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CLERK OF COURT
2009 SEP 21 P 12:13
CLERK OF COURT

September 18, 2009

Via Federal Express

Mr. Joel H. Peck
Clerk of the Commission
State Corporation Commission
C/O Document Control Center
P.O. Box 2118
Richmond, VA 23218-2118

RE: Commonwealth of Virginia, ex rel
Department of Historic Resources v.
Highland New Wind Development, LLC
Case No. PUE-2009-00092

Dear Mr. Peck:

Please find enclosed for filing an original and 15 copies of Defendant's Motion in
Limine - Viewshed.

Very truly yours,

John W. Flora

Enclosures

Cc: Kathleen S. Kilpatrick, Director
Department of Historic Resources
Steven O. Owens, Senior Assistant Attorney General
Office of Attorney General
William H. Chambliss, General Counsel
Commissioner's Office of General Counsel
State Corporation Commission
William F. Stephens, Director
Division of Energy Regulation
State Corporation Commission
Mr. Henry T. McBride, Manager
Highland New Wind Development, LLC

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COMMONWEALTH OF VIRGINIA
BEFORE THE
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

DEFENDANT'S MOTION IN LIMINE – VIEWSHED

Highland New Wind Development, LLC, (“HNWD”), respectfully moves the Commission to exclude evidence and testimony pertaining to viewshed at the hearing scheduled for Wednesday, September 23, 2009 as cumulative, irrelevant and immaterial. In support of this Motion, HNWD asserts the following:

1. On July 14, 2005, the Board of Supervisors of Highland County issued HNWD a conditional use permit for a wind energy electric generating facility in Highland County, Virginia, on parts of Allegheny Mountain known as Red Oak Knob and Tamarack Ridge.¹
2. On November 8, 2005, HNWD filed an application with the State Corporation Commission (“Commission”) for approval to construct, own and operate the facility. On

¹ The conditional use permit required the submission of a site plan “designed to mitigate the impact of the permitted use on nearby property owners and the natural environment and shall include computer simulations or other visual representations of each wind turbine at its proposed location.” A computer photo simulation viewshed analysis has since been conducted as part of the site plan submission. The analysis even included consideration of the Camp Allegheny site in West Virginia, including pictures of the view from Camp Allegheny toward Tamarack Ridge and the wind farm.

December 28, 2005, the Commission issued an Order for Notice and Hearing that directed HNWD to publish notice of its application; established a procedural schedule; set hearing dates to receive public comment and evidence; and appointed a Hearing Examiner to conduct all further proceedings.

3. The Hearing Examiner conducted an extensive review of the proposed project. Local hearings to receive public testimony were held in Highland County on March 13 and 14, 2006. Sixty-six public witnesses testified over the course of the two days, with at least twenty-four witnesses specifically addressing viewshed. Evidentiary hearings were also held in Richmond on October 3, 30, and 31, 2006, and November 1, 6, 15, and 16, 2006. Another twenty-two public witnesses testified at these hearings, with at least eight witnesses specifically addressing viewshed. Following the Hearing Examiner's report, the Commission remanded for further proceedings. Two additional evidentiary hearings on remand were held, with testimony from seven more public witnesses. A total of 309 individuals also filed comments regarding the proposed project.

4. The Department of Environmental Quality ("DEQ") also filed its report with the Commission, in which DEQ coordinated a review of the proposed wind project by a number of state, federal, and local agencies. Pursuant to a request from the Department of Historic Resources ("DHR"), DEQ further recommended that the Commission develop, conduct, and report the results of a viewshed analysis before approving the project. (3/1/07 Hearing Examiner Report, 36).

5. Virginia Code §§ 56-46.1 and 56-580 govern the Commission's approval of electrical facilities. Both Virginia Code § 56-46.1A and § 56-580D provide in part:

In order to avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with

responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and public safety, whether such permit or approval is granted prior to or after the Commission's decision, shall be deemed to satisfy the requirements of this section with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, *and the Commission shall impose no additional conditions with respect to such matters*. Nothing in this section shall affect the ability of the Commission to keep the record of a case open. Nothing in this section shall affect any right to appeal such permits or approvals in accordance with applicable law.

(Emphasis added).

