

**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 13<sup>th</sup> day of February, 2009.

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 Commission reopened this case for the limited purpose of considering Beech Ridge Energy LLC's satisfaction of the Commission's Pre-Construction Conditions set forth in the August 28, 2006 Order granting Beech Ridge a Siting Certificate. Following a hearing and upon consideration of the pleadings, sworn testimony and legal briefs, the Commission concludes that all Pre-Construction Conditions have been met and authorizes construction to begin on the proposed Beech Ridge Energy LLC wholesale electric generating facility in Greenbrier and Nicholas Counties, West Virginia.

**BACKGROUND**

Beech Ridge Energy LLC (Beech Ridge) applied to construct a 186 megawatt (MW) wind-powered electric generating facility nine miles northeast of Rupert in Greenbrier County and a 138 kilovolt (kV) transmission line (collectively, the Project) to connect the generating facility to Allegheny Power's Grassy Falls substation near Nettie in Nicholas County. Pursuant to W. Va. Code §§ 24-2-1(c) and 24-2-11c, the Commission granted Beech Ridge a siting certificate for its proposed project, conditioned upon, among other things, Beech Ridge establishing in a compliance hearing that it had satisfied the Commission's Pre-

Construction Conditions. Comm'n Order pp. 87-91 (Aug. 28, 2006); Comm'n Order pp. 58-59 (Concl. of Law No. 56) (Jan. 11, 2007).

The Commission established a process to ensure compliance with the Pre-Construction Conditions by Beech Ridge because of the number and extent of those conditions:

[T]he Commission concludes that it is reasonable to . . . 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.

Comm'n Order pp. 41 & 59 (Jan. 11, 2007).

Several intervenors appealed the Commission Orders to the West Virginia Supreme Court of Appeals, and on June 23, 2008, the Supreme Court upheld the Commission Orders. S. Ct. Order p. 23, Mountain Comm. for Responsible Energy v. Public Serv. Comm'n, Docket Nos. 33375 & 33376, \_\_\_ W. Va. \_\_\_, 665 S.E.2d 315, 332 (June 23, 2008) (per curiam).

On August 6, 2008, Beech Ridge filed a notice of compliance with all of the Pre-Construction Conditions, consisting of more than 800 pages of supporting documentation contained in three binders. Beech Ridge Ex. 1 (BR-1). Tab 1 of the compliance filing was the eleven-page Verified Statement of David Groberg, in which he explained how Beech Ridge satisfied each of the conditions. Beech Ridge Ex. 2; see also Tr. pp. 16-42 (Oct. 15, 2008).

On August 8, 2008, the Commission set the date for the compliance hearing and several filing deadlines. The Commission also indicated how it expected to conduct the hearing:

The Commission shall conduct the compliance hearing on October 15, 2008. At that hearing, Beech Ridge shall have available one or more witnesses with sufficient knowledge and experience to testify regarding how each separate pre-construction condition was met. Should any one ask the Commission to

make a factual finding that Beech Ridge has not met a particular condition, he or she must present a witness to testify regarding how Beech Ridge is alleged to have not met that particular condition.

Comm'n Order p. 4 (Aug. 8, 2008).

On September 3, 2008, the Commission denied a motion by Jeffrey and Alicia Eisenbeiss to delay the compliance hearing until rules are promulgated specifically to govern a compliance hearing. Comm'n Order p. 3 (Sept. 3, 2008). The Commission concluded that separate procedural rules are not necessary for the myriad of proceedings that the Commission conducts, and it is an ordinary occurrence for the Commission to consider whether a party has complied with conditions required by an order. In this particular case, the Commission chose to schedule a specific compliance proceeding to evaluate whether Beech Ridge has satisfied the Pre-Construction Conditions as apposed to reliance upon individual formal complaints alleging that conditions were not met.

On September 22, 2008, Mountain Communities for Responsible Energy (MCRE) filed a pleading asserting that Pre-Construction Conditions 9, 11 and 12 had not been met, and two MCRE members separately challenged Beech Ridge's compliance with Pre-Construction Condition 16.

On September 22, 2008, the Eisenbeisses filed a pleading challenging Beech Ridge's compliance with Pre-Construction Conditions 9, 11, 12, 14 and 16; the West Virginia State Building and Construction Trades Council, AFL-CIO (Trades Council) filed a pleading stating that Beech Ridge had satisfied the Commission's Pre-Construction Conditions; and Staff filed its final recommendation, advising that

The Engineering Division reviewed the Notice to verify that Beech Ridge provided the required information to satisfy each pre-construction condition except for conditions 16 and 18 which are financial in nature. The Engineering Division believes that Beech Ridge has complied with each of the above mentioned engineering related pre-construction conditions.

Final Engineering Memorandum, attached to Initial & Final Joint Staff Memorandum (Staff Ex. 1).

The Utilities Division, in turn, advised that Beech Ridge had satisfied the financial items, Pre-Construction Conditions 16 and 18. Utilities Division Final Memorandum p. 3, attached to Staff Exhibit No. 1. See also the Joint Staff conclusion: "In Staff's opinion, Beech Ridge has satisfied all of the Pre-Construction Conditions. Therefore, Staff recommends the Commission allow Beech Ridge to commence construction." Staff Ex. 1 p. 1.

On October 7, 2008, MCRE filed a motion to stay the compliance proceedings while MCRE attempts to pursue remedies under the Endangered Species Act (the ESA), 16 U.S.C. § 1531 *et seq.* Beech Ridge, Staff and the Trades Council opposed the request, and on October 10, 2008, the Commission denied that motion. Comm'n Order pp. 6-7 (Oct. 10, 2008).

On October 15, 2008, the Commission convened the compliance hearing. During the first day, Beech Ridge called two witnesses: David Groberg and James Booty. *See* Tr. pp. 14-53 (Mr. Groberg) & 55-83 (Mr. Booty) (Oct. 15, 2008). Mr. Groberg testified at length about how Beech Ridge complied with each of the Pre-Construction Conditions:

Q. So Mr. Groberg, by way of summary, perhaps, having gone through each and every pre-construction condition, is it your representation to the Commission that you believe that Beech Ridge has complied with the Commission's Orders of August 28 and January 11 and satisfied all the compliance requirements in this case?

A. Correct.

Tr. p. 42 (Oct. 15, 2008). Mr. Booty testified about the decommissioning report and concluded the amounts suggested by Beech Ridge to secure the decommissioning fund were appropriate. Tr. p. 70 (Oct. 15, 2008).

Staff presented two witnesses, Wayne Perdue of the Engineering Division and Dixie Kellmeyer of the Utilities Division, who testified that Beech Ridge had satisfied all of the Commission's Pre-Construction Conditions. *See* Tr. pp. 84-87 (Mr. Perdue) & 88-92 (Ms. Kellmeyer) (Oct. 15, 2008).

During the second day, MCRE called three witnesses: Dr. Barbara E. Rasmussen, John Stamberg and Richard James. *See* Tr. pp. 9-48 (Dr. Rasmussen), 49-78 (Mr. Stamberg) & 85-118 (Mr. James) (Oct. 16, 2008). Dr. Rasmussen testified regarding compliance with the Commission's requirements as to the West Virginia State Historical Preservation Office (SHPO). She testified that Beech Ridge complied with the Pre-Construction Conditions relating to SHPO. Tr. pp. 39, 41-42, 44 (Oct. 16, 2008).

Mr. Stamberg disagreed with Mr. Booty's analysis of the salvage value of the turbines and related equipment and the costs to decommission the Project. Tr. pp. 55-58 (Oct. 16, 2008).

MCRE also called Mr. James, who measured background noise levels at various points in the Project area on October 14 and 15, 2008. Tr. pp. 97-98 (Oct. 16, 2008); MCRE Ex. 5. Mr. James is not an expert in cultural resource management and did not know the precise location of any historic resources. *Id.* pp. 98 & 115-116. Although Mr. James

testified that he read and was familiar with the Commission's Siting Rules, 150 C.S.R. Series 30, which require testing for seven days, Mr. James took measurements at the sites he selected for about 30 minutes and then used the quietest ten minutes. Tr. pp. 90, 99 & 103 (Oct. 16, 2008). He developed what he characterized as "background sound levels" around the Project perimeter, but he did not measure ambient noise using day-night sound levels as Siting Rule 3.1.m.4 requires.

## DISCUSSION

As we made clear in our January 11, 2007 Order, this case was reopened for the limited purpose of considering Beech Ridge's satisfaction of the Commission's Pre-Construction Conditions. In all other respects, our decision to grant Beech Ridge a Siting Certificate remains in full force and effect. The Pre-Construction Conditions were established in the August 28, 2006 Order, and they required Beech Ridge to:

- 1) File a verified statement, prior to commencing construction, that all Pre-Construction Conditions have been met. Comm'n Order p. 87.
- 2) Require all contractors to use standard noise buffers on all equipment and trucks. Comm'n Order p. 87.
- 3) Require contractors to use pile driving equipment with the least noise impact and restrict pile driving during the weekdays to 7 a.m. to 7 p.m. Comm'n Order pp. 87-89.
- 4) Limit construction activities to mostly during daylight hours. Comm'n Order p. 87.
- 5) Limit construction activities during church hours. Comm'n Order pp. 87-89.
- 6) Limit dynamiting to daylight hours and follow all State and Federal rules, regulations and laws, if dynamiting becomes necessary. Comm'n Order p. 87.
- 7) Dispose of all contaminated soil and construction debris in approved landfills in accordance with appropriate environmental regulations. Comm'n Order p. 87.
- 8) Design, install and implement a fire protection system, using industrial best practices, in accordance with all applicable fire safety codes. Comm'n Order p. 87.

- 9) Coordinate with fire, safety and emergency personnel during all stages of the Project to promote efficient and timely emergency preparedness and response. Comm'n Order p. 87.
- 10) Provided there are no material changes to the Project that necessitate a reopening, commence a continuous course of construction within five years of the date the final certificate is granted. If construction is not completed by the tenth year, Beech Ridge must petition to expand the time frame. Comm'n Order p. 88.
- 11) File evidence of any necessary environmental permits and/or certifications prior to commencing construction (including any letters from United States Fish & Wildlife Service (USFWS), West Virginia Division of Natural Resources (WVDNR), West Virginia Division of Cultural and History and SHPO) indicating what action, if any, Beech Ridge needs to take to be in compliance. Comm'n Order p. 88.
- 12) File evidence of approval and/or acceptance of the wetlands delineation, and the final endangered species study and the historical/archeological significance study with any required mitigation plans, prior to commencing construction. Comm'n Order p. 88.
- 13) File copies of the final Interconnection Agreements between Beech Ridge and PJM prior to commencing operation. Comm'n Order p. 88.
- 14) Comply with the Endangered Species Act, the Migratory Bird Treaty Act (16 U.S.C. § 701 et seq.), and, if applicable, the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.). If any agency or court with competent jurisdiction finds that Beech Ridge is not complying with any one of these acts in either the construction or the operation of the Project, Beech Ridge must notify the Commission in writing within ten (10) days of such finding being made. The Commission may seek legal remedies, including injunctive relief, to address any such findings. Comm'n Order p. 88.
- 15) File evidence of Beech Ridge's Exempt Wholesale Generator status from the Federal Energy Regulatory Commission prior to commencing operation. Comm'n Order p. 88.
- 16) Have a decommissioning fund in place prior to commencement of operation. The decommissioning fund must i) cover dismantling of the turbines and towers, as well as land reclamation, ii) be an escrow account, or a bond or a surety that is held by an independent party, such as the County Commission, and iii) 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 is 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 may hire its own expert to evaluate any of the periodic reports. Comm'n Order p. 89.

