The Nicholas Chronicle* in Nicholas County on March 2, 2006. See Affidavits of Publication (Mar. 17, 2006).

15. W. Va. Code § 24-1-1(a) requires the Commission to encourage the well-planned development of utility resources consistent with state needs, including the productive use of the state's energy resources, which include coal and wind energy.

16. West Virginia has long been a net-exporting state of energy.

17. There is no evidence in the record to support MCRE's prediction of dire consequences – wind projects may decrease energy demand from West Virginia, which could result in job losses or other negative impacts – if wind projects are developed in West Virginia.

18. The renewable resource needs of other states was among the Commission's deliberations, but the Commission evaluated many other equally important factors. Among them, the Commission also considered the site's wind energy potential, the distance from environmentally significant areas, the location near major electricity transmission facilities, the availability of privately-owned land with compatible uses, and the absence of known critical habitat for listed species. Further, the Commission concluded that it is undisputed that energy is needed in the east coast region, where it is estimated that the reserve margin will be reduced from 18.3% in 2005 to as low as 4.1% in 2014, causing the region to exceed its reliability design limit; and that generating capacity for this region is aging, with as much as 76% of the generating facilities older than 30 years, and 36% older than 40 years by 2010. Still further, the Commission considered the benefits of providing power without generating harmful emissions, and of advancing the state and local economies. See Comm'n Order pp. 70, 75, 76 (Finding of Fact Nos. 3, 4; Concl. of Law Nos. 11, 13-16). MCRE also objected because the project will produce less electricity in summer, when demand peaks, and such need cannot be balanced against the potential long-term adverse impacts in Greenbrier County.

19. The Commission addressed the project's contribution to summer peaks, helping to reduce capacity margins in the August 28, 2006, at pages 46, 59 and 76 (Concl. of Law No. 15).

Id. p. 76. Thus, we agree with Beech Ridge that MCRE has presented nothing new for the Commission to consider.

20. Beech Ridge will pay state B&O taxes of \$212,000 annually, and payroll taxes. Further, Beech Ridge will make construction purchases of \$11 million per year, and local operation purchases of \$11 million per year. Still further, Beech Ridge expects to pay Greenbrier County \$500,000 annually in real property taxes for the first four years, and Beech Ridge has guaranteed to make up the difference if, in any year, taxes fall below \$400,000.

21. Building Trades expanded upon Beech Ridge's economic assessment, using the IMPLAN model, and Building Trades' evidence was unrefuted. The Commission accepted Building Trades' testimony as the best indicator of economic effect.

22. In its petition to reconsider, MCRE alleges for the first time that it is not clear whether public funding will be required to maintain and repair the county roads affected by the project.

23. The record is clear that Beech Ridge seeks no public funding and that road costs are a line item in Beech Ridge's project construction costs budget.

24. In the August 28, 2006, order, the Commission spent considerable time discussing the Pierpont and U.S. Fish & Wildlife letters and the weight to be accorded them. Comm'n Order pp. 9 (Eisenbeiss provides Pierpont documents); 10 (John Walkup provides Pierpont documents); 11-12 (Congressman Mollohan discusses U.S. Fish & Wildlife letter, Staff advises U.S. Fish & Wildlife letter to come, Sierra Club supports U.S. Fish & Wildlife recommendations); 14 (MCRE supports U.S. Fish & Wildlife recommendations); 14-15 (U.S. Fish & Wildlife letter summarized); 20 (Beech Ridge's objection to Pierpont letters, PSC's protective treatment on its own motion); 21 (Ms. Mendelson supports U.S. Fish and Wildlife recommendations); 23-24 (MCRE's Dr. Gannon re: U.S. Fish & Wildlife recommendations); 24 (Mr. Walkup re: U.S. Fish & Wildlife Service recommendations); 28 (Mr. Young suggests U.S. Fish & Wildlife be part of advisory group); 30 (Staff discussion of Pierpont report); 31 (Beech Ridge's Mr. Romme discusses U.S. Fish and Wildlife); 35 (Staff's proposed conditions re: U.S. Fish and Wildlife); 51 (Beech Ridge's initial brief re: U.S. Fish and Wildlife guidelines); 56-57 (Mr. Walkup's Reply Brief supporting U.S. Fish and Wildlife recommendations); 60 (Beech Ridge's reply brief re: Pierpont letter), 61 (U.S. Fish and Wildlife recommendations) & 65 (Staff's recommended conditions), 68-69 (Eisenbeiss discuss Pierpont letter in reply brief); 71 (Finding of Fact No. 15 re: pre-construction studies); 74 (Concl. of Law Nos. 6-7 re: Dr. Pierpont's letter); 74-75 (Concl. of Law No. 8 re: protective treatment on Commission's own motion); 80 (Concl. of Law No. 38 re: pre-construction studies); 81 (Concl. of Law Nos. 39 re: U.S. Fish & Wildlife letter, 41 re: advisory committee, 42-43 re: bat study recommendations); 85 (Concl. of Law No. 61 re: adaptive strategies, 62-63 re: pre-construction studies)); 86 (Concl. of Law Nos. 64-66 re: U.S. Fish & Wildlife letter); 87 (ordering paragraph accepting Pierpont letter as public comment); 88 (ordering paragraph re: certificate conduction); 90 (ordering paragraph re: advisory group).

