



COMMONWEALTH of VIRGINIA

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September 22, 2009

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Mr. Joel H. Peck
Clerk of the Commission
State Corporation Commission
c/o Document Control Center
The Tyler Building
1300 E. Main Street
Richmond, Virginia 23219

DOCUMENT CONTROL

2009 SEP 22 P 2:36

CLERK'S OFFICE

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 the Complainant's Response To Defendant's Motion in Limine – Viewshed.

Should you have any questions, please do not hesitate to call me. Thank you for your assistance.

Very truly yours,

Steven O. Owens

Enclosures

cc: John W. Flora, Esquire
Kathleen S. Kilpatrick, Director, DHR
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

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

RESPONSE TO DEFENDANT'S MOTION *IN LIMINE* – VIEWSHED

Complainant Department of Historic Resources (“DHR”) respectfully responds to the Defendant’s Motion *in limine* and asserts as follows:

1. As detailed in Defendant’s Motion, The State Corporation Commission (“SCC”) issued a Final Order on December 20, 2007 approving the Defendant’s wind turbine project in Highland County subject to certain terms and conditions spelled out in the Order. Among those requirements was the obligation to “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...”
2. This language is similar to that used in other orders for public utility projects in which the proponent routinely coordinates with DHR to determine what historic resources within an Area of Potential Effect (APE) exist and how the effects of the project in question can be minimized or mitigated. In her letter of August 19, 2009 to William H. Chambliss, General Counsel to the

Commission, this is exactly the problem presented by Kathleen Kilpatrick, Director of DHR.

3. In that letter, which serves as the basis of this action, Ms. Kilpatrick stated that, “It is our reading of the December 20, 2007 Final Order that HNWD has been directed to enter into constructive consultation with DHR concerning the necessary studies to identify historic resources and the evaluation of the project’s effects...this project will likely have a negative impact on the pristine historic setting of Camp Allegheny...HNWD has not demonstrated a willingness to consider and minimize the impacts of the project on this significant battlefield”
4. The Defendant’s allege that “The only arguable impact of the project on Camp Alleghany (sic) is visual, or ‘viewshed’...” and that “viewshed is a settled issue.”
5. This position represents a fundamental misunderstanding, from DHR’s perspective, of the nature of a “viewshed” analysis. To the Defendant, apparently, receipt of a Conditional Use Permit from Highland County has resolved all “visual” or “viewshed” issues related to the project. DHR, on the other hand, recognizes the “viewshed” as the initial analysis to be done at the site regarding visual impacts.
6. The determination of the visual impact of a project on potentially significant cultural resources takes place roughly as follows:
 - a. The “viewshed,” i.e., that area from which the project is visible, is identified. This is also the APE for visual impacts.

- b. Architectural studies are then conducted within the APE to determine whether there are any resources that might be adversely impacted by the project, either by demolition or by interference with the visual setting of the historical resource.
 - c. If historical resources have been identified in the APE, then the proposed project is analyzed to determine what, if any, changes can be made to the project to minimize and/or mitigate the impacts of the projects on the historic or cultural resources identified.
7. In this case, DHR does not concede that the Defendant actually conducted studies sufficient to define an APE, but DHR compromised and allowed the Defendant to limit their analysis to a 1.5 mile radius of the project, including an analysis of the potential impact on Camp Allegheny. (Letter from Kathleen Kilpatrick dated March 20, 2008.)
8. DHR then conducted the necessary architectural survey in order to determine that Camp Allegheny, as a battlefield listed on the National Register of Historic Places, is the only historic resource in the APE that requires further analysis regarding the visual impact of the turbines. This is consistent with the requirement for "...recommended studies and field surveys to evaluate the project's impacts to historic resources" found in the Final Order.
9. While DHR does not agree that Defendant has done all of the work required of it under the Commission's Final Order, the work objected to by the Defendant is not the work that DHR alleges remains to be done to fulfill Defendant's obligations. That work is to consult with DHR in order to

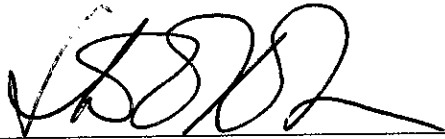
determine the impact of the project on Camp Allegheny, specifically, and to determine what steps can be taken to minimize/mitigate those impacts.

10. Accordingly, DHR requests that the Hearing Examiner find that evidence pertaining to the adverse impact of the project on Camp Allegheny is relevant to the obligations of the Defendant and should be allowed at any hearing regarding Defendant's compliance with the Commission's Final Order.

Respectfully submitted,
Complainant:

COMMONWEALTH OF VIRGINIA,
ex rel the Department of Historic Resources

By Counsel



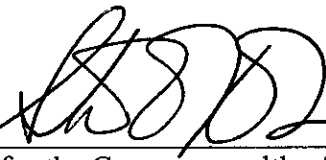
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CERTIFICATE OF SERVICE

I hereby certify that on this 22ND day of September, 2009, a true copy of the foregoing Response to Defendant's Motion was hand-delivered or mailed, postage prepaid, to:

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ex rel the Department of Historic Resources