- 17) Not construct the I-line of turbines unless all I-line property owners agree to participate in the Project. Comm'n Order p. 89.
- 18) Provide a copy of the guaranty agreement by which Beech Ridge agrees to pay at least \$400,000 a year to Greenbrier County. The Greenbrier County Commission may designate a fund for this payment. Comm'n Order p. 89.

Beech Ridge asserted in its pleadings and in the hearing that it is critical to establish what is pending before the Commission – only whether Beech Ridge complied with the Pre-Construction Conditions. Initial Brief p. 1. Beech Ridge noted that thirteen of the conditions were not disputed. Beech Ridge also argued that its August 6, 2008 filing, combined with the testimony during the compliance hearing, left no doubt that Beech Ridge complied with all of the conditions. Id.

Beech Ridge asserted that MCRE and the Eisenbeisses presented opinions concerning the manner of Beech Ridge's compliance, and, in doing so, attempted to re-litigate issues previously decided by the Commission. Initial Brief pp. 1-2. The Commission required any opposing party to produce a witness to testify, and Beech Ridge asserted that the intervenors' witnesses at the compliance hearing only addressed SHPO compliance and decommissioning. Initial Brief p. 10. Beech Ridge argued that MCRE and the Eisenbeisses should not be able to pursue arguments unsupported by testimony at the compliance hearing. Nevertheless, Beech Ridge said it would address their positions. Id. pp. 10-11.

MCRE argued that the issues now before the Commission are not the same ones that were considered when the Commission decided whether to grant a Siting Certificate. Reply Brief p. 1. MCRE asserted that evaluating whether Beech Ridge complied with laws relating to SHPO and whether Beech Ridge filed an "adequate 'historical/archeological significance study with any required mitigation plans' necessarily entails litigation of the issues raised in the documents alleged by [Beech Ridge] to support its claims that it has complied." Id. p. 2.<sup>1</sup> The West Virginia Supreme Court did not intend that parties be limited to commenting on the style, rather than the substance, of any Beech Ridge compliance filing when the Supreme Court wrote, "During this public meeting, MCRE and others will have the opportunity to evaluate Beech Ridge's SHPO compliance." Id.

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<sup>1</sup> Simultaneous with its Reply Brief, MCRE filed a motion to reexamine noise impacts. That motion is separately addressed in this Order.

Staff argued that the Siting Certificate was not conditioned upon compliance to allow the parties to re-litigate the Project's culture and history aspects, but to ensure that Beech Ridge coordinated its efforts with all the appropriate agencies. Reply Brief p. 1.

The Trades Council asserted that the compliance process was not an opportunity to continually modify the Siting Certificate. Reply Brief p. 2. Instead,

It was a process that built upon the foundation of hours of testimony, significant evidence and hundreds of pages of legal argument which ended in the Commission making the decision that the proposed facility met the requirements of the law and, in balancing the project, was in the public's interest.

Id. The Trades Council argued that no evidence was produced at the October 2008 hearing to demonstrate that Beech Ridge failed to comply with any of the conditions. Id.

To address the purpose of the compliance hearing, the Commission returns to the language of the January 11, 2007 order:

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.

Comm'n Order pp. 41 (Jan. 11, 2007); see also id. p. 59. The Commission was quite specific that this case would be reopened only for a limited purpose – to consider whether Beech Ridge satisfied Commission's Pre-Construction Conditions – and the Commission's decision to proceed in this way was not disturbed by the Supreme Court. We agree with Staff, the Trades Council and Beech Ridge that it would be improper to re-litigate issues regarding whether the Siting Certificate should be granted that were resolved upon hours and hours of testimony, significant evidence and hundreds of pages of legal argument.

Both Staff and the Trades Council have recommended that the Commission accept Beech Ridge's compliance filing entirely, and no challenge has been made by any party to Pre-Construction Conditions 1-8, 10, 13, 15, 17 and 18.

Pre-Construction Condition 1 required Beech Ridge to file a verified statement indicating that all pre-construction conditions and requirements of the Siting Certificate have been met, and Mr. Groberg's affidavit is contained in Tab 1 of the compliance filing. BR-1 Tab 1; Tr pp. 14-53 (Oct. 15, 2008).

Pre-Construction Conditions 2-7 related to various requirements and limitations on construction, and Beech Ridge has incorporated each of these requirements and limitations

into an addendum that will be a mandatory feature of the scope of work for any contracts for all bidders seeking to work on the Project. Beech Ridge filed a copy of that addendum with the compliance materials. BR-1 Tab 2; Groberg's Verified Statement pp. at 2-3; Tr. pp. 18-19 (Oct. 15, 2008). In the unlikely event a contractor does not properly dispose of contaminated soil and construction debris, Beech Ridge will do so. Id.

Pre-Construction Condition 8 requires the establishment of a fire protection system, and Beech Ridge has created a Fire Plan that addresses issues concerning fire protection for both the construction and operational phases of the Project. BR-1 Tab 3. Beech Ridge will require all contractors and subcontractors to comply with the Fire Plan. Tr. p. 20 (Oct. 15, 2008).

Pre-Construction Condition 10 provides a time frame in which Beech Ridge must begin construction, and Mr. Groberg affirmed in the Verified Statement and his testimony that Beech Ridge understands the condition and will comply. Groberg Verified Statement p. 4; Tr. pp. 29-30 (Oct. 15, 2008).

Pre-Construction Condition 13 requires Beech Ridge to file the final interconnection agreement among Beech Ridge, PJM Interconnection, LLC and Monongahela Power Company d/b/a Allegheny Power, and Beech Ridge has filed this agreement. BR-1 Tab 22; Groberg Verified Statement p. 8; Tr. pp. 33-34 (Oct. 15, 2008).

Pre-Construction Condition 15 requires Beech Ridge to file evidence of its status as an exempt wholesale generator from the Federal Energy Regulatory Commission, and Beech Ridge has filed the notice evidencing that Beech Ridge has sought and received EWG status. BR-1 Tab 24; Groberg Verified Statement pp. 8-9; Tr. p. 35 (Oct. 15, 2008).

Pre-Construction Condition 17 prohibits Beech Ridge from building the I-line of turbines unless it can secure the agreement of the all of the I-line property owners. Beech Ridge has not yet been able to secure all of these agreements and will not build the I-line of turbines, unless it hereafter secures all of the agreements. Tr. p. 39 (Oct. 15, 2008).

Pre-Construction Condition 18 requires Beech Ridge to provide a copy of the guaranty agreement, whereby Beech Ridge promises to provide at least \$400,000 in property taxes each year to the Greenbrier County Commission. Beech Ridge has filed a copy of the guaranty agreement, which further states that Beech Ridge will provide that amount annually regardless of the number of turbines built and without averaging. BR-1 Tab 28; Groberg Verified Statement p. 10; Tr. pp. 40-41 (Oct. 15, 2008).

Having considered the pleadings, sworn testimony and legal arguments presented in the compliance phase of this case, the Commission concludes that Beech Ridge has satisfied Pre-Construction Conditions 1-8, 10, 13, 15, 17 and 18.

Furthermore, as is more fully explained below, we also conclude that Beech Ridge has satisfied Pre-Construction Conditions 9, 11, 12, 14 and 16. The Commission will address Mr. and Mrs. Eisenbeiss and MCRE's challenges to the remaining Pre-Construction Conditions in numerical order.

**(9) Coordination with fire, safety and emergency personnel**

Beech Ridge asserted that it had contacted various local responders, agencies and groups and incorporated their remarks into the Beech Ridge Fire Protection and Prevention Plan (Fire Plan). Tr. p. 21 (Oct. 15, 2008). Since 2006, Beech Ridge has had ongoing discussions with the Greenbrier County 911 Center that dispatches all of the emergency responders in Greenbrier County. *Id.* p. 23. Beech Ridge also has contacted the Greenbrier County Emergency Management Agency and the Greenbrier County Fire and Emergency Responders Association. Tr. pp. 24 & 52-53. Beech Ridge has contacted the Renick Volunteer Fire Department, has attempted to contact the Quinwood VFD and asserted that it would continue to try to reach the Quinwood VFD. *Id.* pp. 28-29. See also BR-1 Tabs 3-5.

Beech Ridge argued that this condition did not require any particular letters to be filed, but instead required Beech Ridge to coordinate with fire, safety and emergency personnel during all stages of the Project. Beech Ridge filed documents to evidence some of its communications and asserted that it focused on the Williamsburg, Rupert and Richwood VFDs because those units are situated on the Project's main access roads and would be the primary responders because of their location. BR-1 Tab 3 p. 17; Tr. pp. 22, 28 & 50-53 (Oct. 15, 2008).

Beech Ridge intends to have a pre-construction meeting with local responders, another meeting when construction is completed and meetings at least annually thereafter:

- Q. (by Mr. Feinberg) With respect to the big picture of communicating with fire departments, emergency services, ambulance services, et cetera, Beech Ridge has no interest in leaving anybody out along the way; do you?
- A. (by Mr. Groberg) No. The health and safety of the people building the project, our employees, the contractors and whoever else might be up there is of the utmost priority for us. So, to the extent that anybody who can contribute to those discussions and plans, we're interested in hearing what they have to say.

Tr. pp. 21-22 & 53; see also BR-2 p. 3.

Mr. and Mrs. Eisenbeiss argued that Beech Ridge should have presented documents reflecting Beech Ridge's coordination with the Renick and Quinwood VFDs, which cover the eastern and western parts of the project, the Greenbrier County 911 Service, the Greenbrier County Emergency Management Agency, ambulance services and paramedic units. Initial Comments p. 2; Initial Brief pp. 2-3; Reply Brief p. 2.

MCRE also asserted that Beech Ridge's filing did not reflect any coordination with the Renick VFD or area ambulance services or paramedic units. Initial Comments p. 1.

In response, Beech Ridge noted that neither the Eisenbeisses nor MCRE presented any witnesses at the compliance hearing regarding this condition, even though the Commission's order required a witness to testify regarding an alleged insufficiency. Staff likewise noted that the intervenors did not present evidence regarding their positions. Staff Initial Brief pp. 1-2.

The Commission concludes that Beech Ridge's documents and testimony reflect substantial, extensive good faith and on-going efforts to coordinate with emergency responders in the area. These efforts were reasonably focused upon the units that are most likely to be first responders because of their location and access to the Project area.

Because Beech Ridge met its burden and demonstrated compliance, MCRE and Mr. and Mrs. Eisenbeiss were required to rebut the showing through credible testimony or cross-examination, and they did not do so. The Commission recognizes that Mr. Eisenbeiss asked several questions of Mr. Groberg regarding this condition, but Mr. Eisenbeiss' efforts did not elicit information that was different than the testimony and documents Beech Ridge presented. Tr. pp. 48-51 (Oct. 15, 2008).

- (11) Permits and/or certifications (USFWS, WVDNR, SHPO) indicating what action, if any, Beech Ridge needs to take to be in compliance.**
- (12) Wetlands delineation, the final endangered species study and the historical/archeological significance study with any required mitigation plans.**

*Availability of witnesses for cross-examination*

Our August 8, 2008 Order established the process for the compliance hearing:

Beech Ridge shall have available one or more witnesses with sufficient knowledge and experience to testify regarding how each separate pre-construction condition was met. Should any one ask the Commission to make a factual finding that Beech Ridge has not met a particular condition, he or she

must present a witness to testify regarding how Beech Ridge is alleged to have not met that particular condition.

Comm'n Order p. 4 (Aug. 8, 2008).