25. Beech Ridge's witnesses provided their own opinions, based upon various experiences, including review of the Sterzinger study. They were available for questioning on cross-examination, but no intervenor asked them questions.

26. In its recommendation, Staff advised the Commission to grant Beech Ridge a siting certificate. In addition, Staff suggested that removing or relocating some turbines

would eliminate most of the potential negative effects, making the balancing even stronger in favor of granting the certificate.

27. Although Beech Ridge advised in its briefs and at the hearing that it would consider making minor modifications to certain turbines to lessen the chance of noise and visibility impacts, specific alternate locations were not presented to the Commission.

28. When turbines are braked, the blades do not move; the cut-in speed is the point when the blades begin to rotate. Experience at other Appalachian wind farms shows that most bat kills occur at low wind speeds.

29. Beech Ridge will reduce the time when the turbine blades rotate, by not engaging the blades at all when winds are too slow to produce electricity. This is quite different from other Appalachian wind farms, where the blades rotate any time the wind blows. On select turbines, Beech Ridge will also increase the cut-in speed, to see if bat kills are reduced.

30. Mr. Goldman has decades of experience in appraising property and he has conducted studies of economic impacts of utility projects in Putnam and Tucker Counties.

31. Mr. Eisenbeiss, also an experienced appraiser, did not present an economic impact study, but criticizes Mr. Goldman's opinions regarding external obsolescence.

32. Ms. Phillips-Weikle researched data and presented an opinion regarding the project's economic impact, where various public comments did not provide such a basis for their remarks.

33. Mr. Groberg testified as to his experience of the economic impact of other wind farm projects.

34. MCRE did not present any witnesses on economic issues.

35. The Commission recognized the value of public comment to this proceeding at pages 4 through 15 of its order, summarizing many of the comments filed following the evidentiary hearing.

36. MCRE argues that Siting Rule 2.4 requires the Commission to deny the application, because Beech Ridge did not file the final transmission line location with its application.

37. Beech Ridge's project was changed in several respects, as a result of public input, including the following:

- Before the application was filed, Beech Ridge removed nine turbines from the easternmost part of the project to accommodate visual concerns, reducing it from 200 MW to 186 MW.
- Beech Ridge is voluntarily locating all but a few turbines more than one mile from residences, in response to visual and noise concerns.
- The Technical Group will advise on post-construction bird and bat studies, and adaptive management plans, which are in part a response to intervenor concerns.
- Staff's conditions were driven at least in part by intervenor concerns.
- The posting of a removal bond and a guarantee of a minimum property tax payment were driven by intervenor concerns, as was the study on impacts on the local 911 communication system.
- Mr. Lively's concerns relating to the I line of turbines were accommodated.
- Beech Ridge and Building Trades entered into a Memorandum of Understanding requiring the hiring of local workers.
- In its August 28, 2006, order, the Commission imposed many restrictions, including 18 pre-construction and construction conditions and 11 general operation conditions.

38. Nearly all of Mr. Woelfel's petition to reconsider was a recitation of legal precepts, without any application of those precepts to the Commission's order. Mr. Woelfel was specific, though, in asking the Commission to follow Staff's recommendation.

39. Ms. Mendelson's petition to reconsider was not verified.

40. Ms. Mendelson repeats arguments she has already asked the Commission to consider regarding the adequacy of Beech Ridge's five-mile map.

41. Ms. Mendelson's argument regarding local employment does not take into consideration the Memorandum of Understanding, which requires Beech Ridge to hire locally. Similarly, she suggests that Beech Ridge must work with local colleges to provide training, but she overlooks that Beech Ridge itself will provide extensive training to permanent employees.

