



COMMONWEALTH of VIRGINIA

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December 17, 2009

BY HAND DELIVERY

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 DEC 18 P 2:58
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 each of the Complainant's Response to Defendant's Motion for Summary Judgment and the Complainant's Response to Defendant's Motion to Certify Issues to the Commission and for an Ore Tenus Hearing in the above styled matter.

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

Very truly yours,

[Handwritten signature of Steven O. Owens]

Steven O. Owens

Enclosures

- cc: Mark D. Obenshain, 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

VIRGINIA:

BEFORE THE STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA, *ex rel.*)
DEPARTMENT OF HISTORIC RESOURCES,)
))
Complainant)
))
v.)
))
HIGHLAND NEW WIND DEVELOPMENT,)
LLC,)
))
Defendant)

Case No. PUE-2009-00092

COMPLAINANT’S RESPONSE TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Comes now the Complainant, Commonwealth of Virginia, Department of Historic Resources (the “Complainant” or “DHR”), and for its response to Defendant’s Motion for Summary Judgment states as follows:

JURISDICTION

1. Highland New Wind Development, LLC (the “Defendant” or “HNWD”) has alleged that DHR does not possess independent, statutory authority to force HNWD to take any actions with respect to the wind turbine project. DHR has never alleged that such independent authority exists. In fact, DHR has always taken the position that their authority over the project arises from the requirements of the SCC Final Order dated December 20, 2007 (the “Final Order”) and the requirements of §§ 56-46.1 and -580 of the Code of Virginia.
2. The current action arose because DHR complained to the SCC that HNWD was not following the requirements of the Final Order of the SCC, not because DHR had independent statutory authority over the project. In fact, if DHR felt that it had

independent authority over the project, there would be no reason for them to seek the sanction of the SCC to exercise that authority. This argument of the Defendant is devoid of merit on both a factual and legal basis.

3. Furthermore, the entire SCC order regarding historic resources is meaningless if there was no expectation that Defendant would engage in meaningful discussion and undertake some level of mitigation. It is difficult to understand the logic of requiring the identification of historic resources that will be adversely impacted by a project if nothing will be done about the problems.

VIEWSHED

4. Defendant fundamentally misunderstands, and even deliberately misstates, the DHR position on the “viewshed” issue. It is the position of DHR that the term “viewshed” defines the area of potential impact for visual effects. It does not define those effects, whether they are adverse or not, and what can or should be done about them. DHR has not asked HNWD to redefine the “viewshed” for these purposes, even though DHR contends that the studies done by the Defendant were not adequate and are only sufficient because of additional work done by DHR itself.
5. The first step in the analysis is to determine the area from which the project can be seen. The second step is to conduct an architectural study to determine what historic resources exist within the defined viewshed. Finally, the impact of the project on each identified historic resource is analyzed to determine what, if anything, can and should be done to minimize or mitigate any adverse impacts of the project on the historic resources identified.

6. DHR largely completed the architectural survey on its own to determine that Camp Allegheny was the only such historic resource within the viewshed, *i. e.*, that the project was likely to be seen from Camp Allegheny. Defendant and Highland County also agreed that Camp Allegheny fell within the viewshed of the project. Despite completing the first two steps in the process, however, Defendant has refused to engage in any meaningful or serious discussion regarding the impact of the project on Camp Allegheny. It is apparently Defendant's contention that determining that Camp Allegheny might be impacted is enough, and that there is no reason for them to take the final step to determine what, if anything, can and should be done. Their response is simply that they should not have had to do this much and they refuse to consider any efforts to mitigate.

CAMP ALLEGHENY

7. The SCC Order directs HNWD to coordinate with DHR to identify the impacts of the project on "historic resources." Nothing says "Virginia historic resources only." The Final Order gives DHR responsibilities regarding this project. HNWD and the County identified Camp Allegheny as an historic resource impacted by the project.
8. Although the Camp is in West Virginia, it is within the "viewshed" identified by HNWD and Highland County as being impacted by the project. Logic dictates that exercising jurisdiction over a project in one state that has impacts on historic resources in another is the only way to protect those assets. Officials in West Virginia have no authority to dictate to HNWD how to operate their project in Virginia. The location of the project, not the location of the impacted asset, dictates what local, state or federal entity has jurisdiction.

MITIGATION

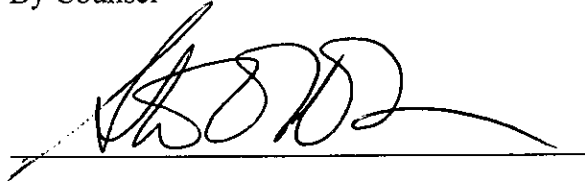
9. Defendant has consistently and, one must again assume, deliberately misrepresented DHR's request for mitigation as a demand for payment of money to DHR. At best, this must be considered a gross mischaracterization of the facts. DHR has never demanded that any sum be paid to it directly for any mitigation measures nor has it ever suggested that such an action would constitute appropriate mitigation. In fact, DHR has only suggested specific monetary amounts as caps on the potential liability of HNWD as it undertakes certain types of mitigation activities.
10. The focus from DHR in the very preliminary discussion of mitigation with HNWD has been the types of activities to be undertaken, the quality of the mitigation measure, its ability to directly benefit the historic resource, etc. HNWD's only focus has been on money.
11. In fact, HNWD has gone so far as to say that any amount of money spent on mitigation measures that was not diverted from a previously committed amount would be unacceptable to the projects finances. This statement must necessarily call into question the financial viability of the project as a whole. In this regard, of course, it must be noted that HNWD has expended substantial resources to resist meeting its consultation obligations under the Final Order. If resources are available to resist DHR, one wonders why those assets could not have been devoted to working with DHR towards a viable solution.

WHEREFORE Complainant prays that:

1. The Defendant's Motion for Summary Judgment be denied.
2. Complainant be granted such other and further relief as may be appropriate.

COMMONWEALTH OF VIRGINIA, *ex rel*
Department of Historic Resources

By Counsel

A handwritten signature in black ink, appearing to read 'S. O. Owens', is written over a horizontal line. The signature is stylized and cursive.

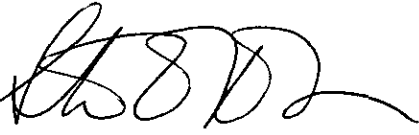
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Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2009, a true copy of the foregoing Complainant's Response To Defendant's Motion For Summary Judgment was telefaxed, hand-delivered or mailed, postage prepaid, to:

Mark D. Obenshain, Esq.
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Counsel for the Commonwealth of Virginia
ex rel the Department of Historic Resources