Beech Ridge presented the testimony of project manager Mr. Groberg, who was Beech Ridge's chief witness at the siting certificate hearing and who coordinated Beech Ridge's compliance work, and Mr. Booty, who prepared the decommissioning report. Mr. Groberg personally verified Beech Ridge's compliance, sponsored the Beech Ridge compliance filing, testified regarding how each Pre-Construction Condition was met, and responded to cross-examination presented by the other parties in this case. Tr. pp. 16-42 (Oct. 15, 2008). Mr. Booty testified regarding how the decommissioning report was prepared and responded to cross-examination presented by the other parties.

MCRE and Mr. and Mrs. Eisenbeiss complain that Beech Ridge did not present a witness for them to cross-examine regarding matters of concern to MCRE and Mr. and Mrs. Eisenbeiss. MCRE Initial Brief pp. 6, 9, 12; Eisenbeiss Initial Brief p. 9; see also Eisenbeiss Reply Brief p. 2; MCRE Reply Brief p. 2.

Staff asserted, however, that the parties were able to cross-examine a Beech Ridge witness who could speak to the purpose of the hearing – whether Beech Ridge complied with the conditions placed upon the Siting Certificate. Reply Brief pp. 1-2. Beech Ridge similarly argued that it was required to present testimony as to how each condition was met and was not required to present testimony from the author of each document contained in the compliance filing. Reply Brief p. 5.

Our August 8, 2008 Order required Beech Ridge to make filings and “have available one or more witnesses with sufficient knowledge and experience to testify regarding how each separate pre-construction condition was met.” Beech Ridge did this when Mr. Groberg and Mr. Booty testified. Beech Ridge also had available a number of people who could be rebuttal witnesses, depending upon the challenges that might be made by MCRE and the Eisenbeisses when they presented their evidence. Tr. pp. 8-9 (Oct. 16, 2008). We conclude that these actions by and on behalf of Beech Ridge satisfied our requirements for Beech Ridge's presentation of its case at the compliance hearing.

The Commission made its requirements for the Eisenbeisses and MCRE as plain as the requirements for Beech Ridge:

Should any one ask the Commission to make a factual finding that Beech Ridge has not met a particular condition, he or she must present a witness to testify regarding how Beech Ridge is alleged to have not met that particular condition.

Comm'n Order p. 4 (Aug. 8, 2008).

Although they complain about the witnesses Beech Ridge chose to present, after Beech Ridge presented its evidence the responsibility of MCRE and Mr. and Mrs. Eisenbeiss was to rebut the Beech Ridge showing through credible testimony or cross-examination, and MCRE and Mr. and Mrs. Eisenbeiss did not do so. The Commission clearly established the procedures to be followed in the compliance hearing, and parties who ignore those instructions, and simply raise spurious and, to some extent, largely unfounded “deficiencies” in filings may not reasonably expect to prevail.

The complaints by MCRE and the Eisenbeisses are analogous to an argument that the Commission rejected when we were considering whether to grant the Siting Certificate – that others must assist the intervenors in making their case. Comm’n Order p. 8 (Concl. of Law 5) (May 5, 2006). We held that each party was responsible for presenting his or her own position, our decision was not disturbed by the Supreme Court, and the same rule applies to these compliance proceedings. See S. Ct. Order pp. 30-33, Mountain Comm. for Responsible Energy v. Public Serv. Comm’n, Docket Nos. 33375 & 33376, \_\_\_ W. Va. \_\_\_, 665 S.E.2d 315, 330-332 (June 23, 2008) (per curiam).

MCRE also argues that the Commission may consider Tabs 13, 14, 17, 18, 19, 20 and 21 of the compliance filing as evidence of Beech Ridge’s consultation with appropriate government agencies, but not to support findings and conclusions about Beech Ridge’s compliance because no witness was made available for cross-examination. Initial Brief p. 6 n. 6, citing Beech Ridge Energy, LLC, Case No. 05-1590-E-CS, Comm’n Order pp. 81 & 86 (Concls. of Law 39, 64, 65 & 66); Reply Brief p. 3.

Again, MCRE has misconstrued the nature of this compliance proceeding. Beech Ridge’s burden was to establish how it complied with the conditions attached to the Siting Certificate, and we find no fault with Beech Ridge’s compliance filing and testimony. The proper avenue for the challengers was to present a witness or evidence to establish a failing by Beech Ridge, and they did not do so.

#### *Bat survey methods*

As part of the compliance filing, Beech Ridge provided the final endangered species report – the September 2006 Mist Net Survey under the Indiana Bat Revised Recovery Plan (USFWS 1999) for the transmission line corridor. BR-1 Tab 21.

Mr. and Mrs. Eisenbeiss argued in their pleadings that Beech Ridge should have used acoustical detectors, thermal imaging and radar when Beech Ridge conducted the final study. Initial Comments p. 3; Initial Brief p. 10. They did not, however, present any witness at the compliance hearing, nor did they raise this position on cross-examination of the Beech Ridge witnesses.

When the Commission was considering whether to grant the Beech Ridge application for a Siting Certificate, MCRE challenged the methods used in the Beech Ridge surveys to verify the presence or absence of federally-listed bat species. Comm'n Order p. 52 (Aug. 28, 2006). The Commission's Siting Certificate Orders reflected that there was considerable coordination between Beech Ridge and both the WVDNR and USFWS, and objections to the surveys were not lodged by either of those agencies. Comm'n Order pp. 11 & 52 (Aug. 28, 2006); Comm'n Order p. 31 (Jan. 11, 2007). Ultimately, the Commission accepted the Beech Ridge surveys.

It continues to be true that the Commission has not received objections from either the WVDNR and USFWS as to the Beech Ridge survey methodologies. Moreover, Mr. and Mrs. Eisenbeiss did not present any witness at the compliance hearing or raise this position on cross-examination of the Beech Ridge witnesses. The Commission has not been persuaded, therefore, that Beech Ridge should be required to use acoustical detectors, thermal imaging and radar for the final endangered species study.

#### *Incidental Take Permit*

The Commission's orders conditionally granting the Siting Certificate did not require Beech Ridge to obtain an incidental take permit. See generally Comm'n Order (Aug. 28, 2006); Comm'n Order (Jan. 11, 2007). In a letter dated July 31, 2007 (filed Aug. 2, 2007), Thomas R. Chapman of the USFWS stated, "The only Service permit available to Beech Ridge is the ESA section 10(a)(1)(B) incidental take permit for federally-listed threatened and endangered species. The decision to obtain this permit lies with the prospective permit applicant." The October 10, 2008 Commission order denying the MCRE motion to stay the compliance proceeding stated that the decision whether to obtain an incidental take permit lies with Beech Ridge in the first instance. Comm'n Order p. 7 (Oct. 10, 2008). Mr. Groberg testified at the compliance hearing that an incidental take permit was not necessary, and his testimony was not rebutted. Tr. p. 31 (Oct. 15, 2008).

Mr. and Mrs. Eisenbeiss asserted, nonetheless, that Section 7 of the Endangered Species Act requires Beech Ridge to correspond with USFWS because Beech Ridge's actions might result in a take of a federally-listed protected species. Without providing any supporting citations, they also alleged that the record contains concerns from USFWS and WVDNR. Initial Comments pp. 3-4. Because "harm" to a listed species under the ESA amounts to a "take," and harm includes habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife, they argued that obtaining an incidental take permit is the only way Beech Ridge can comply with the Commission's requirements. Initial Comments p. 5; see also Reply Brief p. 3.

MCRE similarly argued that it expected that Project operations would result in takes of the Indiana bat, a species protected by federal law. Initial Brief p. 8.

Upon review, we note that the likelihood of the Project resulting in a take of a protected species was extensively litigated when the Commission considered whether to grant Beech Ridge a Siting Certificate. The evidence was unrebutted that no Indiana bat has been seen near the Project site since 1990 and no Virginia big-eared bat has ever been seen in Greenbrier County. These facts provided the basis for Conclusions of Law 43 and 44 in the August 28, 2006 order. See Comm'n Order pp. 21, 33 & 81; see also Comm'n Order p. 55 (Jan. 11, 2007) (Concl. of Law 27).

Beech Ridge met its burden and demonstrated compliance when it filed the final endangered species study. Because Beech Ridge demonstrated compliance, MCRE and Mr. and Mrs. Eisenbeiss were required to rebut the Beech Ridge showing through credible testimony or cross-examination, and they did not do so. These compliance proceedings are not an opportunity to re-litigate whether Beech Ridge should be required to obtain an incidental take permit, in hopes that the Commission will arrive at an answer more to the liking of MCRE and Mr. and Mrs. Eisenbeiss.

#### *Continued Commission oversight*

The Commission recognized in the Siting Certificate Orders that bird and bat mortality concerns were important and continuing oversight was appropriate. In addition to requiring Beech Ridge to file the final endangered species report, the Commission required Beech Ridge to test adaptive management strategies and adopt them if appropriate. The Commission also approved on-going work by a Technical Advisory Committee with membership open to a representative of each of the following: PSC, USFWS, WVDNR, Bat and Wind Energy Cooperative, a statewide environmental organization with more than 500 members and in existence for at least 10 years, a statewide bird group, and a private or academic institution with a background in avian issues. These requirements have not been affected by the Compliance Proceedings and remain in full force and effect. Comm'n Order pp. 11 & 52 (Aug. 28, 2006) (Operational Condition 7). In the appeal the Supreme Court accepted the Commission's breadth of actions regarding continued environmental oversight:

Thus, while the Commission recognized bird and bat mortality as a concern associated with the project, it believed that [Beech Ridge] had taken appropriate and reasonable steps to mitigate those impacts. It further recognized that this was an area under the purview of the U.S. Fish and Wildlife Service, which would have the opportunity to require additional years of study or take any other action it deemed appropriate. Finally, the Commission specifically conditioned approval of the project on any further action required by the U.S. Fish and Wildlife Service.

Upon fully reviewing the record below, it is clear to us that the Commission considered substantial amounts of evidence and properly weighed the various interests involved.

See S. Ct. Order pp. 29-30, Mountain Comm. for Responsible Energy v. Public Serv. Comm'n, Docket Nos. 33375 & 33376, \_\_\_ W. Va. \_\_\_, 665 S.E.2d 315, 330 (June 23, 2008) (per curiam).

Because the Commission Orders granting Beech Ridge a Siting Certificate did not designate who will enter the Project area to search for carcasses of federally-listed bat species, MCRE argued that neither the Commission nor USFWS has any way of knowing whether a take of an endangered species will occur. Reply Brief pp. 3-4. MCRE did not, however, present any witness at the compliance hearing or raise this position on cross-examination of the Beech Ridge witnesses.

Beech Ridge met its burden and demonstrated compliance when it filed the final endangered species study. Because Beech Ridge met its burden, MCRE was required to rebut the Beech Ridge showing through credible testimony or cross-examination, and it did not do so. These compliance proceedings are not an opportunity to re-litigate the continuing oversight regarding bird and bat mortality in hopes that the Commission will arrive at an answer more to the liking of MCRE.

*MCRE bat expert*

MCRE asserted that it did not present its bat witness, Dr. Michael Gannon, because MCRE believed that the Commission would not be receptive to receive evidence from him and because of MCRE's pending prosecution of a suit under the Endangered Species Act. Initial Brief p. 8. In response, Beech Ridge noted that the Commission order required MCRE to put a witness on the stand if MCRE wanted the Commission to make a particular finding of fact, and MCRE did not do so. Reply Brief p. 25.

There is no indication whatsoever that the Commission would refuse to receive testimony from any witness in the compliance hearing that MCRE believed would support its position with respect to a failure by Beech Ridge to meet any of the Pre-Construction Conditions. Whether to present testimony from Dr. Gannon at the compliance hearing was a tactical choice made by MCRE.