42. Ms. Mendelson repeats arguments she has already asked the Commission to consider regarding whether the interstate electric grid should be among the Commission's considerations.

43. Ms. Mendelson asks the Commission to consider health concerns, which she presented by way of public comment and in her briefs.

44. The Commission received the verification to Mr. and Mrs. Eisenbeiss' petition on September 19, 2006.

45. Mr. and Mrs. Eisenbeiss renewed their arguments that the Commission should provide expert opinions for them, as *pro se* intervenors.

46. They ask the Commission to weigh public comment from Dr. Pierpont and U.S. Fish and Wildlife equally with testimony.

47. Mr. Eisenbeiss is a lay witness, without specialized experience and knowledge, and he objected to one location in Beech Ridge's sound study.

48. For the first time, Mr. and Mrs. Eisenbeiss objected to the Commission's June 8, 2006, decision, in a separate proceeding, to terminate a Noise Rule Task Force.

49. Mr. and Mrs. Eisenbeiss challenge the accuracy of Beech Ridge's noise maps because structures on their property do not appear on all of the maps.

50. Mr. and Mrs. Eisenbeiss also alleged that the potential negative economic impact has been grossly overlooked.

51. Mr. and Mrs. Eisenbeiss complained that Mr. Goldman's report does not provide the methodology to define external obsolescence.

52. Mr. Eisenbeiss pursued external obsolescence with Mr. Goldman on cross-examination. Tr. pp. 103-120, 176-186 (May 16, 2006).

53. They also assert that the MeadWestvaco witness' conclusion, that declining property value concerns were not justified, was based on speculation.

54. Mr. and Mrs. Eisenbeiss asked the Commission to rely on MCRE's viewshed maps, which do not reflect any vegetation, because leaves appear only six months of the year.

55. MCRE's witness said its maps were a starting point and that vegetation should be included.

56. Mr. and Mrs. Eisenbeiss complained that the project cannot be justified without federal tax subsidies and accelerated depreciation granted to businesses such as Beech Ridge, and that these benefits create a tax burden on Greenbrier County residents and state citizens, which offends the public interest.

57. Well prior to the evidentiary hearing, Beech Ridge and Staff were in contact with U.S. Fish and Wildlife about Beech Ridge's application.

58. Mr. Eisenbeiss has seen a mountain lion on his property.

59. Mr. and Mrs. Eisenbeiss argue that the August 28, 2006, order violates their due process rights because it too heavily weighs Beech Ridge's interests.

CONCLUSIONS OF LAW

1. Reconsideration offers an opportunity to point out matters which the Commission overlooked, but is not for the purpose of presenting new arguments or evidence not in the record.

Sufficiency of Beech Ridge's five-mile map

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.

Project need

16. To adequately consider the well-planned development of utility resources, it has long been necessary for the PSC to consider West Virginia's position relative to that of other states, since West Virginia exports energy. Therefore, the Commission should reject MCRE's contention that the PSC cannot consider regional needs for energy from renewable resources.

17. Since the Commission may consider regional needs for energy from renewable resources, the Commission may consider applications, such as Beech Ridge's, prior to any development by the Legislature of a policy for renewable energy requirements within West Virginia.

18. Since there is no evidence in the record to support MCRE's prediction of dire consequences if wind projects are developed in West Virginia, the Commission should reject MCRE's assertions in this regard.

19. Since MCRE has presented nothing new for the Commission to consider regarding the project's contribution to summer peaks, the Commission should reject the petition to reconsider in this regard.

Road funding

20. Since MCRE's allegation regarding funding for road costs was not raised before the Commission issued its final order, the Commission should deny the petition to reconsider in this regard. Even if the concern had been raised, the record is clear that Beech Ridge is seeking no public funding and that road costs are within its project budget.

Evidence/public comment

21. The Commission exhaustively addressed the Pierpont and U.S. Fish and Wildlife letters and explained that matters in evidence are tested via cross-examination, which allows the Commission to rely more heavily on matters in evidence, than matters in public comment. As nothing new has been presented to the Commission on reconsideration, the Commission should deny the petition in this regard.

22. Since the Beech Ridge's witnesses provided their own opinions, based upon various experiences, including review of the Sterzinger study, and they were available for questioning on cross-examination, it was appropriate for the Commission to receive this evidence from the Beech Ridge witnesses.

