

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA, *ex rel.*
DEPARTMENT OF HISTORIC RESOURCES

Complainant

v.

CASE NO. PUE-2009-00092

HIGHLAND NEW WIND DEVELOPMENT, LLC

Defendant

STAFF BRIEF

On November 8, 2005, Highland New Wind Development, LLC, ("HNWD") filed an application with the State Corporation Commission ("Commission") for approval to construct, own and operate a wind energy electric generating facility in Highland County, Virginia, near the West Virginia border, on parts of Allegheny Mountain known as Red Oak Knob and Tamarack Ridge.¹ The proposed facility would consist of up to 20 wind turbines, mounted on free-standing tubular towers with rotors reaching up to a height of approximately 400 feet.

By Final Order dated December 20, 2007, the Commission approved the application, together with a number of conditions, based upon recommendations the Commission received, pursuant to § 56-46.1 of the Code of Virginia, from various state environmental agencies and other departments,² with which HNWD was directed to comply.³ These conditions included

¹ *Application of Highland New Wind Development, LLC, For approval to construct, own and operate an electric generation facility in Highland County, Virginia, pursuant to §§ 56-46.1 and 56-580 D of the Code of Virginia.*

² These agencies included the Department of Historic Resources ("DHR" or "Department"), Department of Environmental Quality, the Department of Conservation and Recreation, Department of Game and Inland Fisheries, Department of Agriculture and Consumer Services, Department of Health, Department of Aviation, Department of Forestry, Department of Transportation, Marine Resources Commission, Department of Mines, Minerals and Energy, Central Shenandoah Planning District Commission and the Highland County Board of Supervisors.

³ Final Order, 2007 S.C.C. Ann. Rept. 295 (December 20, 2007).

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DOCUMENT CONTROL

2. Conduct Archeological and Architectural Surveys if Necessary
– Coordinate with DHR for guidance regarding the potential need for archaeological and architectural surveys, recommended studies and field surveys to evaluate the project's impacts to historic resources.

The Commission's Final Order was not appealed by HNWD or any other participant in that proceeding.

On August 19, 2009, the Director of DHR caused a letter to be transmitted to the Commission's General Counsel. The letter asserted the Department's belief "that . . . HNWD has failed to comply with either the letter or the spirit of the [Final] Order." The letter further requested "expedited review and response." The Commission treated this communication as an allegation from a reviewing agency that HNWD had failed to comply with a condition of its Final Order. Accordingly, the Commission deemed the letter to constitute a formal complaint and docketed this proceeding and convened a hearing wherein DHR and HNWD could provide evidence and testimony pertinent to the question whether HNWD is in compliance with the requirements of the Final Order.

Various pleadings have been filed herein and on two occasions the parties convened to discuss legal issues with the Hearing Examiner. No additional evidence has been forthcoming in the form of testimony, although the parties have submitted a stipulated chronology of post-order events that occurred between them. The sole question for the Examiner is whether HNWD is in compliance with the requirements of the Final Order. Staff submits that HNWD is in such compliance, has fulfilled the requirements of the Final Order, and that this matter should be dismissed.

In its Final Order, the Commission held that the report of its Hearing Examiner "properly found that the following matters were considered by Highland County in issuing [HNWD] a

conditional use permit . . . property values; tourism; viewshed; height restrictions; setbacks; lighting; color of structures; fencing[.]” The Commission adopted these findings and held, accordingly, that “the conditional use permit ‘shall be deemed to satisfy the requirements of [§§56-46.1 and 56-580 D] . . . and the Commission shall impose no additional conditions with respect to such matters.’”⁴

It is a fundamental precept of Virginia law that the Commission has no inherent power and that all of its jurisdiction “is either conferred by the Constitution or derived from statutes which do not contravene the Constitution.”⁵ The statutes quoted above by the Commission in the Final Order act as a withdrawal of jurisdiction from the Commission, when “any valid permit or approval required for an electrical generating plant . . . [is] issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing such permits or approvals regulating environmental impact and mitigation of adverse environmental impact,”⁶ to consider adding or removing any such conditions attached to the permit by the issuing agency, or considered by the issuing agency. Since Highland County considered all matters conceivably addressing the visual impact of the project on the environment, the Commission is without authority to impose any additional related condition.

The sole remaining matter at issue between the parties concerns only the visual impact of the project on a site in West Virginia.⁷ The Department has not established that it has jurisdiction over any such extra-territorial impact, but whether it has or not, it must exercise

⁴ Final Order at 297. Emphasis added.

⁵ City of Richmond v. C & P. Tel. Co., 127 Va. 612, 105 S.E.2d 127 (1920).

⁶ Va. Code § 56-46.1.

⁷ See, email dated November 25, 2009, from Mark Obenshain to Steve Owens, last page of exhibits to chronology of events.

whatever authority it believe it possesses over HNWD directly. The law is quite clear that the Commission has no authority to impose any additional condition in these regards, as the Final Order properly finds. Whether or not one agrees with the wisdom of the legislation that limits the Commission from imposing additional conditions on matters considered by other agencies, the plain fact is that this is unquestionably the state of the law. Since the Commission can effect no relief on the Department's complaint, it should be dismissed.

Respectfully submitted,

THE STAFF OF THE STATE
CORPORATION COMMISSION

By 
General Counsel

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Dated: January 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2010, a true copy of the foregoing "Staff Brief" was mailed, postage prepaid, to: Steven O. Owens, Senior Assistance Attorney General, Office of Attorney General, 900 East Main Street, Richmond, Virginia 23219; Mark D. Obenshain, Esquire, and John W. Flora, Esquire, Lenhart Obenshain, PC, 90 North Main Street, Suite 201, Harrisonburg, Virginia 22802-3719.