6. Consequently, the Hearing Examiner properly stated in its initial Report that “the Commission’s review is limited, as the statutes exclude matters encompassed by any other governmental permits or approvals, and excludes all matters within the authority of, and considered by, the governmental entity in issuing a permit or approval.” (3/1/07 Hearing Examiner Report, 68). The Hearing Examiner correctly acknowledged that “the most limiting factor on the Commission’s review is the conditional use permit granted by Highland County pursuant to its zoning ordinance and comprehensive plan.” (3/1/07 Hearing Examiner Report, 68). The Hearing Examiner noted that, although DEQ recommended the Commission conduct a viewshed analysis pursuant to a request from DHR, a viewshed analysis was considered in relation to the conditional use permit granted by Highland County. (3/1/07 Hearing Examiner Report, 76) As a result, the Hearing Examiner found that “the Commission is prohibited by §§ 56-46.1A and 56-580D of the Virginia Code from adding these recommendations as conditions.” (3/1/07 Hearing Examiner Report, 77).

7. After considering the record, the pleadings, the Hearing Examiner’s Report and Report on Remand, and the applicable law, the Commission approved the application by Final

Order dated December 20, 2007. The Final Order specifically declined to impose conditions otherwise considered by Highland County, including viewshed. The Final Order states in part:

The Hearing Examiner properly found that the following matters were considered by Highland County in issuing Highland New Wind a Conditional Use Permit pursuant to Highland County's Zoning Ordinance and Comprehensive Plan: . . . viewshed. As a result, the Conditional Use Permit shall be deemed to satisfy the requirements of Sections 56-46.1A and 56-580D with respect to those matters, and the Commission shall impose no additional conditions with respect to such matters. Accordingly, we shall not consider those matters.

(12/20/07 Final Order, 6-7).

8. On August 19, 2009, DHR filed a Complaint with the Commission alleging HNWD has failed to comply with a condition of the Final Order. The focus of the Complaint is the wind project's alleged "negative impact on the pristine historic setting of Camp Alleghany," located about two miles away from the wind farm in West Virginia.

9. Pursuant to Virginia Code §§ 56-46.1A and 56-580D, the Commission's Final Order, and the Hearing Examiner's Report, no additional conditions pertaining to viewshed can be imposed by the Commission.

10. Upon information and belief, DHR plans to present at the hearing extensive evidence and testimony pertaining to the wind project's alleged "negative impact on the pristine historic setting of Camp Alleghany." The only arguable impact of the project on Camp Alleghany is visual, or "viewshed." Viewshed, however, is a settled issue, and as such it is beyond the scope of these proceedings. As the Hearing Examiner aptly stated: "[r]ather than have this Commission make such decisions from Richmond, the General Assembly, in amending §§ 56-46.1A and 56-580D to avoid duplication of governmental review, has placed issues touching upon the quality of life in Highland County in the hands of a locally-elected board of supervisors, and limited review by this Commission." (3/1/07 Hearing Examiner Report, 68).

11. Both the Hearing Examiner and the Commission have ruled that viewshed will not be considered in the proceedings before the SCC because it has been considered by the Board of Supervisors of Highland County, yet DHR continues to assert in these proceedings that an additional viewshed analysis is required.

12. Any evidence pertaining to viewshed is irrelevant, immaterial and cumulative of evidence previously presented to the Hearing Examiner and to Highland County, and the Commission is prohibited from imposing further conditions pertaining to viewshed according to both Virginia law and its Final Order. As a result, any testimony and evidence pertaining to viewshed should not be admitted.

13. Accordingly, HNWD moves for an Order to exclude testimony and evidence pertaining to viewshed, or any evidence in relation to issues previously considered by Highland County in issuing permits and approvals, from being presented at the September 23, 2009 hearing.

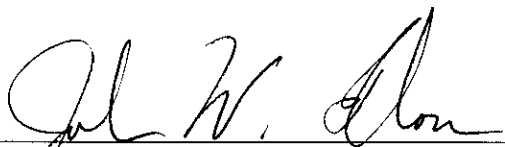
Respectfully submitted,
Defendant:

HENRY T. MCBRIDE, JR.

Title:

MANAGER, HIGHLAND NEW
WIND DEVELOPMENT, LLC

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2009, a true copy of the foregoing Defendant's Motion was hand-delivered or mailed, postage prepaid, to:

Honorable Kathleen Kilpatrick, Director
Virginia Department of Historic Resources
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Steven O. Owens
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