

**Virginia State Corporation Commission
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Case Number (if already assigned)	PUE-2009-00092
Case Name (if known)	Commonwealth of Virginia, ex rel. Department of Historic Resources v. 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

MOTION TO CERTIFY ISSUES TO THE COMMISSION
AND FOR AN *ORE TENUS* HEARING

Before the State Corporation Commission (“Commission”) is a Complaint filed by the Department of Historic Resources (“DHR”) alleging Highland New Wind Development (“HNWD”) has filed to comply with a condition of the Commission’s December 20, 2007 Final Order (“Final Order”) approving HNWD’s application to construct and operate a wind energy generating facility in Highland County, Virginia, near the West Virginia border. As set out in the Final Order, HNWD is required to “[c]oordinat[e] 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.” (12/20/07 Final Order, 8).

HNWD has coordinated with DHR and it has conducted all recommended studies and surveys. DHR has confirmed that there are no remaining or unresolved archaeological issues. DHR has also confirmed that there are no remaining or unresolved architectural issues impacting any Virginia resource. DHR has filed its Complaint based on its expressed belief that the wind

project will have a visual impact on a site in West Virginia – Camp Allegheny. As set forth fully in HNWD’s Motion for Summary Judgment, DHR has neither the authority nor the jurisdiction to delay the wind project or seek further relief from the Commission.

The powers of DHR are expressly restricted to the protection and preservation of property located in the Commonwealth of Virginia. The condition imposed by the Commission’s Final Order has been satisfied – the surveys and studies have been conducted in coordination with DHR, and they have revealed that the wind project will not impact, either archaeologically or architecturally, any historical resource in Virginia. Notably, DHR is not suggesting any change to the nature, design, or location of the wind project.

The HNWD project presents an unusual circumstance. It is not subject to federal regulation. It has satisfied the architectural and archaeological requirements of the state in which it is located. HNWD has expended substantial resources in order to answer a Virginia agency’s claims that the wind project required further archaeological and architectural studies and surveys. DHR and HNWD, however, cannot come to terms on the demands made by DHR for monetary payments to address the alleged visual impact on a resource located in another state.

Furthermore, issues related to the visual impact of the wind project, or viewshed, cannot be considered by the Commission pursuant to the express terms of its Final Order and Virginia Code §§ 56-46.1A and 56-580D. The Final Order and these statutory provisions prohibit consideration of viewshed because the local government of Highland County has already assumed authority over the issue during its permitting process. DHR, however, persists in raising the viewshed issue related to Camp Allegheny as the sole basis for its Complaint.

Because of the unique circumstances presented by this proceeding, the issues pertaining to jurisdiction and authority, and the necessary interpretation of the condition imposed by the

Commission's Final Order, HNWD respectfully requests the Hearing Examiner certify the material issues presented in this proceeding to the Commission for its consideration and resolution pursuant to 5 VAC 5-20-120 B of the State Corporation Commission Rules of Practice and Procedure, including all issues raised in the DHR Complaint and in the HNWD Answer and Motion for Summary Judgment. HNWD specifically requests the following issues be certified:

- (1) Whether HNWD has complied with the condition of the Final Order as to DHR;
- (2) Whether DHR has the standing or authority to pursue the relief requested in this matter;
- (3) Whether the Commission has the authority or jurisdiction to entertain this proceeding or require further coordination with DHR based on the wind project's alleged impact to a site outside of Virginia;
- (4) Whether the Final Order and Va. Code §§ 56-46.1A and 56-580D bar further consideration of the viewshed issues raised by DHR in this matter; and
- (5) Whether DHR has waived any objection to the Commission's Final Order barring further consideration of viewshed issues.

HNWD further requests that the Commission conduct an *ore tenus* hearing upon the issues certified.

Respectfully submitted,
Defendant:

HENRY T. MCBRIDE, JR.

Title:

MANAGER, HIGHLAND NEW
WIND DEVELOPMENT, LLC

By Counsel




JOHN W. FLORA (VSB #19704)
MARK D. OBENSHAIN (VSB #27476)
ANDREW S. BAUGHER (VSB #74663)
Of Lenhart Obenshain PC
90 N. Main Street, Suite 201
P. O. Box 1287
Harrisonburg, Virginia 22803
(540) 437-3111
(540) 437-3101 (fax)
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2009, a true copy of the foregoing Defendant's Motion was emailed, faxed or mailed, postage prepaid, to:

Steven O. Owens
Senior Assistant Attorney General
Office of Attorney General
900 East Main Street,
Richmond, VA 23219

William H. Chambliss
General Counsel
State Corporation Commission
Office of the General Counsel
P.O. Box 1197
Richmond, VA 23218-1197


Counsel for Highland New Wind Development, LLC

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