## *Migratory Bird Treaty*

An incidental take permit is not available under the Migratory Bird Treaty Act. Ltr. dated July 31, 2007 from Thomas R. Chapman of USFWS to Russ Romme (filed Aug. 2, 2007). For the Beech Ridge Project, the Commission established, as an operational condition, a Technical Advisory Committee, with membership open to a USFWS representative, to oversee post-construction bird studies, and the Commission required Beech Ridge to work in good faith to implement economically feasible and effective adaptive management techniques. Comm'n Order pp. 4-6 (Jan. 11, 2007).

Mr. and Mrs. Eisenbeiss argued that compliance with the Migratory Bird Treaty Act appears unachievable because that statute does not allow an incidental take. Initial Comments pp. 5-6. Mr. and Mrs. Eisenbeiss, however, did not present any witness at the compliance hearing or raise this position on cross-examination of the Beech Ridge witnesses.

In response, Beech Ridge argued that the USFWS expressly recognizes that some migratory birds may be killed at structures such as wind turbines, but focuses its enforcement actions on takings when conservation measures have been developed but are not properly implemented. Beech Ridge Initial Brief pp. 17-18; see also Ltr. dated July 31, 2007 from Thomas R. Chapman of USFWS to Russ Romme (filed Aug. 2, 2007).

Beech Ridge met its burden and demonstrated compliance when it filed the final endangered species study. Because Beech Ridge met its burden, Mr. and Mrs. Eisenbeiss were required to rebut the Beech Ridge showing through credible testimony or cross-examination, and they did not do so. These compliance proceedings are not an opportunity to re-litigate any issues in hopes that the Commission will arrive at an answer more to the liking of Mr. and Mrs. Eisenbeiss.

## *Visual change to rural atmosphere*

The area's viewshed and the visual impact of the Project were extensively litigated when the Commission considered whether to grant Beech Ridge a Siting Certificate. Beech Ridge presented a visual study by John Guariglia, and MCRE filed the testimony of Van Cleve Anderson (visibility map), Carroll Bassett (day/night ridge photos), David Buhrman (dark sky), John Walkup (photo essay of Williamsburg, Friers Hill and Leonard-Cordova), and Josh Lipton (review of Beech Ridge's simulations, MCRE views from Laurel Hill Baptist, and Andrew Chapel United Methodist). In evaluating all of the evidence, the Commission considered and balanced several claims. Ultimately, the Commission accepted the Beech Ridge position regarding the visual impact of the Project. Comm'n Order pp. 78-79, 80 (Concls. of Law 26, 27 & 37) (Aug. 28, 2006); Comm'n Order p. 58 (Concl. of Law 51). On appeal, the Supreme Court concluded that the Commission appropriately balanced the multiple interests. See S. Ct. Order pp. 29-30, Mountain Comm. for Responsible Energy v. Public Serv. Comm'n, Docket Nos. 33375 & 33376, \_\_\_ W. Va. \_\_\_, 665 S.E.2d 315, 330

(June 23, 2008) (per curiam) (“Upon fully reviewing the record below, it is clear to us that the Commission considered substantial amounts of evidence and properly weighed the various interests involved.”)

As required by the Commission, Beech Ridge consulted with SHPO regarding the Project’s impact upon cultural and historic resources in the area. In a letter dated May 29, 2007, to Beech Ridge’s visual consultant, SHPO commented, pursuant to W. Va. Code § 29-1-8, on the methods Beech Ridge proposed to use in the forthcoming “Study Plan for Assessment of Effects, Beech Ridge Wind Energy Facility”:

We concur that the adverse effects may be indirect as well as direct, and that the report will include evaluation of visual, atmospheric, or audible elements that diminish the integrity of the property’s significant features. . . We also concur with the methods proposed to analyze the visual effects through a combination of (1) computerized analysis of viewsheds, (2) photographic simulations and (3) field investigations. . . .

BR-1 Tab 14. About a year later, in a letter dated April 10, 2008, after reviewing the report, SHPO agreed with the visual impact described in the study and concluded that the Project would have an adverse effect on the community:

We concur that the 124 wind turbines will add visual elements to the landscape which may not be keeping with the area’s historic patterns of settlement and development. In addition, the proposed project will introduce visual elements that will have an adverse effect to 20 of the 51 resources eligible for listing in the National Register of Historic Places.

\* \* \*

We concur that the construction of 124 wind turbines will introduce a new, industrial element to the rural landscape. The immediate change will be primarily visual and will affect the setting, feeling and association of the rural landscape. . . .

\* \* \*

Therefore, it is our opinion that the proposed construction of the Beech Ridge Wind Energy Facility will have an *Adverse Effect* to 20 of the 51 resources eligible for listing in the National Register of Historic places as well as an *Adverse Effect* to the rural landscape and cultural setting within some portions of the [Area of Potential Effects.]

In anticipation of an Adverse Effect to architectural and structural resources eligible for listing in the National Register of Historic Places the Beech Ridge Energy LLC has provided a draft Memorandum of Agreement (MOA) for the adverse visual effects . . . .

BR-1 Tab 14 (emphasis in original). MCRE witness Dr. Rasmussen concurred with the report and SHPO's conclusions regarding adverse effects. Tr. pp. 41-42 (Oct. 16, 2008).

SHPO signed the MOA with Beech Ridge on July 31, 2008, and the MOA states that the potential adverse effects to above ground historic resources cannot be reasonably eliminated due to the nature of the Project and the necessary wind turbine height. BR-1 Tabs 13 & 20 pp. 2-3. In mitigation of those adverse visual effects, the MOA requires Beech Ridge to provide up to \$10,000, or in-kind service(s) of equivalent value, for historic preservation-related activities focusing upon the communities that will be visually affected by the Project. Finally, the MOA states that SHPO's signature reflects that Beech Ridge has afforded SHPO the opportunity to comment on the Project and its effect on historic properties and Beech Ridge has addressed the Siting Certificate condition. Id. p. 7.

Mr. and Mrs. Eisenbeiss asserted that construction of the wind turbines represents a semi-permanent change, primarily visual, to the rural landscape, and, thus, the Project would have some adverse cultural effects. Initial Comments p. 7. The Eisenbeisses also argued that mitigation to move turbines was never addressed. Initial Comments p. 8, citing BR-1 Tab 20 p. 1. Mr. and Mrs. Eisenbeiss did not, however, present any witness at the compliance hearing or raise this position on cross-examination of the Beech Ridge witnesses.

Beech Ridge met its burden and demonstrated compliance when it provided the letters evidencing its consultation with SHPO and the MOA. BR-1 Tabs 13-14 & 17-20. Because Beech Ridge met its burden, Mr. and Mrs. Eisenbeiss were required to rebut the Beech Ridge showing through credible testimony or cross-examination, and they did not do so.

The Commission has previously recognized that, to some degree, the visual impact of wind turbines is a subjective and personal opinion; in other words beauty is in the eye of the beholder and seems to be, understandably, a function of proximity to, and to some extent, an economic interest in the Project. Comm'n Order p. 17, AES Laurel Mtn., Case No. 08-0109-E-CS (Nov. 26, 2008). It has always been agreed that the Beech Ridge Project will have some visual impact upon the area. In this regard, Mr. and Mrs. Eisenbeiss' concerns are consistent with the conclusions stated in the Beech Ridge study and concurred with by SHPO.

Mr. and Mrs. Eisenbeiss are incorrect when they assert that moving the turbines was not addressed as a possible means of mitigation. MCRE witness Dr. Rasmussen testified that the only possible mitigation would be to move the turbines entirely away from the skyline, but she did not advocate for such action. See Tr. p. 19 (Oct. 16, 2008). The MOA with SHPO recognizes that the potential adverse effects to above ground historic resources cannot

be reasonably eliminated due to the nature of the Project and the necessary wind turbine height. BR-1 Tabs 13 & 20 pp. 2-3. Both Dr. Rasmussen and SHPO appreciated the fact that locating the turbines on the ridge line is essential to the Beech Ridge Project.

*Mr. James' noise measurements*

MCRE complained that its witness, Richard R. James, conducted a general noise study in 2008, but the Commission limited his testimony at the compliance hearing to adverse auditory impacts upon historic resources, even though Beech Ridge presented a general noise study in 2006 when the Commission was considering whether to grant the Siting Certificate. Initial Brief p. 4. MCRE urged the Commission to find, based upon Mr. James' work in 2008, that the operation of Beech Ridge's turbines would increase ambient sound levels by 8 to 26 decibels at sites within 6,000 feet of the Project, which would significantly alter the characteristics of the community and impose adverse auditory impacts upon at least some National Register-eligible resources. Initial Brief p. 5, citing Tr. MCRE Ex. 5 (Oct. 16, 2008).

Mr. and Mrs. Eisenbeiss argued that Mr. James' 2008 noise measurements reflect conflicting evidence regarding the Project's expected noise levels. Initial Brief pp. 3-4.

In response, Beech Ridge asserted that Mr. James' noise measurements, had they been prepared as a general noise study in 2006 when the Commission considered whether to grant the Siting Certificate, did not meet the Commission's requirements because the Siting Rules require testing for seven days and Mr. James only took measurements for about 30 minutes and then used the quietest ten minutes from those readings. He also developed what he characterized as "background sound levels" around the perimeter, but he did not measure ambient noise using day-night sound levels as the Siting Rules require. Initial Brief p. 23, citing Tr. pp. 94 & 102-03 (Oct. 16, 2008). Beech Ridge also argued that it was inappropriate to present a general noise study during the compliance proceedings. Id. p. 21.

Furthermore, Beech Ridge argued that the Commission should not accept any testimony by Mr. James that noise from the Project could adversely affect historic structures because Mr. James did not know where the historic structures were located. Reply Brief pp. 17-22, citing Tr. p. 98 (Oct. 16, 2008) ("I was aware that there were historic sites in the area, but the exact location of them and which were relevant and which were not relevant was not part of the discussion.")

Upon review of these conflicting positions, the Commission concludes that MCRE's request is contrary to the purpose of the compliance proceeding. The Commission required this additional proceeding to insure that Beech Ridge complied with the conditions that were imposed, based on the voluminous record that was created during the 2005-06 proceedings, when the Siting Certificate was granted. This compliance proceeding was not an opportunity to present another ambient noise study or to dispute the findings regarding ambient noise

levels that the Commission made in 2006, when MCRE vigorously challenged the Beech Ridge noise study with exhibits and testimony from Van Cleve Anderson, Michael Woelfel, and Jeffrey Eisenbeiss. Comm'n Order p. 41 (Aug. 28, 2006). At that time, the Commission considered MCRE's concerns, but ultimately accepted the Beech Ridge study.

Furthermore, during the compliance hearing the Commission ruled that the time had passed for MCRE to challenge the Beech Ridge noise study, but MCRE nonetheless continues to press its argument. See Tr. p. 111 (Oct. 16, 2008). One more time, we hold that the Commission will not consider Mr. James' testimony and noise measurements to the extent they were proffered as a general ambient noise study in the compliance proceedings.

#### *Noise data provided to SHPO*

In 2005-06 when the Commission was considering whether to grant the Siting Certificate, Beech Ridge provided evidence that the Project's construction and operational sound levels will be masked by existing ambient, or background, noise levels, and the Commission accepted Beech Ridge's noise study. Comm'n Order pp. 79-80 (Concl. of Law 34) (Aug. 28, 2006). Thereafter, Beech Ridge provided its sound evidence to SHPO, as required by the Commission.