Long-term benefits vs. adverse impacts

23. The Commission agrees with Beech Ridge that MCRE minimizes the project's permanent jobs and tax revenues, although MCRE concedes that construction has positive economic effects. Also, MCRE does not provide citations in the record to support its

conclusion as to adverse impacts. We conclude that MCRE simply disagrees with the result we reached in the final order. There being nothing new for the Commission to address, the petition to reconsider should be denied in this regard.

Staff comments to move turbines

24. Several intervenors argue that, based upon Staff's recommendation, that the Commission must require Beech Ridge to remove or relocate some turbines as a condition of receiving a siting certificate. The Commission disagrees. Staff's recommendation is not entitled to any more weight than other evidence received in a proceeding. Moreover, Staff's recommendation must be fairly and fully read. The Commission cannot ascribe to Staff a recommendation that Staff did not make.

25. It is reasonable for the Commission to allow Beech Ridge to continue to work cooperatively with affected landowners, and perhaps reach agreement to make minor modifications to the turbine locations, to limit the potential noise and visibility impacts.

Impact on bats

26. MCRE's petition mixes braking the turbines with cut-in speeds. Thus, the Commission should deny MCRE's petition as it relates to braking/reducing the cut-in speed.

27. MCRE also alleges that it is highly likely that an Indiana bat will be taken by the project, and Beech Ridge strenuously objects. MCRE presents nothing new for the Commission to consider. Thus, the petition should be denied in this regard.

Tourism and property values

28. Since Mr. Goldman has decades of experience in appraising property and he conducted studies of economic impacts of utility projects in Putnam and Tucker Counties, it was appropriate for the Commission to accord his testimony more weight than public comment, which was not supported by study of the issue. It also is reasonable for the Commission to accord Mr. Goldman's testimony more weight than Mr. Eisenbeiss, also an appraiser, who did not present a study.

29. Since MCRE has presented nothing new for the Commission to consider, it is reasonable to deny the petition in this regard.

Public support/protest

30. Although there has been considerable public opposition to this project, there has also been considerable public support. The Commission should reject the argument that this issue can be determined simply by counting the numbers on either side of the issue.

Transmission line route

31. Since MCRE has presented nothing new for the Commission to consider regarding the minor change in the transmission line route, the petition to reconsider should be denied in this regard.

Effect of intervenor participation

32. Since Beech Ridge's project was changed in several respects, due to public comment, MCRE's allegation to contrary should be rejected. In this regard, the Commission should deny the petition to reconsider.

Mr. Woelfel's arguments

33. Since nearly all of Mr. Woelfel's petition to reconsider was a recitation of legal precepts, without any application of those precepts to the Commission's order, it is reasonable to deny Mr. Woelfel's petition in this regard, pursuant to well-settled law and Commission practice.

34. Mr. Woelfel was specific in asking the Commission to follow Staff's recommendation. The Commission's discussion above applies to resolve this request by Mr. Woelfel. Thus, in this regard as well, the Commission should deny Mr. Woelfel's petition to reconsider.

Ms. Mendelson's arguments

35. Although Procedural Rule 19.3 requires that petitions to reconsider be verified, it is reasonable for the Commission to exercise its discretion and consider Ms. Mendelson's petition, in recognition of her consistent participation in this proceeding and her pro se status.

36. The Commission's five-mile map discussion above applies equally to Ms. Mendelson's concerns about the sufficiency of Beech Ridge's map. Moreover, she previously made these arguments to the Commission and presents nothing new for the Commission to consider. Therefore, the Commission should deny her petition to reconsider in this regard.

37. Similarly, the Commission's discussion of the number of protest letters for and against the project equally applies to Ms. Mendelson's arguments, and the Commission should deny her petition to reconsider in this regard.

38. Since Ms. Mendelson's arguments regarding local employment and training are contrary to the record, her petition to reconsider should be denied in this regard.

39. Ms. Mendelson argues that the PSC's mandate is to protect interests specific to West Virginia, and that the Commission should not be so concerned with the health of the interstate electric grid. MCRE made a similar argument, and the Commission's discussion above applies equally to Ms. Mendelson. Accordingly, in this regard her petition should be denied.

40. Ms. Mendelson asks the Commission to consider health concerns, which she presented by way of public comment and in her briefs. As the Commission has taken those arguments and comments into account, and as she has presented nothing new for the Commission to consider, her petition to reconsider should be denied in this regard.

Mr. and Mrs. Eisenbeiss' arguments

41. Since Mr. and Mrs. Eisenbeiss' petition was verified, the Commission should deny Beech Ridge's request to strike their petition to reconsider.