Mr. and Mrs. Eisenbeiss argue that the ambient sound levels are misrepresented in the Beech Ridge noise study, noise is a crucial component of SHPO's evaluation and SHPO's mitigation position was insufficient because of the lack of information from Beech Ridge. Initial Comments p. 7; Initial Brief pp. 3-4 & 7; Reply Brief p. 2.

MCRE similarly argued that SHPO was not able to determine an appropriate mitigation plan because there is conflicting evidence from Mr. James on the Project's adverse auditory impact to National Register-eligible resources. Initial Brief p. 7, citing Tr. p. 20 (Oct. 16, 2008).

The Trades Council asserted that Beech Ridge demonstrated that it has received final SHPO approval and SHPO did not identify any outstanding issues. Initial Brief p. 3. The Trades Council noted that MCRE witness Rasmussen testified that the MOA between SHPO and Beech Ridge was professionally done and that Beech Ridge complied with the Commission's Pre-Construction Conditions with regard to historic preservation. Tr. pp. 38-39 (Oct. 16, 2008) ("I believe they did."); see also Staff Initial Brief p. 2, citing Tr. pp. 19-20, 39 & 44-45 (Oct. 16, 2008); Beech Ridge Initial Brief p. 19, citing Tr. pp. 11-12, 39, 41-42 & 43 (Oct. 16, 2008).

Beech Ridge complained that the results of Mr. James' work were not provided until the day he testified at the compliance hearing, he did not know the precise location of any historic resource, his work focused upon hypothetical sites, and he took no sound readings from any historic site. Initial Brief pp. 10 & 22; see BR-1 Tab 19 p. 37. Beech Ridge

argued, therefore, that his measurements were irrelevant with regard to any alleged effects on eligible historic sites. Id.

Beech Ridge also noted that on cross-examination, neither MCRE nor the Eisenbeisses asked Mr. Groberg a single question about compliance with SHPO. Beech Ridge Reply Brief p. 13.

We conclude that Mr. James' testimony was irrelevant regarding alleged effects on sites eligible for listing in the National Register of Historic Places because he did not measure sound levels at any eligible historic site and he did not know the location of eligible historic sites.

Moreover, we again conclude that the Eisenbeisses and MCRE's position misconstrues the purpose of this compliance proceeding. The Commission has granted Beech Ridge a Siting Certificate, conditioned in several respects. The compliance proceeding is to determine whether Beech Ridge satisfied the Pre-Construction Conditions. This argument by MCRE and the Eisenbeisses attempts to directly attack and reopen the record upon which the Commission decided to grant the Beech Ridge application for a Siting Certificate.

Furthermore, the Commission's compliance proceeding is not an opportunity for MCRE or the Eisenbeisses to go behind the SHPO decision. The Supreme Court explained that SHPO, not the Commission, would consider certain matters:

We further recognize that there will necessarily be certain information that simply cannot be supplied until after the process has been completed and is more appropriate for another agency to carefully consider. In the situation with SHPO, Beech Ridge must receive final approval on matters of culture and history as required by that state agency prior to beginning construction.

\* \* \*

Thus, the Commission's requirement of a future compliance hearing ensures Beech Ridge will obtain SHPO compliance and that any issues that agency identifies will be fully litigated and considered by the Commission.

S. Ct. Order pp. 22-23, Mountain Comm. for Responsible Energy v. Public Serv. Comm'n, Docket Nos. 33375 & 33376, \_\_\_ W. Va. \_\_\_, 665 S.E.2d 315, 328 (June 23, 2008) (per curiam).

The Commission's role is to ensure that Beech Ridge participated fully in the SHPO process. Based upon the representations appearing in the MOA between SHPO and Beech Ridge, we conclude that Beech Ridge has done so. Because SHPO did not identify any issues that need further attention, the Commission's work is done. The Supreme Court order

devoted considerable space to listing the responsibilities of SHPO that are set forth in W. Va. Code § 29-1-8, and we do not have authority to overrule SHPO's determinations relating to matters of culture and history. See S. Ct. Order pp. 20-21, Mountain Comm. for Responsible Energy v. Public Serv. Comm'n, Docket Nos. 33375 & 33376, \_\_\_ W. Va. \_\_\_, 665 S.E.2d 315, 332 (June 23, 2008) (per curiam).

*Mitigation amount*

Beech Ridge has consulted with SHPO and filed letters that contain, among other things, SHPO's conclusion that the potential adverse effects to above ground historic resources cannot be reasonably eliminated due to the nature of the Project. The SHPO letters also reflect that, in mitigation of the adverse effects, Beech Ridge will provide up to \$10,000, or in-kind service(s) of equivalent value, for historic preservation-related activities focusing upon the communities that will be visually affected by the Project. BR-1 Tabs 13 & 20 pp. 2-3. SHPO's signature on the MOA acknowledges that Beech Ridge afforded SHPO the opportunity to comment on the Project and its effect on historic properties and that Beech Ridge thereby addressed the Siting Certificate condition imposed by the Commission. Id. p. 7.

MCRE witness Dr. Rasmussen testified at the compliance hearing that Beech Ridge had complied with the Commission's conditions with regard to historic preservation. Tr. p. 39 (Oct. 16, 2008). She also testified that the \$10,000 mitigation amount in the MOA could fund roughly one National Register nomination, but \$500,000 – enough to nominate all 51 eligible sites – would be a more appropriate mitigation amount. Id. p. 20.

Staff urged the Commission to accept the amount in the MOA because SHPO is the agency designated by statute to oversee the preservation of West Virginia's culture and history. Initial Brief pp. 2-3, citing Tr. pp. 19-20, 39 & 44-45 (Oct. 16, 2008); see also Trades Council Initial Brief p. 3.

Beech Ridge similarly asserted that the amount and degree of mitigation is SHPO's decision, any mitigation required for historical and/or archaeological issues is memorialized in the MOA, and the MOA reflects Beech Ridge's satisfaction of Pre-Construction Condition 12. Initial Brief pp. 16, 19-20, citing Tr. pp. 20 & 44-45; Reply Brief p. 24; BR-1 Tabs 13 & 20 pp. 2-3. Beech Ridge asserted that it submitted a series of studies to SHPO, SHPO reviewed and approved those studies at each step, and SHPO could have required some other amount of mitigation. BR-1 Tabs 13 & 20 p. 6.

In this proceeding, Beech Ridge met its burden and demonstrated compliance when it provided the letters evidencing its consultation with SHPO and the MOA. BR-1 Tabs 13-14 & 17-20. As the Supreme Court recognized, SHPO is the state office entrusted by statute to protect West Virginia's historic and cultural treasures. The MOA evidences SHPO's agreement with the \$10,000 amount for mitigation as well as SHPO's satisfaction with its

opportunity to participate in the Beech Ridge proceeding. As we stated above, we do not have authority to overrule SHPO's determinations relating to matters of culture and history, and the Commission's compliance proceeding is not an opportunity to go behind the SHPO decision.

*Rasmussen testimony*

MCRE also alleged that the Commission required Dr. Rasmussen to demonstrate technical knowledge of sound propagation to be able to provide an opinion as to *any* aspect of adverse auditory impact, but when the Commission was considering whether to grant the Siting Certificate the Commission received testimony from Beech Ridge's culture and history consultant and did not require the Beech Ridge witness to have technical knowledge of sound propagation. MCRE Initial Brief p. 3 (emphasis in original).

MCRE's position is contrary to what occurred during the compliance hearing. Dr. Rasmussen, who has a master's degree and Ph.D. in American History, with a specialization in Appalachian and West Virginia history from West Virginia University, testified extensively regarding matters of culture and history. This Order contains numerous citations to her testimony. E.g. Tr. pp. 11-12, 17-21, 38-39, 41-42, 43, 44-45 (Oct. 16, 2008).

Moreover, the MCRE argument is again based upon the incorrect assumption that the evidence relied upon when the Commission decided to grant the Beech Ridge application for a Siting Certificate can be reopened and challenged in the compliance proceedings. As this Order and our prior Orders have repeatedly stated, the purpose of the compliance proceeding was limited to determining whether Beech Ridge satisfied the conditions attached to the Siting Certificate, and the Supreme Court did not disturb the Commission decision to proceed in this manner. Matters decided in the 2005-06 Siting Certificate proceedings are final and cannot be re-litigated during the compliance hearing.

**(14) Compliance with the Endangered Species Act, the Migratory Bird Treaty Act, and, if applicable, the National Environmental Policy Act of 1969**

The January 11, 2007 Order requires Beech Ridge to advise the Commission if Beech Ridge is ever found to be in violation of three federal statutes – the Endangered Species Act, the Migratory Bird Treaty Act and the National Environmental Policy Act. Beech Ridge has committed to advise the Commission in writing within ten days of any competent decision holding that Beech Ridge is not complying with a provision of any of these statutes. BR-1 Tab 1 p. 8; Tr. p. 35 (Oct. 15, 2008). Beech Ridge correctly notes that it has neither started construction nor operation of the Project, no evidence was provided that Beech Ridge has been found in violation of any of these statutes, and no witness was offered at the hearing regarding this condition. Initial Brief p. 25.

Mr. and Mrs. Eisenbeiss presented their arguments relating to this condition jointly with their positions regarding Pre-Construction Conditions 11 and 12. See Initial Comments p. 3; Initial Brief pp. 8-9; Reply Brief pp. 2-3. Similarly, MCRE addresses Pre-Construction Condition 14 by predicting that a take will occur. Initial Brief p. 8; Reply Brief p. 4 n. 3. The Commission addressed the concerns of Mr. and Mrs. Eisenbeiss and MCRE in detail above.

Moreover, we conclude that evidence of any non-compliance by Beech Ridge cannot be presented until after construction and operations begin. Beech Ridge's assurance that it will provide the required notice, if Beech Ridge is ever found to be in violation of any of these three statutes, satisfies the Commission requirements at this juncture.

### **(16) Decommissioning fund**

The August 28, 2006 Commission Order established our requirements for the decommissioning fund in detail:

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.

Comm'n Order p. 89 (Aug. 28, 2006) (emphasis added).

In the verified statement by Mr. Groberg, Beech Ridge committed to have a Decommissioning Fund in place prior to the start of operations. BR-1 Tab 1 p. 9. The fund will not be a Beech Ridge asset, will be held by an independent third party and will cover the costs of dismantling and land reclamation. Id. Beech Ridge hired HDR Engineering, Inc. as its evaluative expert and requested the Commission's approval of HDR, which is an architectural, engineering, planning and consulting firm with worldwide energy and power system expertise, including all phases of wind power development. Id.

Through the HDR Decommissioning Report, Beech Ridge advised that if the Project must be decommissioned, Beech Ridge will first remove the wind turbines, then the transformers, and then partially remove the tower foundations. BR-1 Tab 25 p. 1. After all

materials have been removed to a depth of four feet, Beech Ridge will restore and seed the surface. Id.

Properly maintained wind turbines have a minimum life of twenty years. BR-1 Tab 25 p. 1. At the end of the Project life, depending upon market conditions and Project viability, the turbines may be “re-powered” with new nacelles, towers and/or blades, or the turbines may be decommissioned. Id. Each tower contains about 138 tons of potentially salvageable steel. The nacelles weigh more than 40 tons and contain steel, copper and other materials. The Beech Ridge report did not assign a salvage value to the blades because they are predominantly fiberglass-reinforced epoxy and carbon fibers. Id. pp. 1-2. The Beech Ridge report, dated June 2008, noted that salvage values for steel and copper fluctuate, and December 2007 prices were used for the calculations. Id. p. 2.

The 2007 cost to erect a tower, hub, nacelle and blades was estimated at \$45,000, and the report stated that the cost to dismantle this equipment should be within ten percent of the same amount. BR-1 Tab 25 p. 2. When the costs to remove the dismantled materials are included, the amount rises to about \$70,000 per turbine. Id. There are also costs to partially remove the concrete foundations and to restore the land.

HDR estimated the total decommissioning costs for the Project at \$10.8 million and the total salvage value at \$12.6 million. Accordingly, the report concluded that the Project’s estimated salvage value exceeds the decommissioning costs by \$1.8 million, or \$14,645 per turbine. BR-1 Tab 25 p. 4. HDR will provide an additional report when construction is completed and the report will be updated thereafter every five years. Id.

Even though the expected salvage value for the Project exceeds the estimated decommissioning costs in the HDR report, Beech Ridge proposed to provide further financial assurance by way of a bond, surety or escrow to be valued according to the life of the Project:

Years 1-5	\$2,500 per turbine
Years 6-10	\$5,000 per turbine
Years 11-15	\$10,000 per turbine
Years 16 and beyond	\$20,000 per turbine

BR-1 Tab 25 p. 5. HDR supports the Beech Ridge schedule of additional financial assurance. Id. Beech Ridge will certify to the Commission that the additional financial assurance has been funded through an independent party. Beech Ridge also proposed a periodic review of the adequacy of the assurance and to increase the amount if needed in the future. If, during any of the periodic updates, the values contained in the Decommissioning Report change, Beech Ridge committed nonetheless to continue to provide the additional financial assurance listed above. Id.; Tr. p. 81 (Oct. 15, 2008).

Commission Staff and the Trades Council recommended that the Commission find that Beech Ridge complied with this condition. Staff Initial Brief p. 3; see also Utilities Division Final Memorandum pp. 2-3 (citing Groberg Affidavit pp. 9-10), attached to Initial & Final Joint Staff Memorandum (Staff Ex. 1) (Sept. 22, 2008); Trades Council Initial Brief pp. 3-4, citing Tr. pp. 49-76 (Oct. 16, 2008). They both argued that the intervenors simply disagreed with the amount of the fund.

Having reviewed the pleadings,<sup>2</sup> evidence and legal briefs, we are persuaded that the Beech Ridge decommissioning proposal is reasonable, in the public interest, and in compliance with Pre-Construction Condition 16. Beech Ridge has satisfied the Commission requirements, Beech Ridge has volunteered to provide additional financial assurance, regardless of the need established in any periodic HDR report. We also approve of Mr. Booty's company, HDR Engineering, Inc., as Beech Ridge's evaluative expert with regard to decommissioning and approve the funding schedule proposed by Beech Ridge as further financial assurance.

*Consideration of salvage value, other costs*

Mr. and Mrs. Eisenbeiss argue that Beech Ridge's report is deficient in calculating the cost to decommission the Project because the estimated resale or salvage value of the towers and turbines was netted out, which shifts the full decommissioning costs to a third party, such as the Greenbrier County Commission. Initial Comments pp. 8-9; Initial Brief p. 11, 12, citing MCRE Ex. 3 & Tr. p. 61 (Oct. 15, 2008); Eisenbeiss Reply Brief p. 3. They also asserted that Beech Ridge omitted several costs: labor, large equipment rentals, transportation, demolition, and disposal fees at local landfills for turbine blades (because they have no salvage value). Initial Brief p. 12; Reply Brief p. 3.

Jonathan Stroud, MCRE co-chairperson, likewise argued that subtracting the salvage credit for the turbines, towers and rotors from the decommissioning costs shifts the financial risk for a decline in scrap metal values and/or increase in decommissioning costs to the local government. Initial comments pp. 1-2. He asked the Commission to require Beech Ridge to post a bond covering the entire decommissioning cost without a scrap credit and to revise the bond amount every five years. Id.

On September 22, 2008, Commission Staff recommended that the Commission accept the HDR Decommissioning Report and Beech Ridge's offer of additional financial assurance. Initial & Final Joint Staff Memorandum p. 1.

On October 16, 2008, Daniel A. Ruley of Lewisburg filed public comments in response to the Staff memo, asserting that the amount of per-turbine assurance proposed by

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<sup>2</sup> MCRE and Mr. and Mrs. Eisenbeiss' objections to the Decommissioning Report are dealt with in detail in the sections that follow.

Beech Ridge is fanciful and inadequate. Letter pp. 1-2. He asserted that the cost to dismantle a tower should be about the same as the cost to erect the tower, plus the cost of land reclamation.

MCRE witness John B. Stamberg asserted that decommissioning is a labor-intensive process, but Beech Ridge did not include labor and equipment rental costs or the disposal cost for the turbine blades. *Id.*, citing Tr. pp. 57-58, 77-78 (Oct. 16, 2008). Mr. Stamberg testified that Beech Ridge could not comply with Pre-Construction Condition 16 if the decommissioning fund takes salvage value into consideration. *Id.* p. 61.

In response, Beech Ridge noted that Pre-Construction Condition 16 required Beech Ridge to take salvage or re-sale value into consideration. Initial Brief p. 28.

Our decommissioning condition was detailed and clear – the fund must take into consideration resale or salvage value. As we have repeatedly stated, the decision to grant Beech Ridge a Siting Certificate is final. The compliance proceedings are not an opportunity for MCRE or Mr. and Mrs. Eisenbeiss to re-fashion the conditions more to their liking.

MCRE and Mr. and Mrs. Eisenbeiss also argue that Beech Ridge’s calculation of decommissioning costs was incomplete because the Beech Ridge report did not contain specific line items for certain costs. Upon review, the Commission concludes that Beech Ridge’s report is sufficient and Beech Ridge need not break out the specific sub-costs that MCRE and the Eisenbeisses allege are necessary. The Beech Ridge report contains estimated costs to construct a tower, dismantle a tower, remove the dismantled materials, partially remove the concrete foundations, and reclaim the land, as well as estimated salvage values. We find the report to be satisfactory.

The Commission’s decision not to require Beech Ridge to provide certain sub-costs at this time should not be construed as a limitation upon the Commission’s evaluation of future periodic decommissioning reports. Depending upon the particular facts and circumstances under review, the Commission may require additional information from time to time in support of the periodic reports, including any of the sub-costs that we do not require today.

#### *Market prices for scrap*

The HDR Decommissioning Report used the prices for scrap metals published in the December 2007 issue of *Demolition Scrap Metal and Salvage News*. Tr. p. 74 (Oct. 15, 2008). MCRE argued that Beech Ridge’s salvage values were not based on current market prices. Initial Brief pp. 10-11, *citing* Tr. p. 53 (Oct. 16, 2008). MCRE provided an alternate decommissioning report dated October 7, 2008, based on lower scrap prices obtained on October 2, 2008, from large volume scrap dealers and recyclers used or contacted when a U.S. gypsum plant in Salt Rock, West Virginia, was decommissioned. Tr. pp. 55-56, 58 &

MCRE Ex. 3 (Oct. 16, 2008); see also MCRE Initial Brief pp. 8-9. In response, Beech Ridge asserted that it had to prepare its report well in advance of the hearing, yet Mr. Stamberg could choose when to make his calculations. Beech Ridge also argued that market volatility was one of the reasons the Commission required periodic reviews of the decommissioning fund. Initial Brief p. 29.

The Commission acknowledges that the price of scrap metal fluctuates. The Commission also recognizes that MCRE and Mr. and Mrs. Eisenbeiss did not accord any value at all to the voluntary agreement by Beech Ridge to provide substantial financial assurance separate and apart from the HDR recommendation. See Trades Council Initial Brief pp. 3-4, citing Tr. pp. 49-76 (Oct. 16, 2008). Having reviewed the competing positions, the Commission will accept the Beech Ridge report, even though it was based on higher scrap values, because 1) Beech Ridge will provide substantial financial assurance, independent of the HDR recommendation and 2) at regular intervals, both the HDR report and Beech Ridge's separate financial assurance amounts will be updated, and through the periodic updates, the Commission will be able to require whatever level of financial assurance is necessary to protect the public interest.

#### *Demand for wind turbines*

In response to concerns about who would bear decommissioning costs and responsibilities if the Beech Ridge Project would fail, Staff asserted that demand for wind turbines is extremely high and a buyer would be waiting to take over the Project if it is abandoned by Beech Ridge. Initial Brief p. 3. MCRE argued, however, that the record does not support Staff's statement. Reply Brief p. 7.

Although MCRE is technically correct that the record does not contain sales or demand figures for wind turbine components, we recognize that the change in administration at the federal level likely will result in increased emphasis upon electric generation from renewable fuel sources and greater and greater antipathy toward carbon-based generation. In future certificate proceedings, this "new era" will not change the requirement that applicants for a certificate of public convenience and necessity in West Virginia must prove that there is need for a proposed project. Our deliberations regarding need for proposed projects, including our assessment of Beech Ridge's application, have for some time considered our nation's growing interest in power generated from renewable fuel sources, and we will continue to do so.

*Witness experience*

MCRE argued that Mr. Booty had no experience in decommissioning a wind project Initial Brief pp. 10-11, citing Tr. pp. at 78-80 (Oct. 15, 2008).

Beech Ridge asserted, however, that Mr. Booty has worked on seven to ten wind energy projects since 1997. Initial Brief pp. 26, 36, citing Tr. p. 57 (Oct. 15, 2008). He has served as a structural engineer and directed projects for various developers, putting together construction documents, designing foundations, electrical collection systems and roads and permitting the facilities, as well as decommissioning:

Q. (by Mr. Shuman) Now, Mr. Booty, as part of your responsibilities with respect to a wind power projects, have you ever had occasion to address issues pertaining to decommissioning?

A. Yes, we have. This project, the Beech Ridge project, as well as several others, different states, depending upon the developer, depending who we were working for at the time. Some of the developers in other states have been asked to have decommissioning as part of their development.

Tr. p. 58 (Oct. 15, 2008).

In response to the MCRE challenge to Mr. Booty's decommissioning experience, Beech Ridge questioned Mr. Stamberg's decommissioning experience:

Q. Have you ever been to a [wind energy project] that's being decommissioned?

A. No. I'll repeat it. The only ones – they're not decommissioning these. There's a few being discussed in California which were technologists [sic]. Basically the ones that are in trouble are the ones that have broken or fallen over. The recent hurricanes, there were several that broke, and I've got pictures of those. There are undetermined numbers to tear them down or to rebuild them, and so there's not a bank that looks at the decommissioning history.

Initial Brief p. 31, citing Tr. p. 76 (Oct. 16, 2008) (emphasis by Beech Ridge).

Wind-powered generation facilities are relatively new throughout the nation, and we do not expect there to be many people experienced in decommissioning. At this juncture in the industry's development, we find the background and experience of both witnesses to be acceptable.

## **Pleadings filed after the compliance hearing & briefing**

### *Motions to re-examine noise issues*

On November 17, 2008, MCRE asked the Commission to receive additional evidence regarding the noise impacts of the Project, again complaining that Beech Ridge did not have a noise witness available for cross-examination at the compliance hearing. Motion pp. 1-3. MCRE reiterated that the Commission had been presented with new evidence regarding the Project's noise levels at the compliance hearing. Id. p. 5.

On November 21, 2008, the Trades Council opposed the MCRE motion, arguing that the Commission's rules permit further hearing for matters that have arisen since the hearing or which were not known to the party at the time of the hearing. Because the Project's noise impact was extensively litigated when the Commission considered whether to grant the Siting Certificate, the Trades Council argued that the MCRE request was contrary to the Commission's Procedural Rule 19.2, 150 C.S.R. Series 1. Response pp. 1-3. The Trades Council also noted that the noise measurements provided by Mr. James were not provided in sufficient time for the parties to prepare for cross-examination of Mr. James at the compliance hearing and his measurements do not comply with the Commission's Siting Rules.