42. While intervenors may participate in all facets of a PSC proceeding, the state is not required to pay for an intervenor to attempt to prove his or her case.

43. On May 5, 2006, the Commission denied Mr. and Mrs. Eisenbeiss' motion to appoint scientific and economic experts, and they renewed that request in the petition to reconsider. Since the Eisenbeisses have not presented anything new for the Commission to consider, the petition to reconsider should be denied in this respect.

44. Mr. and Mrs. Eisenbeiss also repeat their request for the Commission to weigh letters from Dr. Pierpont and U.S. Fish and Wildlife equally with testimony. When matters are disputed, it is reasonable to accord evidence more weight than public comment, because positions provided in evidence have been tested through cross-examination. This is well settled, and the Eisenbeisses present no reason to depart from this principle. Therefore, the petition to reconsider should also be denied in this regard.

45. It is reasonable for the Commission to prefer the testimony of Beech Ridge's acoustic expert, over Mr. Eisenbeiss who is a lay witness without specialized sound experience and knowledge and who objected to only one location of Beech Ridge's study. Therefore, the petition to reconsider should be denied in this regard.

46. For the first time in the petition to reconsider, Mr. and Mrs. Eisenbeiss objected to the Commission's June 8, 2006, decision, in a separate proceeding, to terminate a Noise Rule Task Force. That separate proceeding was to consider whether the Commission should amend its Siting Rules, and ultimately the Commission chose not to do so. That proceeding is not relevant to this siting certificate application by Beech Ridge. Therefore, the Commission should deny the petition to reconsider in this regard.

47. The single map discrepancy noted by Mr. and Mrs. Eisenbeiss regarding the location of structures is outweighed by the rest of the evidence as to turbine locations and their proximity to local structures. Therefore, the petition to reconsider should be denied in this regard.

48. Information about the project's economic impact was conflicting. When the Commission considered the conflicting information, the Commission weighed Mr. Goldman's and Building Trades' testimony more heavily than public comment to resolve this issue. Mr. and Mrs. Eisenbeiss do not offer specific items that the Commission overlooked, but ask the Commission to revisit its balancing of the information. The Commission should decline to do so.

49. Since Mr. Eisenbeiss pursued external obsolescence with Mr. Goldman on cross-examination, this issue has been fully litigated, and the Commission is not convinced it should reconsider.

50. It is reasonable for the Commission to accept the testimony of MeadWestvaco's witness regarding property values because that testimony was based upon the witness' experience as the long-time property owner and upon research. Therefore, the Commission is not convinced that it should reconsider.

51. The Commission should not grant Mr. and Mrs. Eisenbeiss' request to rely upon MCRE's viewshed maps because MCRE's witness said its maps were a starting point and that vegetation should be included. Therefore, the Commission should deny the petition in this regard.

52. The costs and benefits to society of particular tax requirements are evaluated by lawmakers, not the Commission.

53. Mr. and Mrs. Eisenbeiss did not establish that Beech Ridge's tax treatment will create any type of tax burden in West Virginia.

54. In requiring Beech Ridge to comply with federal laws relating to endangered species, the Commission has accommodated Mr. Eisenbeiss' concern about seeing a mountain lion on his property.

55. Due process is notice and the opportunity to be heard, and the Eisenbeisses clearly had notice and participated in this proceeding. Their due process rights are not violated simply by virtue of the Commission reaching a result they did not request.

Satisfaction of pre-construction conditions

56. It is reasonable for the Commission to modify its order and require Beech Ridge to notify the Commission when all pre-construction conditions have been met. Upon

receipt of this notification from Beech Ridge, the Commission should schedule a hearing regarding the pre-construction conditions. At that hearing, Beech Ridge should have the burden of demonstrating that it has satisfied the pre-construction conditions. Beech Ridge may not commence construction until the Commission's review of the pre-construction conditions is complete.

ORDER

IT IS THEREFORE ORDERED that the Commission denies the petitions to reconsider filed by Mountain Communities, Mr. Woelfel and Mr. and Mrs. Eisenbeiss.

IT IS FURTHER ORDERED 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.

IT IS FURTHER ORDERED this case is removed from the Commission's docket of active cases.

IT IS FURTHER ORDERED that the Commission's Executive Secretary serve a copy of this order upon all parties of record by United States First Class Mail and upon Commission Staff by hand delivery.

A True Copy, Teste:


Sandra Squire
Executive Secretary

CLW:sek
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