On November 21, 2008, Beech Ridge likewise opposed the MCRE Motion. Response pp. 1-21. Beech Ridge argued that MCRE cannot re-litigate issues in the compliance proceedings that were resolved in the evidentiary proceedings. Beech Ridge also argued that MCRE was not attempting to present any matters that have arisen since the hearing or that facts exist that were not known at the time of the hearing, as Procedural Rule 19.2 requires. Beech Ridge complained that MCRE was doing everything in its power to slow the Project or derail it entirely.

On December 1, 2008, Staff similarly opposed the MCRE motion:

This is simply an effort by MCRE to submit a noise study to refute the noise study submitted by Beech Ridge. There was a time and a place for the submission of this evidence, the original evidentiary hearings conducted in 2006. The Commission has already decided the noise impacts of this study and the Supreme Court has affirmed that decision.

Response pp. 1-2.

On December 1, 2008, MCRE replied, arguing that the public interest dictates that the Commission should consider Mr. James' noise measurements and permit MCRE to again cross-examine Beech Ridge's noise witness, despite the arguments made by Beech Ridge, Staff and Trades Council. Reply pp. 1-6.

On December 1, 2008, MCRE filed a *further* motion, continuing to request that the Commission consider Mr. James' noise measurements and permit MCRE to again cross-examine the Beech Ridge noise witness. Further Motion pp. 1-2. In a footnote, MCRE addressed Procedural Rule 19.2:

MCRE believes that the Motion sets forth issues which do not easily fall into either category of justification cited in Rule 19.2, but nonetheless now files this application for hearing, accompanied by a verification, under Rule 19.2 in the interest of full compliance with the Rules.

Further Motion p. 1 n. 1. MCRE argued, "it has come to light only in the course of briefing following the Compliance Hearing the extent of the incompleteness of the record pertaining to noise, not to mention other material issues for which Beech Ridge did not present a witness at the Compliance Hearing."

On December 3, 2008, Beech Ridge responded to the *further* motion:

The bottom line is that Beech Ridge put Jim Barnes on the witness stand in May 2006 during the original hearing in this matter to address issues pertaining to noise. MCRE cross-examined him. It did not call a qualified witness to rebut Mr. Barnes' testimony. MCRE argued noise impacts to the Commission in post-hearing briefs. The Commission addressed the issue in two separate orders. The West Virginia Supreme Court of Appeals addressed noise impacts in its decision. Belatedly, MCRE placed Richard James on the witness stand on October 16, 2008 to address noise impacts in a general fashion, despite its assurances that Mr. James was going to address noise in the context of historical resources, which he patently did not do. MCRE filed an initial brief. It then waited until the close of the briefing schedule to file the original (and defective) "Motion of Mountain Communities for Responsible Energy for Hearing to Reexamine Noise Impacts" (the "Motion"), along with its late filed reply brief. These are facts MCRE simply cannot escape. . . .

MCRE fundamentally offers nothing new. Moreover, MCRE has now added new elements it seeks to have re-heard, despite offering absolutely no justification for the request. The Commission can and should deny the Application.

Response to Further Motion pp. 1-3.

On December 3, 2008, Trades Council likewise opposed the MCRE *further* motion.  
Ltr. p. 1.

Under Procedural Rule 19.2, a party may request a new hearing because of matters that have arisen since the hearing or due to facts that were not known by the party at the time of the hearing. As MCRE candidly suggests, its request does not meet either category of justification because when the Commission was considering whether to grant Beech Ridge a Siting Certificate, the Siting Rule requirements for an ambient noise study were in place, MCRE presented its own evidence regarding expected noise levels, and MCRE challenged the sufficiency of the Beech Ridge general noise study.

The Commission recognizes that MCRE's present counsel was not involved in the earlier stages of this matter and that current counsel may have chosen to proceed differently in the earlier phases of this matter. We conclude, nonetheless, that MCRE has been adequately and proficiently represented in this case and MCRE is bound by the existing record. It would be manifestly unfair and against the public interest to require Beech Ridge to present its case again because MCRE has secured new counsel.

For these reasons, we will deny the MCRE Motions.

*Filings regarding MCRE proposed "settlement"*

Finally, on December 11, 2008, MCRE suggested that the better use of resources for all concerned would be a settlement of the differences among the parties. Ltr. pp. 1-2. MCRE also filed a copy of settlement terms that MCRE had proposed to Beech Ridge.

Later that day, Beech Ridge filed a response, asserting that the settlement proposal could be an attempt to delay a final decision because Beech Ridge was not contacted before the proposal was filed with the Commission. Further, the settlement proposal would limit construction to 63 turbines on the western half of the Project, and MCRE has long known that such a proposal would make the Project economically impossible. Ltr. pp. 1-2.

On December 15, 2008, MCRE responded, asserting that it had hoped its proposal might generate a final settlement, but, upon review of the Beech Ridge response, MCRE believed that settlement could not be obtained. Ltr. pp. 1-2.

It is clear that the parties have not resolved their differences, and no agreement or settlement was reached by MCRE and Beech Ridge. Accordingly, no action by the Commission is required upon the documents relating to the MCRE settlement proposal.

**FINDINGS OF FACT**

1. On August 28, 2006, the Commission granted Beech Ridge a Siting Certificate conditioned upon, among other things, Beech Ridge establishing in a compliance hearing that

it had satisfied the Commission's Pre-Construction Conditions. Comm'n Order pp. 87-91 (Aug. 28, 2006); Comm'n Order pp. 58-59 (Concl. of Law No. 56) (Jan. 11, 2007).

2. Several intervenors appealed the Commission Orders to the West Virginia Supreme Court of Appeals, and on June 23, 2008, the Supreme Court upheld the Commission Orders. S. Ct. Order p. 23, Mountain Comm. for Responsible Energy v. Public Serv. Comm'n, Docket Nos. 33375 & 33376, \_\_\_ W. Va. \_\_\_, 665 S.E.2d 315, 332 (June 23, 2008) (per curiam).

3. On August 6, 2008, Beech Ridge filed a notice of compliance with all Pre-Construction Conditions, together with three volumes containing more than 800 pages of supporting documentation. BR-1.

4. The Commission established this process for the compliance hearing:

Beech Ridge shall have available one or more witnesses with sufficient knowledge and experience to testify regarding how each separate pre-construction condition was met. Should any one ask the Commission to make a factual finding that Beech Ridge has not met a particular condition, he or she must present a witness to testify regarding how Beech Ridge is alleged to have not met that particular condition.

Comm'n Order p. 4 (Aug. 8, 2008).

5. In various pleadings, MCRE and Mr. and Mrs. Eisenbeiss asserted that Beech Ridge had not complied with Pre-Construction Conditions 9, 11, 12, 14 and 16.

6. In various pleadings, Staff and Trades Council advised that Beech Ridge had met all of the Commission's requirements.

7. No one challenged Beech Ridge's compliance filing regarding Pre-Construction Conditions 1-8, 10, 13, 15, 17 and 18.

8. Beech Ridge contacted various local responders, agencies and groups and incorporated their remarks into the Beech Ridge Fire Plan. Tr. pp. 21, 24, 28-29 & 52-53. (Oct. 15, 2008).

9. Beech Ridge focused on the Williamsburg, Rupert and Richwood VFDs because those units are situated on the Project's main access roads and would be the primary responders because of their location. BR-1 Tab 3 p. 17; Tr. pp. 22, 28 & 50-53 (Oct. 15, 2008).

10. Beech Ridge will have a pre-construction meeting with local emergency responders, another meeting when construction is completed and meetings at least annually thereafter. Tr. pp. 21-22 & 53 (Oct. 15, 2008) ; see also BR-2 p. 3.

11. Neither the Eisenbeisses nor MCRE presented any witnesses at the compliance hearing regarding Pre-Construction Condition 9.

12. Although Mr. Eisenbeiss asked several questions of Mr. Groberg regarding Pre-Construction Condition 9, Mr. Eisenbeiss did not elicit information that was different from the testimony and documents Beech Ridge presented. Tr. pp. 48-51 (Oct. 15, 2008).

13. Mr. and Mrs. Eisenbeiss did not present any witnesses to advocate the use of acoustical detectors, thermal imaging and radar in the final Beech Ridge endangered species study, nor did they raise this position on cross-examination of the Beech Ridge witnesses.

14. Beech Ridge's testimony that the Project does not require an incidental take permit was unrebutted. Tr. pp. 31 & 52 (Oct. 15, 2008).

15. Neither the Eisenbeisses nor MCRE presented any witnesses at the compliance hearing regarding an incidental take permit under the Endangered Species Act.

16. MCRE did not present any witness at the compliance hearing regarding who may enter the Project area to search for carcasses of federally-listed bat species or raise this position on cross-examination of the Beech Ridge witnesses.

17. An incidental take permit is not available under the Migratory Bird Treaty Act. Ltr. dated July 31, 2007 from Thomas R. Chapman of USFWS to Russ Romme (filed Aug. 2, 2007).

18. Mr. and Mrs. Eisenbeiss did not present any witness at the compliance hearing regarding compliance with the Migratory Bird Treaty Act or raise this position on cross-examination of the Beech Ridge witnesses.

19. Beech Ridge consulted with SHPO regarding the Project's impact upon cultural and historic resources in the area. BR-1 Tabs 13-14 & 17-20.

20. MCRE witness Dr. Rasmussen concurred with Beech Ridge's report and SHPO's conclusions regarding adverse effects from the Project on cultural and historical sites. Tr. pp. 41-42 (Oct. 16, 2008).

21. In mitigation of the adverse visual effects, SHPO has required Beech Ridge to provide up to \$10,000, or in-kind service(s) of equivalent value, for historic preservation-related activities focusing upon the communities that will be visually affected by the Project. BR-1 Tabs 13 & 20 pp. 2-3.

22. Mr. and Mrs. Eisenbeiss did not present any witness at the compliance hearing regarding the Project's adverse visual impact upon the community or raise this position on cross-examination of the Beech Ridge witnesses.

23. Both Dr. Rasmussen and SHPO appreciated the fact that locating the turbines on the ridge line is essential to the Beech Ridge Project. Tr. p. 19 (Oct. 16, 2008); BR-1 Tabs 13 & 20 pp. 2-3.

24. MCRE witness Richard R. James performed several noise measurements in the vicinity of the Project site immediately prior to the compliance hearing that began on October 15, 2008. Tr. pp. 97-98 (Oct. 16, 2008).

25. Mr. James took measurements for about 30 minutes on October 14 and 15, 2008, and then used the quietest ten minutes from those readings. He also developed what he characterized as "background sound levels," but he did not measure ambient noise using day-night sound levels. Tr. pp. 94, 97-98 & 102-04 (Oct. 16, 2008); MCRE Ex. 5.

26. When he performed his measurements, Mr. James did not know the locations of National Register-eligible sites near the Project. Tr. p. 98 (Oct. 16, 2008).

27. The MOA evidences SHPO's agreement with the \$10,000 amount for mitigation as well as SHPO's satisfaction with its opportunity to participate in the Beech Ridge proceeding. BR-1 Tabs 13 & 20 pp. 2-3.

28. MCRE witness Dr. Rasmussen testified that Beech Ridge had complied with the Commission's conditions with regard to historic preservation. Tr. p. 39 (Oct. 16, 2008).

29. Beech Ridge not started construction or operation of the Project.

30. HDR Engineering, on behalf of Beech Ridge, estimated the total decommissioning costs for the Project at \$10.8 million and the total salvage value at \$12.6 million. Accordingly, the Project's estimated salvage value exceeds the decommissioning costs by \$1.8 million, or \$14,645 per turbine. BR-1 Tab 25 p. 4.

31. HDR will provide an additional decommissioning report when construction is completed and the report will be updated thereafter every five years. Id.

32. Beech Ridge agreed to provide additional financial assurance by way of a bond, surety or escrow to be valued according to the life of the Project:

Years 1-5	\$2,500 per turbine
Years 6-10	\$5,000 per turbine
Years 11-15	\$10,000 per turbine
Years 16 and beyond	\$20,000 per turbine

BR-1 Tab 25 p. 5. Beech Ridge also agreed to a periodic review of the adequacy of the additional assurance and to increase the amount if needed in the future. Id.; Tr. p. 81 (Oct. 15, 2008).

33. MCRE and Mr. and Mrs. Eisenbeiss did not accord any value to the voluntary agreement by Beech Ridge to provide substantial financial assurance separate and apart from the HDR recommendation. See Trades Council Initial Brief pp. 3-4, citing Tr. pp. 49-76 (Oct. 16, 2008).

34. Pursuant to the Commission's August 8, 2008 Order, Beech Ridge published notice of the compliance proceedings in Kanawha, Greenbrier and Nicholas Counties. See Affidavits of Publication filed Aug. 21, 2008.

### CONCLUSIONS OF LAW

1. The issue to be resolved in the compliance proceedings is whether Beech Ridge has satisfied the Pre-Construction Conditions established in the August 28, 2006 Order. Comm'n Order pp. 41 (Jan. 11, 2007); see also id. p. 59.

2. The Verified Statement and supporting testimony of David Groberg satisfies Pre-Construction Condition 1. BR- 1 Tab 1; Tr pp. 14-53 (Oct. 15, 2008).

3. Beech Ridge has satisfied Pre-Construction Conditions 2-7 by incorporating certain requirements and limitations on construction into an addendum that will be a mandatory feature of the scope of work for any contracts for all bidders seeking to work on the Project, as well as by agreeing to properly dispose of contaminated soil and construction debris if a contractor does not do so. BR-1 Tab 2; Groberg's Verified Statement pp. at 2-3; Tr. pp. 18- 19 (Oct. 15, 2008).

4. Beech Ridge has satisfied Pre-Construction Condition 8 by establishing a Fire Plan and requiring all contractors and subcontractors to comply with the Fire Plan. BR-1 Tab 3; Tr. p. 20 (Oct. 15, 2008).

5. Beech Ridge has satisfied Pre-Construction Condition 10 through its sworn statement that it understands and will comply with the time limits established by the Commission. Groberg Verified Statement p. 4; Tr. pp. 29-30 (Oct. 15, 2008).

6. Beech Ridge has satisfied Pre-Construction Condition 13 by filing the final interconnection agreement among Beech Ridge, PJM Interconnection, LLC and Monongahela Power Company d/b/a Allegheny Power. BR-1 Tab 22; Groberg Verified Statement p. 8; Tr. pp. 33-34 (Oct. 15, 2008).

7. Beech Ridge has satisfied Pre-Construction Condition 15 by filing the notice evidencing that Beech Ridge has sought and received EWG status. BR-1 Tab 24; Groberg Verified Statement pp. 8-9; Tr. p. 35 (Oct. 15, 2008).

8. Beech Ridge has satisfied Pre-Construction Condition 17 through its sworn statement that it will not build the I-line of turbines unless it can secure the agreement of the all of the I-line property owners. Tr. p. 39 (Oct. 15, 2008). Beech Ridge's testimony in this regard satisfies Pre-Construction Condition 17.

9. Pre-Construction Condition 18 requires Beech Ridge to provide a copy of the guaranty agreement, whereby Beech Ridge promises to provide at least \$400,000 in property taxes each year to the Greenbrier County Commission. Beech Ridge has filed a copy of the guaranty agreement, which further states that Beech Ridge will provide that amount annually regardless of the number of turbines built and without averaging. BR-1 Tab 28; Groberg Verified Statement p. 10; Tr. pp. 40-41 (Oct. 15, 2008). Beech Ridge's filing and testimony in this regard satisfies Pre-Construction Condition 18.

10. Pre-Construction Condition 9 did not require Beech Ridge to file any particular letters, but instead required Beech Ridge to coordinate with fire, safety and emergency personnel during all stages of the Project.

11. Beech Ridge's evidence regarding Pre-Construction Condition 9 reflects substantial, extensive good faith and on-going efforts to coordinate with emergency responders in the area. These efforts were reasonably focused upon the units that are most likely to be first responders because of their location and access to the Project area.

12. Because Beech Ridge met its burden and demonstrated compliance with Pre-Construction Condition 9, MCRE and Mr. and Mrs. Eisenbeiss were required to rebut the showing through credible testimony or cross-examination, but they did not do so.

13. The August 8, 2008 Order required Beech Ridge to make filings and "have available one or more witnesses with sufficient knowledge and experience to testify regarding how each separate pre-construction condition was met." Beech Ridge presented the testimony of Mr. Groberg and Mr. Booty and had available a number of people who could be rebuttal witnesses, depending upon the challenges that might be made by MCRE and the Eisenbeisses when they presented their evidence. These actions by and on behalf of Beech Ridge satisfied the Commission requirement for Beech Ridge's presentation of its case at the compliance hearing.

14. The MCRE argument that the Commission should consider Tabs 13, 14, 17, 18, 19, 20 and 21 of the compliance filing as evidence of Beech Ridge's consultation with appropriate government agencies, but not to support findings and conclusions about Beech Ridge's compliance because no witness was made available for cross-examination misconstrues the nature of this compliance proceeding. Beech Ridge's burden was to

establish how it satisfied the Commission's conditions, and the Beech Ridge compliance filing and testimony was satisfactory. The proper avenue for the challengers was to present a witness or evidence to establish a failing by Beech Ridge, and they did not do so.

15. Beech Ridge met its burden and demonstrated compliance with Pre-Construction Condition 9 when it filed evidence and provided testimony with regard to its coordination with local safety and emergency agencies. BR-1 Tabs 3-5; Tr pp. 14-53 (Oct. 15, 2008).

16. Although Mr. and Mrs. Eisenbeiss asked the Commission to require the use of acoustical detectors, thermal imaging and radar for the final endangered species study, they did not present a witness or explore this matter on cross-examination of the Beech Ridge witnesses. The Commission has not been persuaded, therefore, to require Beech Ridge to conduct the studies using the methods that the Eisenbeisses prefer.

17. The decision whether to obtain an incidental take permit under the Endangered Species Act lies with Beech Ridge in the first instance. Comm'n Order p. 7 (Oct. 10, 2008).

18. Beech Ridge met its burden and demonstrated compliance with Pre-Construction Conditions 11 and 12 when it filed evidence and provided testimony regarding its environmental permits and/or certifications, acceptance of the wetlands delineation, and the final endangered species study and the historical/archeological significance study with any required mitigation plans. BR-1 Tabs 7- 21; Tr pp. 14-53 (Oct. 15, 2008).

19. The Commission requirements for continuing oversight related to bird and bat mortality were not changed by the Supreme Court, have not been affected by the Compliance Proceedings and remain in full force and effect. Comm'n Order pp. 11 & 52 (Aug. 28, 2006) (Operational Condition 7).

20. Whether to present testimony from Dr. Gannon at the compliance hearing was a tactical choice made by MCRE.

21. Mr. James' noise measurements, had they been prepared as a general noise study when the Commission considered in 2006 whether to grant the Siting Certificate, did not meet the requirements of the Commission's Siting Rules.

22. Mr. James' testimony regarding alleged effects on sites eligible for listing in the National Register of Historic Places was irrelevant because he did not measure sound levels at any eligible historic site and he did not know the location of eligible historic sites.

23. The compliance proceedings are not an opportunity to challenge the information that the Commission evaluated in 2005-06 when it considered whether to grant the Beech Ridge application for a Siting Certificate.

24. The compliance proceedings are not an opportunity to go behind the SHPO decision. The Commission does not have authority to overrule SHPO determinations relating to matters of culture and history.

25. The Commission's role is to ensure that Beech Ridge participated fully in the SHPO process. Because SHPO entered into the MOA and did not identify any issues that need further attention, the Commission's work is done.

26. Evidence of any non-compliance by Beech Ridge regarding Pre-Construction Condition 14 cannot be presented until after Project construction and operations begin. Beech Ridge's assurance that it will provide the required notice, if Beech Ridge is ever found to be in violation of any of these three statutes, satisfies the Commission requirements at this juncture. BR-1 Tabs 1 & 23.

27. Beech Ridge met its burden and demonstrated compliance with Pre-Construction Condition 16 when it presented testimony, filed the HDR Decommissioning Report and Mr. Groberg's verified statement, made its separate promise to provide additional financial assurance, and agreed to periodically review the appropriate level of funding for both the decommissioning fund required by the Commission and the additional financial assurance that Beech Ridge agreed to provide additional financial assurance. BR-1 Tabs 25 & 26; Tr. pp. 14-53 & 55-83 (Oct. 15, 2008).

28. Pre-Construction Condition 16 required Beech Ridge to take into consideration salvage or re-sale value.

29. Beech Ridge's initial decommissioning report does not have to contain the specific sub-costs requested by MCRE and the Eisenbeisses.

30. The Beech Ridge initial decommissioning report is sufficient, even though it was based on higher scrap values, because 1) Beech Ridge will provide substantial financial assurance, independent of the HDR recommendation and 2) at regular intervals, both the HDR report and Beech Ridge's separate financial assurance amounts will be updated, and through the periodic updates, the Commission will be able to require whatever level of financial assurance is necessary to protect the public interest.

31. Under Procedural Rule 19.2, a party may request a new hearing because of matters that have arisen since the hearing or due to facts that were not known by the party at the time of the hearing. As MCRE candidly suggests, its request does not meet either category of justification because when the Commission considered whether to grant Beech Ridge a Siting Certificate, the Siting Rule requirements for an ambient noise study were in place, MCRE presented its own evidence regarding expected noise levels, and MCRE challenged the sufficiency of the Beech Ridge general noise study.

32. Although MCRE's present counsel was not involved in the earlier stages of this matter, MCRE is bound by the existing record from when the Commission considered whether to grant the Beech Ridge application for a Siting Certificate.

### ORDER

IT IS THEREFORE ORDERED that Beech Ridge has satisfied the Commission's Pre-Construction Conditions established in the August 28, 2006 Order. Accordingly, Beech Ridge may begin construction of the wholesale electric generating facility authorized by the Siting Certificate previously issued in this proceeding.

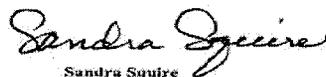
IT IS FURTHER ORDERED that, prior to the commencement of operations, Beech Ridge shall tender a letter of credit in favor of the Greenbrier County Commission in the amount of \$2,500 per turbine constructed. In future years, Beech Ridge shall comply with the financial assurance schedule set forth above.

IT IS FURTHER ORDERED that Beech Ridge shall submit to the Commission for its review and approval an "as-built" decommissioning report when Project construction is completed and an updated decommissioning report every five years thereafter. The Commission reserves the right to adjust the amount of security required if an increase is warranted by the results of the "as-built" review or any of the periodic updates.

IT IS FURTHER ORDERED that this matter 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 and by United States First Class Mail and upon Commission Staff by hand delivery.

A True Copy, Tester:

  
Sandra Squire  
Executive Secretary

CLW:sek  
051590cl.wpd